Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32464/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th March 2015	**On 24th March 2015**
Prepared on 17th March 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR PRINCE ASAMOAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Akohene, Solicitor
For the Respondent: Ms E. Savage, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Ghana born on 25th December 1987. He appealed against the decision of the Respondent dated 18th July 2013 to refuse to issue him with a residence card as confirmation of his right of residence in the United Kingdom under the Immigration (European Economic Area) Regulations 2006 ("the 2006

Regulations"). The Appellant stated that he was the spouse of a citizen of Belgium, Mrs Dorcas Owusu ("the Sponsor"), who was present in the United Kingdom exercising treaty rights. The application was refused because the Respondent was not satisfied that the Appellant and his Sponsor were married as claimed. The Appellant's appeal was allowed by First-tier Tribunal Judge Chohan sitting at Sheldon Court, Birmingham on 5th November 2014. The Respondent appeals with leave against that decision and the matter thus comes before me in the first place as an appeal by the Respondent against the First-tier Tribunal's decision. For the reasons which I have set out below I have set aside the First-tier Tribunal's decision and remade the decision in this case. Therefore, for the sake of convenience I will continue to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 21st June 2010 with a visit visa which was valid until 26th October 2010. He and the Sponsor were married by proxy at a customary marriage in Ghana on 7th November 2012. This case has an unfortunate history which I need not rehearse here save to say that a previous appeal by the Appellant against the Respondent's decision of 18th July 2013 had been allowed on the papers by Judge of the First-tier Tribunal Mulvenna on 11th March 2014. That decision was set aside, the appeal was remitted back to the First Tier and the matter eventually came before First-tier Tribunal Judge Chohan on 5th November 2014.

The Hearing at First Instance

3. Judge Chohan recorded in his determination that at the outset of the hearing before him the Appellant's solicitor (who also appeared before me) submitted that the Appellant and his partner, Ms Owusu, the Sponsor, had made enquiries regarding recognition of their marriage in Belgium but the enquiries had not been fruitful. As such the Appellant would no longer be proceeding under Regulation 7 of the 2006 Regulations (that he was married to the Sponsor) but instead under Regulation 8(5) of the 2006 Regulations on the basis that he and the Sponsor were in a durable relationship. It was accepted that the Sponsor was in employment and therefore a qualified person. The issue was whether the Appellant and Sponsor were in a durable relationship.

4. Although there was no documentary evidence of a tenancy agreement the Judge held that was not fatal to the Appellant's claim. There were some minor discrepancies in the oral testimony but they too did not go to the core of the Appellant's claim. The majority of the documentary evidence in respect of utility bills, bank statements etc. were in the Sponsor's name. There was one document from Aviva in respect of life insurance, which was in joint names. The TV licence was in the Appellant's name. The documentary evidence, described by Judge Chohan as "limited", did nevertheless show that the Appellant and the Sponsor had the same address. He was satisfied that the Appellant and Sponsor lived together and they had been since November 2012 in a relationship akin to marriage. Regulation 8(5) of the 2006 Regulations was therefore met. The Judge did not proceed to consider Article 8 in those circumstances.

The Onward Appeal

5. The Respondent appealed against that decision arguing that the issue of a residence card to an extended family member was at the discretion of the Respondent and as such the matter should have been referred back to the Respondent for reconsideration. The grounds cited Regulation 17(4) of the 2006 Regulations which provides that the Respondent may issue a residence card to an extended family member if in all the circumstances it appears to the Respondent appropriate to issue the residence card. As the Respondent had not yet considered the matter under Regulation 17(4) the Judge had erred in allowing the appeal outright.

6. The Respondent relied in her grounds on the case of **Ihemedu [2011] UKUT 00340**, whose head note states:

> "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."

