



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/10529/2014

THE IMMIGRATION ACTS

Heard at Field House

On 4 March 2015

**Decision & Reasons
Promulgated
On 31 March 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR UMAIR ASRAR
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Whitwell

For the Respondent: Mr Saeed

DECISION AND REASONS

1. Mr Asrar is a citizen of Pakistan born in 1991. He appealed against a decision of the Secretary of State made on 10 February 2014 to refuse Mr Asrar's application for a Residence Card pursuant to Regulation 17 of the Immigration (European Economic Area) Regulations 2006. He claimed to be the partner of Ms Catherine Tandu, a citizen of Germany and, as such,

the “*extended family member*” of an EEA national. The Secretary of State, however, concluded that Mr Asrar had not demonstrated that he was in a “*durable relationship*” with Ms Tandu, pursuant to Regulation 8(5) and/or that Ms Tandu was a “*qualified person*” pursuant to Regulation 6(2).

2. He appealed.
3. Following a hearing at Taylor House on 15 October 2014 Judge of the First-tier M Whalan allowed the appeal.
4. His findings are at paragraphs [22-26] of the determination. In brief, he found that Mr Asrar and Ms Tandu “*both gave clear, consistent and credible evidence*”. He found that Mr Asrar had been in a “*continuing, durable relationship with Ms Tandu ... since Summer 2012*” and that they had lived together since September 2012, 25 months by the date of the hearing. They have a daughter who was conceived in December 2012 and was born in September 2013 [23].
5. He also found that Ms Tandu had at date of hearing been engaged in part-time work continuously for over a year. She has a “*modest but established part-time job, in that she has worked at the pharmacy for over a year*” [26]. The judge found accordingly that she is a “*qualified person*” pursuant to Regulation 6(1). He found that she was a “*self-sufficient person*”.
6. The judge (at [27]) concluded by allowing Mr Asrar’s appeal.
7. The Secretary of State sought permission to appeal which was granted on 8 January 2015.
8. At the error of law hearing Mr Whitwell made two brief points. First, the judge should not have found that Ms Tandu was “*self sufficient*” for the purpose of Regulation 6(1). He should have found that she is a “*worker*”.
9. More significantly, the issue of a residence card to an “*extended family member*” is at the discretion of the Secretary of State and as such the matter should have been referred back to the Secretary of State for reconsideration.
10. Mr Saeed did not demur from that submission.
11. I agreed and set aside the decision to be remade.
12. On the first point the judge erred in concluding on the evidence before him that Ms Tandu was “*self-sufficient*”. He should have found that she was a “*worker*”. However, that was not a material error as, on that evidence she was nonetheless a “*qualified person*”.
13. On the other issue Regulation 17(4) provides.

“The Secretary of State may issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application if -

- (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under Regulation 15; and*
- (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.”*

14. The headnote in **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC)** clarifies this further:

“iii) Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant’s favour or not to the Secretary of State.”

15. As the Secretary of State has not yet considered the matter under Regulation 17(4) the judge erred in allowing the appeal outright. The decision he should have reached on the facts found, which are unchallenged, was that the Secretary of State’s decision was not in accordance with the law.

Decision

The First-tier Tribunal’s determination contains an error on a point of law and it is set aside.

It is remade as follows:

The appeal is allowed to the extent that the application for an EEA residence card remains outstanding before the Secretary of State.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Conway