Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22818/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2015	**On 18 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FATOU JALLOW JOME
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr C Emezie of Chipatiso Associates LLP

DECISION AND REASONS

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Morgan promulgated on 15 July 2015. Judge Morgan allowed the appeal of Ms Fatou Jallow Jome against a decision of the Secretary of State for the Home Department to refuse to issue her with an EEA residence card, such decision having been made by way of Notice of Immigration Decision dated 9 May 2014 for reasons set out in a 'reasons for refusal' letter ('RFRL') of the same date.

2. Although before me the Secretary of State is the appellant and Ms Jome is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Jome as the Appellant and the Secretary of State as the Respondent.

3. The Appellant's application for a residence card was based on her relationship with her partner, Mr Malam Endami, a Portuguese national. The couple had entered into a proxy marriage in the Gambia on 13 December 2013.

4. The Respondent refused the application for a residence card essentially for two reasons. In the first instance the Respondent was not satisfied that the marriage was a valid marriage for the purposes of the application for a residence card - that it was not duly recognised and as such could not avail the Appellant in her claim to be a family member of an EEA national exercising Treaty rights. In the alternative the Respondent went on to consider the issue of 'durable relationship' in the context of whether the Appellant might be said to be an extended family member of her partner: the Secretary of State was not satisfied in that regard.

5. The Appellant appealed to the Immigration and Asylum Chamber.

6. On appeal the First-tier Tribunal Judge heard evidence from the Appellant and her partner and, as he states at paragraph 6 of his decision, found such evidence to be "*credible and consistent within itself and with the documentary evidence contained within the Appellant's bundle*". In such circumstances the Judge accepted "*that evidence in its entirety*", and then set out his findings on the basis of that evidence at paragraphs 7 and 8.

7. At paragraph 9 the Judge says this:

> "*In respect of the validity of the marriage I accept the couple's evidence that this marriage is valid under Gambian law. However Mr Emezi, on behalf of the appellant accepted that were no evidence before me in respect of the validity of the marriage under Portuguese law. Mr Emezi therefore accepted that the issue before me was the durability of the couple's relationship.*"

8. The Judge went on to consider the issue of durability, found on the basis of his primary findings of fact that the relationship should indeed be characterised as a durable relationship, and in those circumstances was satisfied that the Appellant was the extended family member of a Portuguese national working in the United Kingdom and exercising Treaty rights under the EEA Regulations. On that basis the First-tier Tribunal Judge allowed the appeal.

9. The Respondent has sought and been granted permission to appeal against the decision of Judge Morgan. The Secretary of State's grounds raise two bases of challenge. One, primarily in reliance upon the case of **Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC)**, and the other primarily in reliance upon the guidance in the case of **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC).**

10. The Respondent's ground relating to the case of **Kareem** is raised in the application for permission to appeal on a contingent basis; it is relied upon only if it be considered the case that the Judge had concluded that there was a valid marriage for the purposes of EEA law. The grounds suggest "*It is unclear whether the IJ is allowing the appeal purely on the basis of the durable relationship or in addition to him finding the couple have contracted a customary marriage*".

11. Permission to appeal was granted by First-tier Tribunal Judge Frankish on 13 October 2015.

12. The Appellant, through her representatives, has filed a Rule 24 response under cover of letter dated 29 October. That response has arrived under cover of a letter from the Appellant's solicitors, and as I understand it was drafted by Mr Emezie. Attached to the Rule 24 response are extracts from a communication from the Portuguese authorities to the Office of the High Commissioner for Human Rights at the UN in relation to Portuguese domestic law with regard to marriage, which I will return to in due course.

Consideration

13. In my judgement it is very clear that the First-tier Tribunal Judge did not proceed on the basis that he was satisfied that there was a valid marriage for the purposes of EEA law. It is abundantly clear from the passage already quoted from paragraph 9 of the decision that the Judge considered that a concession had been made in this regard by the Appellant's representative, and in those circumstances the Judge turned his mind to the alternative argument in respect of a durable relationship.

14. I will return to the issue of that concession in a few moments.

15. Because I am of the view that it is clear that the Judge proceeded on the basis that he was only looking at the issue of 'durability' I need not go into any greater detail at this time with regard to that aspect of the Respondent's challenge based on **Kareem**, and accordingly I turn to the challenge made in reliance upon the case of **Ihemedu**.

16. The key relevant passage from **Ihemedu** is that set out in the headnote at subparagraph (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.*"

17. In short, the Respondent argues that the Judge went too far in allowing the appeal outright. Having concluded that there was a durable relationship the Judge, it is argued, should simply then have remitted the case to the Secretary of State to given consideration to the discretion under Regulation 17(4).

