



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

Appeal Number: IA/13697/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31<sup>st</sup> January 2014**

**Determination  
Promulgated  
On 6<sup>th</sup> June 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**OLABOWALE AYODELE OGUNSANYA**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr C Ikegwuruka (Legal Representative)

For the Respondent: Mr P Deller (Senior Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The appellant's appeal against a decision to refuse to issue him with a residence card was dismissed by First-tier Tribunal Judge Prickett ("the judge") in a determination promulgated on 1<sup>st</sup> August 2013.
2. The judge determined the appeal on the basis of the documentary evidence before him, in the light of the appellant's indication in his notice

of appeal that he did not require a hearing. In refusing the application, the Secretary of State first considered whether the appellant had shown in his application that he was entitled to a residence card as the family member of an EEA national present here, exercising treaty rights. In this context, she found that no valid marriage certificate had been produced and that the certificate relied upon by the appellant was insufficient to make out his case. The Secretary of State went on to consider whether the appellant was an extended family member, as a person in a durable relationship with an EEA national. The appellant's application was considered in this context under Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). She found that the appellant had failed to provide evidence that he fell within Regulation 8(5) and she declined to exercise discretion under Regulation 17(4) of the 2006 Regulations.

3. In determining the appeal, the judge took into account bundles prepared by the parties. The appellant's bundle included a statement from him, made on 16<sup>th</sup> July 2013 and a statement from his partner, made on the same date. The appellant's case that he was a family member, falling within Regulation 7 of the 2006 Regulations, was advanced in reliance upon a customary marriage conducted by proxy in Nigeria. The judge found that the appellant and his wife were indeed married according to customary law. He was not, however, satisfied that the appellant and his wife were in a durable relationship, for the purposes of Regulation 8(5) of the 2006 Regulations. He went on to make an Article 8 assessment, finding that family life between the appellant and his wife was not shown, in the light of his adverse finding regarding the claimed durable relationship. The judge accepted that the appellant had established private life ties in this country, albeit in the knowledge that he had no right to remain here permanently. He concluded that the adverse decision amounted to a proportionate response.
4. An application for permission to appeal was made by the appellant, through his solicitors. It was contended, first, that as the customary marriage was accepted by the judge, it was irrational and thereby an error of law to require "more evidence on the durability of the relationship". In a second ground, it was contended that even if the judge properly went on to consider whether a durable relationship was shown, there was ample supporting evidence in the appellant's appeal bundle. The appellant would not have taken out a joint life insurance policy with another person unless the person was his wife and the joint life policy showed the relationship between them. In a third ground, it was contended that the judge's Article 8 assessment was flawed. His conclusion that no family life was shown between the appellant and his wife was irrational, in the light of his acceptance that the marriage had occurred.
5. Permission to appeal was granted on 21<sup>st</sup> August 2013. The appeal was then listed for hearing in November 2013, before Deputy Upper Tribunal Judge Davey. Judge Davey found that the judge's reasoning fell short of

what was required in relation to Regulation 7 and Regulation 8(5) of the 2006 Regulations. The judge failed, in particular, to consider whether a valid customary marriage, meeting the requirements of Nigerian law, had a substantial impact upon the application made by the appellant for a residence card. So far as Regulation 7 is concerned, he considered that remaining to be considered was whether a valid proxy marriage had taken place which met the requirements of the law here. He noted that the appellant's wife, a Portuguese national, did not attend, apparently through illness. An important question was whether the marriage in Nigeria was recognised under Portuguese law.

6. Judge Davey adjourned the hearing, directing that the parties should provide such evidence as they chose, particularly in relation to whether the customary marriage was a recognised marriage for the purposes of Portuguese law.

