



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

Appeal Number: IA/30622/2014

THE IMMIGRATION ACTS

Heard at Field House, London

Decision and Reasons

Promulgated

On 30 September 2015

On 16 October 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SALIM MBYE

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Julie Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms S Bassiri-Dezfouli, Counsel, instructed by Stuart Karatas Sols

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Khan) allowing the respondent's appeal against a decision taken on 11 July 2014 to refuse to issue a residence card under the Immigration (European Economic Area) Regulations 2006 ("the Regulations") as the spouse of an EEA national.

Introduction

3. The respondent is a citizen of Gambia born on 31 October 1983. He claims to be married to Eva Morena Angel who is a citizen of Spain born on 14 April 1990 ("the EEA sponsor"). The parties claim that they were married by proxy in Gambia on 21 November 2013.
4. The Secretary of State accepted the respondent's identity and nationality but concluded that the relationship was not genuine and the marriage was one of convenience.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 1 May 2013. He was represented by Ms McCarthy, Counsel. The First-tier Tribunal found that the respondent had not proved that the proxy marriage was valid under Gambian law or that it was recognised under Spanish law. However, the judge also found that the parties had been living together in a genuine and subsisting relationship for two years and that the respondent was therefore an extended family member. The appeal was allowed under regulation 8(5) of the Regulations.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in finding that the relationship was genuine and had also erred in allowing the appeal outright, failing to consider regulation 17(4) which only entitles the respondent to have his application considered by the Secretary of State.
7. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 5 July 2015. Permission to appeal against the finding that the parties were in a genuine relationship was refused. However, permission to appeal was granted on the basis that the judge had not considered regulation 17(4). It was arguable that extended family membership did not simply entitle the respondent to a residence card.
8. Thus, the appeal came before me

Discussion

9. Ms Isherwood submitted that there is a material error of law but permission was granted in relation to regulation 17(4) only. She relied upon Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 003400 (IAC). Where the Secretary of State has not exercised discretion under regulation 17(4) the most a judge is entitled to do is to allow the appeal as not being 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.
10. Ms Bassiri-Dezfouli agreed and indicated that she had explained the case law to the respondent. The durable relationship is accepted. The decision should be expedited because the respondent has problems with accessing

medical care at present because the Secretary of State has retained his passport.

11. The material error of law is set out at paragraph 9 above and is agreed by the parties. The judge correctly allowed the appeal under regulation 8(5) but incorrectly allowed the appeal outright. Thus, the First-tier Tribunal's decision to allow the respondent's appeal outright under the Regulations involved the making of an error of law and its decision cannot stand.

Decision

12. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by allowing the appeal to the limited extent that the decision of the Secretary of State was not in accordance with the law because the respondent is an extended family member of the EEA sponsor and the Secretary of State should now consider whether to exercise discretion under regulation 17(4).

13. I encourage the Secretary of State to expedite the decision.

Signed 

Date 15 October 2015

Judge Archer

Deputy Judge of the Upper Tribunal