18. As regards the **Ihemedu** point, in the Rule 24 response it is simply stated that "*the authority relied upon is not on point*". With respect, it seems to me that the authority of **Ihemedu** is absolutely on point.

19. In the course of discussion and submissions Mr Ezemie decided to advance the submission in the alternative: that if it was on point, **Ihemedu** was wrongly decided. However he had not produced a copy of the case of **Ihemedu** in order to be able to take me through it to identify those areas of the reasoning of the Tribunal with which he disagreed, and he did not provide any other materials to support such a submission. As indicated, in any event, such a submission is not the submission advanced in the Rule 24 response.

20. In those circumstances I find that nothing has been said to me today to undermine the reasoning in **Ihemedu**, and I accept and adopt its reasoning and approach. On that basis I find that within the parameters with which Judge Morgan set out his decision he was indeed wrong to go on to allow the appeal outright and should properly have simply recognised that there was a discretion at large which needed to be remitted to the Secretary of State to consider in accordance with the findings and guidance set out in the case of **Ihemedu**. It was accordingly in those terms a material error of law for him to allow the appeal substantively.

21. It is necessary, however, for me to make some comments and observations in respect of the issue of proxy marriage, as that has been

the subject of some considerable discussion during the course of the hearing today.

22. I have already quoted the passage wherein the First-tier Tribunal Judge records what was in his perception a concession made on this point. I should just emphasise that the concession as recorded by Judge Morgan in his decision was *not* to the effect that Mr Emezie had said that the marriage was or was not valid under Portuguese law, but that there was *no evidence* before Judge Morgan in respect of the validity of the marriage under Portuguese law.

23. Before me today Mr Emezie claims that he made no such concession, and indeed asks rhetorically why would he have made such a concession in circumstances where such a marriage is indeed valid? Again I note that the concern was not whether the marriage was or was not valid but what was the available evidential material in respect of its validity in Portugal. Indeed it is clear that there was no such material in the appeal bundle that was filed by the Appellant's representatives with the First-tier Tribunal in support of the appeal.

24. Mr Emezie has produced for the Upper Tribunal - appended to the Rule 24 response - a communication from the Portuguese authorities to the Office of the High Commission for Human Rights. Before me today he suggested that he in fact submitted that document to Judge Morgan - and indeed it is very much on that premise that he advances the contention that he would not have made the concession recorded in the First-tier Tribunal's decision.

25. There is not a copy of the Portuguese document on file contemporaneous with the First-tier Tribunal hearing. The only copy is the one that has been provided with the Rule 24 response. Accordingly, if such a document was handed to Judge Morgan it is not apparent that he placed it on the file. It is difficult to see in circumstances where all of the other documents are duly on file, why the Judge would not have put this one particular document on file. It is also difficult to see why Judge Morgan would have stated what he did in paragraph 9 if in fact he had just been handed a document to a contrary effect to the concession that he thought Mr Emezie had made.

26. Be that as it may, and in any event, the issue of the concession has not been raised in the Rule 24 response. Whilst arguments have been advanced in respect of the validity of the Appellant's proxy marriage in Portuguese law, nothing has been said at all in the Rule 24 response taking issue with the apparent concession recorded by Judge Morgan at paragraph 9.

27. In my judgement it is too late to raise what is essentially a new ground of challenge, and moreover a ground founded upon a factual dispute as to what had happened before the First-tier Tribunal – such a challenge also only being raised by way of Mr Emezie's oral submissions at the appeal, not in writing, and with no notice to the Respondent. Where an appellant or his/her representatives wish to raise a dispute of fact in relation to some aspect of the procedure before the First-tier Tribunal this would in the usual way require to be supported by evidence: in the instant case that would in effect require Mr Emezie to file a statement in support of his version of any contentious issues. Moreover this would then involve the very likely probability of Mr Emezie having to stand aside as an advocate in these proceedings because he could not at both times be a witness as to what had happened before the First-tier Tribunal and an advocate. I am clear, and have no hesitation in ruling, that it is too late to be raising these matters – particularly when there is no reference, not even a hint of such a matter in the Rule 24 response.

28. Nonetheless I have had brief regard to the materials that Mr Emezie has submitted appended to the Rule 24 response and I makes the following brief observations.