### **Submissions Made on Behalf of the Parties on 31<sup>st</sup> January 2014**

7. Mr Ikegwuruka said at the outset that although the appellant had been able to obtain a letter from a local authority in Nigeria, regarding the status of the customary marriage he relied upon, he had been unable to obtain evidence from lawyers in Portugal, regarding recognition of the marriage according to the law of that country. He accepted, in the light of Kareem (proxy marriages - EU law) [2014] UKUT 00024 (IAC) that the appellant was unlikely to succeed in showing that the customary marriage, conducted by proxy, was one recognised in Portuguese law.
8. The First-tier Tribunal Judge found that the evidence of the claimed durable relationship was insufficient. Mr Ikegwuruka said that even if the appellant could not succeed under Regulation 7 of the 2006 Regulations, a decision was required from the Secretary of State under Regulation 8(5). At paragraph 9 of the determination, the judge found that he was not satisfied, on the balance of probabilities, that a durable relationship was shown. The second ground in support of the application for permission to appeal to the Upper Tribunal was relied upon here. The evidence showing the relationship was before the First-tier Tribunal and the judge erred in law in failing to relate his findings to the evidence before him.
9. Mr Ikegwuruka said that the error was shown in paragraph 9, in line 9, for example. The judge referred to "new water bills" in joint names. This was evidence that the parties were living together. There was also an account statement from Santander which should have led the judge to find that a durable relationship existed. The documents contained in the appellant's bundle included bills in joint names, over a period of two or three years.
10. Mr Deller said that so far as durable relationship was shown, the reasoning of the judge did indeed appear largely in paragraphs 9 and 10 of the determination. The critical question was whether he erred in law in this context. The appeal was determined without an oral hearing. The judge

had to assess durable relationship, on the basis of the documentary evidence before him. The analysis in paragraphs 9 and 10 was thorough and the judge's findings were open to him.

11. In a brief response, Mr Ikegwuruka said that the joint life insurance policy taken out with the appellant's spouse showed a durable relationship. The purpose of the policy would be defeated if there were no such relationship. The judge ought to have considered the evidence in the round. His failure to do so revealed an error of law.

### **Findings and Conclusions**

12. The judge determined the appeal on the basis of the documentary evidence before him, as the appellant did not require an oral hearing. The bundle of documents prepared on his behalf was carefully considered by the judge, as paragraphs 9 and 10 of the determination show.
13. The appellant's wife was not present at the hearing before Judge Davey in November 2013 and she was not present before the Upper Tribunal in January 2014. The appellant's case is still borne by the bundle of documents relied upon before the First-tier Tribunal.
14. So far as Regulation 7 of the 2006 Regulations is concerned, it is readily apparent that the absence of any evidence showing that the customary marriage conducted by proxy in Nigeria is recognised in Portuguese law is fatal to the appellant's case that he is entitled to a residence card as the family member of an EEA national present here, exercising treaty rights, in the light of Kareem [2014] UKUT 00024. At paragraph 17 of the determination in that case, the Upper Tribunal held that the question of whether there is a marital relationship is to be examined in accordance with the laws of the Member State from which the Union citizen obtains nationality and from which that citizen derives free movement rights. There is no evidence before the Upper Tribunal showing that the marriage relied upon is recognised in the law of the Member State from which the appellant's wife obtains nationality and from which she derives free movement rights.
15. So far as Regulation 8(5) is concerned, Mr Ikegwuruka contended that the judge erred in law in failing to properly assess the evidence. Mr Deller, on the other hand, submitted that paragraphs 9 and 10 of the determination show a careful assessment of the evidence before the First-tier Tribunal.
16. It is clear from those paragraphs that the judge had in mind the contents of the appellant's bundle and the particular documents showing the names of both the appellant and his wife at 303 Gurney Close in Barking. The judge was perfectly entitled to conclude that the few letters giving both names, including the letters from Aviva dated 30<sup>th</sup> April 2013, fell short of showing, on a balance of probabilities, that a durable relationship existed. Contrary to Mr Ikegwuruka's submission, I find that the judge did weigh all

the evidence in the round. He was entitled to draw attention to the absence of photographs showing the appellant and his wife together or with friends and the absence of letters or statements from those who knew the appellant and his wife, confirming that they have lived together, as claimed.

