



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

Appeal Number: IA/14046/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 2 February 2015**

**Decision & Reasons  
Promulgated**

**On 4 February 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**MR OLAWALE FAPOHUNDA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Claire of Counsel

For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, Olawale Fapohunda, is a citizen of Uganda. His date of birth is 28 July 1968. He applied for a residence card as confirmation of a right of residence under EC law as the extended family member of an EEA national exercising treaty rights in the United Kingdom. That application was refused by the respondent in a decision dated 5 March 2014.
2. The appellant's appeal against the respondent's refusal was allowed by Judge Wyman ("the Judge") in a determination promulgated on 6

November 2014. The grounds claimed the Judge made a material misdirection in law by allowing the appellant's appeal. The respondent relied upon **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC)**, in particular with regard to headnote (iii).

3. The grounds claimed that given the fact that no exercise of discretion had been made by the Secretary of State, the Judge only had the power in law to allow the appeal to the extent that it be remitted back to the Secretary of State for consideration under Regulation 17(4) rather than allowing the appeal outright.
4. Permission was granted by Judge Pooler on 15 December 2014 on the basis that it was arguable the Judge should not have done more than allow the appeal on the ground that the decision was not in accordance with the law so that the discretion which arose under Regulation 17(4) could then be exercised by the respondent rather than allowing the appeal by finding that the appellant met the requirements of Regulation 8(2) of the EEA Regulations 2006.

### **Submissions on Error of Law**

5. Mr Claire conceded that Regulation 17(4) provided for the Secretary of State to exercise a discretion, such that he properly did not challenge the respondent's grounds.

### **Conclusion on Error of Law**

6. The Judge's factual findings were not challenged.
7. Headnote (iii) to **Ihemedu** is instructive:

*"(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."*

8. The Judge made a material error in law by allowing the appeal. I remake the decision by allowing the appeal so that the discretion arising under Regulation 17(4) can be exercised by the Secretary of State.

### **Notice of Decision**

Appeal allowed.

No anonymity direction is made.

Signed

Date 2 February 2015

Deputy Upper Tribunal Judge Peart