



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

Appeal Number: IA/48751/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 23 October 2015**

**Decision & Reasons Promulgated
On 29 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RUTH HARRIS CHANZA
(NO ANONYMITY ORDER MADE)**

Respondent

Representation

For the Appellant: Mr S. Staunton, Senior Home Office Presenting Officer

For the Respondent: Mr Z. Arain, instructed by ARA Immigration Services Ltd.

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a citizen of Malawi born on 1 August 1983. This appeal concerns the decision of the appellant (hereinafter “the Secretary of State”) to refuse to grant her a residence card under the Immigration (EEA) Regulations 2006 (“the 2006 Regulations”) as confirmation of her right to reside in the UK as an extended family member.
2. The claimant applied for a residence card on the basis that she satisfied Regulation 8(5) of the 2006 Regulations; that is, she was in a durable

relationship with an EEA national. The Secretary of State rejected the application on the ground that insufficient evidence had been provided to demonstrate she was in a durable relationship.

3. Having heard evidence from the claimant and her sponsor, First tier Tribunal (FtT) Judge Samimi determined that they were in a genuine and durable relationship. He allowed the appeal, concluding that the claimant had satisfied the requirements of Regulation 6 of the 2006 Regulations.
4. The grounds argue that the FtT's decision contains a material error of law because:
 - a. it falls short of finding there was a durable relationship but still allows the appeal;
 - b. the matter has been considered under the wrong Regulation. The FtT refers to Regulation 6 instead of 8(5); and
 - c. the FtT failed to have regard to *Ihemedu (OFM's - meaning) Nigeria* [2011] UKUT 00340 (IAC) under which the matter should have been remitted to the Secretary of State.
5. Shortly before the error of law hearing commenced Mr Arain, on behalf of the claimant, applied for an extension of time on the basis that he had only recently been instructed. At the hearing, I dealt with this as a preliminary issue. After hearing brief submissions I decided to not allow an extension as there had been sufficient notice of the hearing date for the claimant to instruct a representative. I then proceeded to hear arguments.
6. Mr Staunton stated that it was no longer the Secretary of State's position that the judge had erred in relation to his finding about the relationship between the appellant and her sponsor. However, whether or not to issue a residence card was a matter of discretion for the Secretary of State. Mr Arain raised no objection to this line of reasoning.

Findings

7. At paragraph [7] of the FtT decision, the judge states that the Home Office Presenting Officer "*in his submissions has accepted that there is now ample evidence to show that the couple have been in a genuine and durable relationship.*" Given this concession by the Home Office Presenting Officer, it is clear that the judge did not err in finding that the appellant and sponsor were in a genuine and durable relationship.
8. However, the judge has made an error of law in failing to recognise the correct Regulation the claimant satisfied in consequence of being in a durable relationship with an EEA national. The judge refers to Regulation 6 of the 2006 Regulations but the relevant Regulation is 8(5), which concerns the criteria to be met for a partner of an EEA national to be an "extended family member".

9. For the reasons set out by the FtT, the claimant satisfies the requirements of Regulation 8(5) and therefore is an “extended family member”. She is not, however, a “family member “of an EEA national.
10. Under Regulation 17(1) of the 2006 Regulations the Secretary of State must issue a residence card to a “family member”. In contrast, under Regulation 17(4) the Secretary of State may issue a residence card to an “extended family member”. In other words, with respect to extended family members, such as the claimant, the Secretary of State has a discretion. That discretion has not yet been exercised. The position was clarified in *Ihemedu (OFM’s - meaning) Nigeria* [2011] UKUT 00340 (IAC):

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.

Decision

11. The First tier Tribunal’s decision contains an error on a point of law and is set aside.
12. The decision I substitute is to allow the claimant’s appeal to the extent that her application for an EEA residence card as an extended family member remains outstanding before the Secretary of State to exercise discretion under Regulation 17(4) of the 2006 Regulations.
13. No anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 26 October 2015