



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46925/2013**

THE IMMIGRATION ACTS

Heard at Field House
On 20 July 2015

**Decision and Reasons
Promulgated
On 28 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**Miss MAUREEN KHABUYA
(Anonymity Direction not made)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer.

For the Respondent: Mr P Richardson (counsel), instructed by Ivy Solicitors.

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Miss Khabuya as the appellant, reflecting their positions before the First-tier Tribunal.

3. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Miles, promulgated on 19 March 2014 which dismissed the Appellant's appeal against the respondent's decision to refuse a residence card under regulation 17 of the Immigration (EEA) Regulations 2006.

Background

4. The Appellant was born on 18 September 1978 and is a national of Uganda.

5. On 14 January 2013 the Appellant applied for a residence card as the extended family member of an EEA national exercising treaty rights of movement in the UK. On 28 October 2013 the Secretary of State refused the Appellant's application.

The Judge's Decision

6. The appellant appealed against that refusal and in a determination of the First Tier Tribunal promulgated on 19 March 2014, her appeal was dismissed. The appellant appealed that decision to the Upper Tribunal and in a determination of the Upper Tribunal promulgated on 9 July 2014, the appeal was allowed and the appellant's case was remitted to the First Tier Tribunal to determine of new. In a determination of First Tier Tribunal Judge Rothwell promulgated on 14 November 2014, the appellant's appeal was allowed under the Immigration (EEA) Regulations 2006. It is against that decision (promulgated on 14 November 2014) that this appeal is directed.

7. Grounds of appeal were lodged and on 7 January 2015, First Tier Tribunal Judge R A Cox granted permission to appeal stating *inter alia*:

"... the grounds do not take issue with the judge's findings but contend that, instead of allowing the appeal outright, the judge should have allowed it to the extent that the decision was not in accordance with the law and remitted the matter to the SoS to exercise her discretion under Regulation 17(4). The point is clearly arguable."

The Hearing

8. Even though this is the respondent's appeal, Mr Richardson took me to the appellant's bundle and directed me to page 6, where there is a copy letter dated 14 January 2015 (incorrectly dated 2014) responding to directions dated 8 January 2015 and stating "*on the condition that all the other findings of the First Tier Tribunal are preserved, the respondent consents to the Secretary of State's appeal being allowed by the Upper Tribunal to the extent that a decision is substituted allowing the respondent (Ms Khabuya's) appeal on the basis that the Secretary of State's refusal to issue a residence card was not in accordance with the law*". He told me that the appeal has not been resisted for

more than six months and asked me to consider making a costs order in terms of Paragraph 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. Mr Tufan for the respondent moved the appeal and urged me not to make an order for costs.

Analysis

10. This appeal is no longer contested. By letter dated 14 January 2014, the appellant's solicitors conceded the appeal on the condition that the findings of the First Tier Tribunal are preserved. The Home Office presenting officer had the opportunity to address me on the preservation of the First Tier Tribunal's findings and adopted a neutral position.

11. I therefore preserve the findings of the First Tier Tribunal as there is no challenge to those findings and no obvious error in those findings.

12. In Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC) the Tribunal held that 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.

13. The conclusion that the respondent's decision dated 28 October 2013 was made in error of law is not challenged. However, because of the operation of Regulation 17(4) of the Immigration (EEA) Regulations 2006, the notice of decision allowing the appeal under the Immigration (EEA) Regulations 2006 contains a material error of law. Section 17(4) of the 2006 Regulations provides for the Secretary of State to exercise discretion. The Secretary of State has not yet exercised that discretion.

14. I therefore set aside the decision promulgated on 14 November 2014 because it contains a material error of law.

15. But I preserve the findings in fact of First Tier Tribunal Judge Rothwell made in the determination promulgated 14 November 2014.

16. It is now for the respondent to consider the application of new in light of the findings in fact of the determination promulgated on 14 November 2014.

17. The appellant asks for an order for costs because, in January 2015, a concession was made by the appellant. That concession was made in writing. It is the appellant's position that the respondent delayed in accepting the concession offered by the appellant. Although the appellant does not specifically say so, it is implied that today's hearing is entirely unnecessary and has been caused by the respondent.

18. It would have been helpful if the respondent had paid attention to the appellant's letter of January 2015, but it is not clear to me what contact the

appellant had with the respondent after January 2015. Quite properly, I am not told of discussions which may or may not have taken place between the appellant and the respondent throughout 2015. The offer made by the appellant is conditional on the preservations of findings in fact. It was only when this case called before me that the preservation of the findings in fact of the First Tier Tribunal could be clarified. Arguably, my decision is necessary to set aside the decision of the First Tier Tribunal (whilst preserving the findings in fact) and so frees the respondent to consider the appellant's application once more.

19. In all the circumstances, I cannot see that either a party or a representative has acted unreasonably in the conduct of these proceedings, nor can I see that the appellant's agents have made a written application for costs and intimated that written application to the respondent. I therefore make no order for costs.

Decision

20. The decision of the First-tier Tribunal contains a material error of law. I therefore set the decision aside, but preserve the findings in fact made by the First tier Tribunal in the decision promulgated on 14 November 2014. I substitute the following decision.

21. The appeal is allowed. The application remains outstanding and awaits a lawful decision by the Secretary of State in light of the findings in fact contained in the decision of the First tier Tribunal promulgated on 14 November 2014.

Signed

Date 25 July 2015

Deputy Upper Tribunal Judge Doyle