



IAC-FH-CK-V1

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

Appeal Number: IA/48678/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4<sup>th</sup> January 2016

Decision & Reasons Promulgated  
On 26<sup>th</sup> January 2016

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

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

Appellant

**and**

**RAJA HASAN RAZA KHAN  
(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

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

For the Respondent: Written representations received. No appearance at hearing.

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her refusal to issue him an extended family member residence card to the claimant under Regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 (as amended).
2. The claimant is a Pakistani citizen and his partner is a Slovakian citizen, working here for various mobile telephone companies.

## Background

3. The claimant did not apply to enter the United Kingdom as the unmarried partner of an EEA citizen exercising her Treaty rights here. He entered the United Kingdom as a student on 15 October 2007. He has not had any lawful status in the United Kingdom since his student leave expired in 2007 or 2008. He was served with form IS151A as an overstayer on 12 July 2012 but did not embark. He made a human rights application which was refused on 21 May 2013 and refusal maintained on 4 June 2014. The claimant did not embark for Pakistan, his country of origin.
4. On 4 June 2014, the claimant made an application for an EEA extended family member residence card based on his relationship with his Slovakian partner. The Secretary of State refused: she considered that the appellant's claimed relationship with an unmarried partner, an EEA citizen said to be exercising Treaty rights in the United Kingdom, was not genuine and was one of convenience.

## First-tier Tribunal decision

5. The First-tier Tribunal found that the relationship between the claimant and his partner was genuine and durable. The Secretary of State does not dispute that finding and it is no longer in issue that the appellant is an extended family member as defined in Regulation 8(5) of the EEA Regulations.
6. The First-tier Tribunal then went on to allow the appeal outright under the Immigration Rules, not the EEA Regulations. That takes no account of the Secretary of State's discretion under Regulation 17(4) in respect of extended family members who can meet the Regulation 8 test:

“(4) 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.”

## Permission to appeal

7. Permission to appeal was granted on the basis that the First-tier Tribunal had erred in failing to approach this appeal as set out in *Ihemedu* (OFMs - meaning) Nigeria [2011] UKUT 340 (IAC):
  - “i) Article 3(2) of Directive 2004/38/EC (“Citizens Directive”) treats other family members (“OFMs”) as a residual category and, in contrast to close family members (“CFMs”) within the meaning of Article 2(2), does not limit it to particular types of relatives (plus spouses or civil partners). There is nothing in the Immigration (European Economic Area) Regulations 2006 akin to the Immigration Appeals (Family Visitor) Regulations 2003 which in our domestic immigration law seeks to specify

exhaustively the categories of family relationship that can qualify a person. Only relatives are covered, albeit with focus on those relatives with whom the Union citizen has significant factual ties.

ii) An important consideration in the context of an OFM/extended family member case is that if a claimant had come to the UK without applying for a family permit from abroad (for which provision is made in reg 12 of the Immigration (European Economic Area) Regulations 2006), this will mean that the UK authorities have been prevented from conducting the extensive examination of the individual's personal circumstances envisaged by reg 12(3) and in the course of such an examination check the documentation submitted. If an applicant chooses not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right.

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."

## **Discussion**

8. The claimant's solicitors do not now dispute the error of law on the basis of which permission to appeal was granted. His solicitors, St John Legal, did not attend the hearing or arrange representation. They wrote to the Upper Tribunal on 18 November 2015 in the following terms:

"...We confirm that we concede to the point raised by the Secretary of State and agree for the matter to be looked at again by the Home Office. We would however request that the matter is kindly considered on an urgent basis in light of the time that our client has already spent awaiting a determination of his application. ..."

9. I am satisfied that the First-tier Tribunal erred in law, both by determining this appeal under the Immigration Rules not the EEA Regulations, and in allowing it outright, rather than leaving the discretion in Regulation 17(4) to be exercised by the Secretary of State, as *Ihemedu* requires. Such error is material, since the Secretary of State has not had any opportunity to exercise her discretion or to consider all the circumstances, including the claimant's poor immigration history.
10. I allow the Secretary of State's appeal and set aside the First-tier Tribunal decision. The claimant's appeal is allowed to that limited extent and it remains for the Secretary of State to exercise her discretion under Regulation 17(4).

## **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I re-make the decision in the appeal by allowing it to the extent that the appellant's application remains before the Secretary of State for a lawful decision under Regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 (as amended).

Signed: Judith AJC Gleeson  
Upper Tribunal Judge Gleeson

Date: 25 January 2016