(i) The document appears to be a communication sent from the Portuguese Permanent Mission in Geneva to the Office of the High Commissioner for Human Rights of the United Nations, seemingly dated as having been received by that office on 22 April 2014. It is said that the communication refers to note OHCHR/RRDD/VAW which I pause to observe is not otherwise explained, and that it is a "*Reply by the Portuguese authorities to the questionnaire on child, early and forced marriage*".

(ii) Perusal of the body of the document does indeed suggest that this is an attempt to summarise certain aspects of the civil law provisions contained in the Portuguese Civil Code relating to inter-personal relationships. The particular passage to which my attention has been directed appears at paragraph 1.2.1 which is in the following terms:

> "*Marriage by proxy is permitted (Article 1620 CC). One of the intending spouses may delegate authority to an appointed representative through a proxy document that must contain specific authority to contract the marriage, name the other intending spouse and indicate how the marriage will take place and the type of marriage.*
> *The proxy becomes invalid if it is revoked or if the principal representative dies or becomes incapacitated. The intending spouse can revoke the proxy any time (Article 1621 CC).*"

(iii) Without more I am not satisfied that these passages are not simply references to procedures that are permissible within Portugal in respect of proxy marriage. Without more I am not satisfied that this constitutes evidence that a proxy marriage contracted elsewhere in circumstances which may or may not be consistent with Portugal's own code is inevitably

a recognised marriage. Accordingly I am not satisfied that this document could have, as it were, 'filled the gap' in the evidence identified by Judge Morgan as having been the subject of a concession. As such it is immaterial, in my judgement, whether Judge Morgan either did not have the document before him, or alternatively failed to address it.

29. Mr Emezi otherwise made reference during the course of submissions to the recent Court of Appeal case of **Collins Agho [2015] EWCA Civ 1198**. He did so again without producing a copy of that decision, although he was able to bring up a case note on his mobile device which I was able to peruse briefly. That case essentially says that where the Secretary of State is alleging a sham marriage or a marriage of convenience in the context of an EEA case then the burden of proof is on the Secretary of State to demonstrate that the marriage was indeed a sham.

30. It seems to me that that is not on point. The Secretary of State is not now in the proceedings before me arguing that the relationship was not genuine or that the marriage was a sham: the issue is the question of the recognition of the marriage by the Portuguese authorities. I am not remotely persuaded in those circumstances that the case of **Collins Agho** results in a shift of the burden of proof from that which was applied in the case of **Kareem**.

31. Mr Emezie otherwise fell back on arguing that **Kareem** was wrongly decided, and in this context made reference to two cases in respect of which permission to appeal had been granted by the Court of Appeal.

32. Yet again, these matters have been raised in his Rule 24 response and the Secretary of State has not been put on notice of them accordingly. I do not have particular or specific details of those cases pending before the Court of Appeal, but in any event no decision has yet been made on them and until such time as any decision is made on them I am content to agree with the approach taken in **Kareem** and adopt that approach in cases where it is relevant.

33. Be that as it may, it seems to me for the reasons already given that the issue in respect of proxy marriage is not squarely before this Tribunal in this case. It was raised in the alternative by the Secretary of State in circumstances where it is clear to me it was entirely unnecessary for the Secretary of State to raise it. There is no cross-appeal against the First-tier Tribunal's decision on the point, and the arguments that Mr Emezie has sought to advance on the point during the course of the hearing are not raised in the Rule 24 response which confines itself to submissions on factual merits. Those factual merits essentially rest on the Portuguese documents which I have indicated seem to me not to advance the matter any further.

34. Accordingly in summary I find that the First-tier Tribunal Judge did indeed err in law in respect of failing to identify the residual discretion under Regulation 17(4) and to that extent his decision must be set aside. In remaking the decision I find that the appeal must be allowed on the basis that the issue of discretion remains at large and that is to be remitted to the Secretary of State to be considered in accordance with the law, pursuant to the guidance in **Ihemedu**. No doubt the Secretary of State in considering the residual discretion will want to take into account the very positive findings made by Judge Morgan in respect of this couple's relationship. There is no need for me to interfere with any aspect of the First-tier Tribunal Judge's decision in respect of validity of marriage and that aspect of the decision stands.

Notice of Decision

35. The decision of the First-tier Tribunal Judge is set aside.

36. I remake the decision in the appeal. The appeal is allowed to the limited extent of being remitted to the Secretary of State to consider the discretion under Regulation 17(4).

34. No anonymity direction is made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed Date: 15 January 2016

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award because it was necessary for the Appellant to pursue her appeal before the First-tier Tribunal in order to establish that she was in a genuine durable relationship with the sponsor.

Signed Date: 15 January 2016
Deputy Upper Tribunal Judge I A Lewis