17. Having considered the competing submissions, I conclude that the judge's findings in relation to durable relationship were open to him, in the light of the evidence. I find that no error of law has been shown in this context.
18. No submissions were made on the appellant's behalf with regard to Article 8 of the Human Rights Convention and Judge Davey noted in November 2013 that no substantive challenge was made albeit that an issue was raised regarding the judge's assessment. Paragraphs 11 and 12 contain the judge's reasoning in this context. He was entitled, I find, to conclude that family life was not shown, in the light of his adverse findings regarding durable relationship. So far as private life ties are concerned, there was little evidence before the judge. The appellant's bundle included several certificates issued to the appellant, including a degree certificate dating from October 2009. The judge noted the absence of evidence regarding the appellant's entry into the United Kingdom and his status since then. His witness statement includes a very brief mention of a private life established with his community, in the last paragraph of the but there is little else. Taking into account the paucity of evidence regarding private life ties, the judge was entitled to conclude that although Article 8 was engaged, the adverse decision was a proportionate response. He did not err in law in concluding as he did.
19. Although the submissions made by both parties were concerned with whether or not the judge erred in law in relation to Regulation 8(5) and the appellant's claim to be in a durable relationship with a Portuguese national, and although Judge Davey's determination shows that he was concerned largely with Regulation 7 and the status of the customary marriage, he adjourned the appeal so that the decision could be remade. I have not been persuaded that there is any reason to disturb the judge's assessment of the durable relationship claim. Remaking the decision leads to a similar conclusion. As noted earlier in this determination, the evidence before the Upper Tribunal remains the appellant's bundle, as it was before the First-tier Tribunal. Weighing together the two witness statements and the small number of documentary items recording the names of both the appellant and his wife at the premises in Barking, I conclude that a durable relationship has not been shown, on a balance of probabilities. Overall, what is surprising is the lack of photographic or similar evidence showing the appellant and his wife together and the absence of supporting evidence, capable of being properly tested, from friends who know them both. The appellant was perfectly entitled, of course, to choose to have his appeal determined without a hearing, with the consequence that the claims made in the witness statements could not be tested in cross-examination, but, nonetheless, he can have been in

no doubt that his relationship was in issue. Directions were sent to the parties by the Upper Tribunal in August 2013, advising them to prepare on the basis that if the decision of the First-tier Tribunal Judge were set aside, any further evidence, including supplementary oral evidence, could be considered when the matter came before the Upper Tribunal. Notwithstanding the centrality of the issue, the evidence relied upon by the appellant has remained confined to what was put before the First-tier Tribunal.

20. The net result is the same, in any event. The appellant has failed to show, on a balance of probabilities, that he falls within Regulation 8(5) of the 2006 Regulations, as a person in a durable relationship with an EEA national. There is no good reason to disturb the judge's Article 8 assessment but remaking the decision in this context leads to a similar outcome. No family life has been shown and there is almost no detailed evidence of the appellant's private life ties. No case was advanced on his behalf that he meets the requirements of the Immigration Rules in this context (under paragraph 276ADE). The educational certificates and other parts of the documentary evidence show that he has been present in the United Kingdom for some years but there is, again, no detail shown in them regarding any particular ties or associations. It appears that the appellant has spent periods of time here studying and he would have done so in the full knowledge that he had only limited leave. There is nothing to show that he has ceased to have ties with his country of nationality. Overall, I find that Article 8 is engaged (the threshold of engagement being not particularly high), that the decision to refuse to issue him with a residence card was in accordance with the law and that the decision was a proportionate response.
21. In summary, the appellant has not succeeded in showing that he was or is entitled to a residence card under the 2006 Regulations. His claim to be a family member falling within Regulation 7 fails in the light of Kareem. There is no good reason to disturb or set aside the judge's findings in relation to Regulation 8(5), regarding the durable relationship claimed with his Portuguese wife. In any event, remaking the decision leads to a conclusion that the evidence does not show a durable relationship. I also conclude that the appellant cannot succeed under Article 8 of the Human Rights Convention.

## **DECISION**

Appeal dismissed.

## **ANONYMITY**

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell