



IAC-FH-CK-V1

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

Appeal Number: IA/05963/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2016**

**Decision & Reasons Promulgated
On 26 February 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ABDUL REHMAN ARIF BUTT
(ANONYMITY DIRECTION NOT MADE)**

Claimant

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer

For the Respondent: Mr Z Ranjha, Legal Representative, Sky Solicitors Ltd

DECISION AND REASONS

1. The Secretary of State appeals with permission against a determination of First-tier Tribunal Judge Suffield-Thompson promulgated on 1 September 2015 in which the judge allowed the appeal of Mr Abdul Rehman Arif Butt, whom I refer to as the claimant, against a decision of the Secretary of State to refuse to issue him a residence card as the extended family member of an EEA national pursuant to the Immigration (European Economic Area) Regulations 2006.

2. The judge in this case heard evidence and concluded, having directed himself to the decision in **Dauhoon (EEA Regulations - reg 8(2))** [2012] UKUT 79 (IAC) that the claimant is in fact an extended family member of an EEA national. The judge then allowed the appeal under the Immigration (EEA) Regulations 2006.
3. The Secretary of State sought permission to appeal against that decision on the narrow basis that the judge erred in law by allowing the appeal outright when the Secretary of State had not considered her discretion pursuant to Regulation 17(4) of the EEA Regulations. It was submitted that what the judge should have done in this case was for the appeal to have been allowed on the basis that the decision was not otherwise in accordance with the law and the Secretary of State directed to make a fresh decision exercising her discretion pursuant to Regulation 17(4), that being the course of conduct outlined in the decision of the Upper Tribunal in **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340**.
4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Adio on 29 December 2015.
5. Before me Mr Wilding relied on the grounds of appeal. Mr Ranjha for the claimant sought to distinguish **Ihemedu** on the basis that in that case in the First-tier the Secretary of State first had not been represented and so the possibility of exercising discretion was not relevant. He submitted also that this case was different on its facts.
6. I am not satisfied that there is any basis on which I should depart from the course of and principles set out in **Ihemedu** in the head note. In this case the Secretary of State in her refusal letter had concluded that the requirements of Regulation 8 were not met and contrary to Mr Ranjha's submission I do not consider that it could be in any way interpreted as being that the Secretary of State had considered whether or not to exercise her discretion pursuant to Regulation 17(4). There is simply no mention of that in the decision of the Secretary of State.
7. Further I do not consider that the decision in **Ihemedu** can be distinguished on the basis canvassed by Mr Ranjha. The fact that a Presenting Officer may or may not be present in court before the First-tier Tribunal is not relevant to the issue of whether discretion could be exercised. It would not be possible for there to be an exercise of discretion until specific facts which were in dispute had been decided or conceded. In this case that is not so and the facts found in favour of the claimant were found by the judge in a decision promulgated some time later.
8. Accordingly, I am satisfied that, following the decision in **Ihemedu**, the First-tier Tribunal did err in allowing the appeal outright. I therefore set aside that decision on the basis that the decision involved the making of an error of law. I remake the decision preserving the findings of fact made by the judge by allowing the appeal on the basis that the decision of the

Secretary of State was not in accordance with the law. The effect of this is that the Secretary of State must take a fresh lawful decision in respect of the application for a residence card, taking into account the findings of fact reached by the First-tier Tribunal which are not challenged and to issue a fresh decision pursuant to Regulation 17(4).

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal on the basis that it is not in accordance with the law. The application is thus still pending before the respondent awaiting a fresh, lawful decision, based on the findings of fact made by the First-tier Tribunal.

Signed

Date: 23 February 2016

Upper Tribunal Judge Rintoul