7. The application for permission to appeal came on the papers before First-tier Tribunal Judge Holmes on 21st January 2015. In granting permission to appeal he wrote that:

> "The Appellant relied upon a proxy marriage in Ghana to a Belgian national, conducted whilst he had no immigration status in the UK. He has a poor immigration history. The Respondent considered that there was no lawful marriage or if there were it was a marriage of convenience and there was in truth no durable relationship between the couple.
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> The Appellant abandoned the argument before the Tribunal that he had entered into a lawful marriage with the Sponsor and that he was her spouse as defined in the EEA Regulations. The appeal was pursued on the sole ground that the Appellant was an extended family member of the Sponsor by virtue of their durable relationship under Regulation 8.
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> If the appeal was properly to be allowed on the basis that the Appellant was an extended family member of the Sponsor the decision reveals that the Judge did not refer himself to **Ihemedu** or to **Moneke [2011] UKUT 430** and did not allow the appeal on the limited basis that Regulation 8 having been made out the Respondent should now consider the exercise of her discretion under Regulation 17(4). Even if the requirements of Regulation 8 were made out it is arguable that the Judge should not have simply allowed the appeal because in doing so neither he nor the Respondent had considered how the Regulation 17 discretion should be exercised. The grant of a residence card to an EFM being a two stage process, the second stage had therefore not yet been undertaken."

8. The Appellant responded to the grant of permission in a letter addressed to the Presenting Officers Unit dated 24th February 2015 a copy of which was sent to the court. The letter stated:

> "We agree with the position taken by the Tribunal Judge J M Holmes and suggest your agreement to the consent order below to save time and costs. Immigration Judge Chohan in his determination dated 27th November 2014 was satisfied that the Appellant meets the requirements of Regulation 8(5) of the 2006 Regulations [paragraph 15]. He allowed the appeal under the 2006 Regulations [paragraph 17]. In short the Appellant has shown that they are in a durable relationship for the purpose of Regulation 8(5) and thus that she is an extended family member for the purposes of the EEA Regulations. Regulation 17(14) of the Regulations provides a discretion to the Secretary of State to issue a residence card to an extended family member. In the Appellant's case the Secretary of State has not yet considered the exercise of such discretion. It is not open to an Immigration Judge to consider the exercise of discretion absent the Secretary of State first doing so. In the circumstances we suggest that we both agree by consent without attending court that:
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> The decision of the First-tier Tribunal contains an error on a point of law and is set aside. The decision is remade as follows: the appeal is allowed to the extent that the application for an EEA residence card remains outstanding before the Secretary of State."

9. There was no response to that letter from the Respondent; I was told by the Presenting Officer that it had only reached her yesterday. It was agreed by both parties that the findings of fact made by Judge Chohan should be preserved when the matter was once more before the Respondent to make a fresh decision.

Findings

10. In granting permission to appeal Judge Holmes stated the matter very succinctly. It was not open to Judge Chohan to allow the appeal outright under Regulation 8, particularly in the circumstances where the Appellant's appeal under Regulation 7 had been withdrawn. The Respondent was not seeking for the Tribunal to rehear the whole appeal all over again but rather for the matter to go back before the Respondent to be considered in line with the discretion provided under Regulation 17(4) of the 2006 Regulations. In my view that was an eminently sensible solutionfollowing a very sensible suggestion made by the Appellant's solicitor. I indicated therefore that I found an error of law in Judge Chohan's decision which I set aside (save that his findings of fact were all preserved) and that I would remake the decision in this case by allowing the Appellant's appeal against the Respondent's decision to refuse to issue a residence card to the extent that the Respondent's decision was not in accordance with the law and remained outstanding for the Respondent to take.

11. In those circumstances I too do not consider the issue of Article 8 and the matter is now once again before the Respondent to consider. Given the unfortunate history of

this matter and the number of times that it has been before the Tribunal it is to be hoped that the Respondent will consider this matter in accordance with the 2006 Regulations as soon as possible. In considering this matter the Respondent should have a copy of Judge Chohan's determination which will inform her decision-making as Judge Chohan's findings of fact have been preserved.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by allowing the Appellant's appeal against the Respondent's decision to the extent that the Respondent's decision is not in accordance with the law.

Appellant's appeal allowed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

I do not disturb the fee award of £80 made by Judge Chohan which took into account the fact that on the one hand the Appellant had been successful below but on the other hand had submitted a substantial amount of information at a relatively late stage.

Signed this 23rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft