



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35298/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14 July 2016

Decision and Reasons Promulgated
On 15 July 2016

Before

Upper Tribunal Judge Southern

Between

ISAAC BERCHIE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Akohene of Afrifa and Partners, solicitors
For the Respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION

1. The appellant, who is a citizen of Ghana, arrived in the United Kingdom in September 2012 and was admitted as a visitor. He overstayed that leave and on 4 August 2013 was served with notice of liability to be removed. On 6 June 2014 he applied for a residence card as the son-in-law of Mary Serwaa, a Dutch citizen. Ms Serwaa was born in Accra as a Ghanaian national but moved to the United Kingdom after having obtained Dutch citizenship. Her daughter travelled to the United Kingdom to join her as a dependant relative of an EEA national. The

appellant had not met either Mary Serwaa or her daughter, Antoinette Owusu, before they arrived in the United Kingdom.

2. On 6 June 2014 the appellant applied for a residence card as the son-in law of an EEA national exercising Treaty rights in the United Kingdom. The marriage between the appellant and Ms Owusu was said to be a proxy marriage conducted in Ghana on 1 March 2014 that neither party attended, they both being in the United Kingdom at the time. It is not suggested otherwise than that both the appellant and Ms Owusu possess Ghanaian nationality only.
3. By a decision made on 26 August 2014 the respondent refused that application on the basis that it was not accepted that the proxy marriage was a valid one. The respondent explained that there were a number of reasons for arriving at that conclusion. These included that a careful examination of the documents submitted disclosed that the “signature in the husband and wife field does not match that of the application form or passport”; the respondent did not accept that the Customary Marriage certificate had been validly registered in accordance with the Customary Marriage and Divorce (Registration) Law 1985; the essential Statutory Declaration was not accepted as sufficient evidence because no evidence had been provided that the appellant was related as claimed to the person identified as his uncle, and the burden of proving the fact that it is a valid marriage is on the appellant.”; similarly, no evidence was provide that the person described as Ms Owusu’s father was related as claimed so that it was not accepted these persons were entitled to represent the absent parties for the purpose of the customary marriage.
4. Thus, the issue to be resolved in the appeal that came before First-tier Tribunal Judge Thew was said to be the validity or otherwise of the customary marriage. By a decision promulgated on 13 November 2015 he dismissed the appeal but did so on the basis that:

“I have no evidence before me that Dutch law recognises the appellant’s marriage as a valid marriage...”
5. Permission to appeal was granted by First-tier Tribunal Judge Nicholson because, he considered:

“It is arguable that where, as here, the marriage is between two non-EEA Ghanaian nationals, the validity of their marriage is assessed solely by reference to Ghanaian law.”
6. Before the Upper Tribunal it is common ground and agreed between the parties that the judge erred in law in the approach he took in determining the appeal. Thus, the matter that is in issue between the parties as a consequence of the decision under appeal has not been addressed. If matters rested there, the answer would be to simply carry out the task that it was for the First-tier Tribunal Judge to accomplish and determine the appeal.

7. However, matters do not rest there. At the beginning of this morning's hearing I asked Mr Akohene to explain how the appellant had any access at all to a right of residence recognised by the Immigration (EEA) Regulations 2006 ("the 2006 Regulations") or, indeed, the Directive they implement into domestic law. Although he did not concede that the appellant had no right of residence on the basis of his marriage to someone who herself is not an EEA national but is present as the dependant daughter of a mother who is, in my judgement his valiant attempt to construct a route to a right of residence as an Extended Family Member of an EEA national cannot succeed. In order to explain why I must first set out to the extent relevant the provisions of the 2006 Regulations relied upon by Mr Akohene, those being Regulations 7, 8 and 17. Ms Serwaa is working in the United Kingdom and so it is not necessary to reproduce those provisions of Regulation 7 that are concerned with students, nor those provisions dealing with accessions states:

Family member

7. –(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are –

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) ...

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) ...

"Extended family member"

8. –(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

Issue of residence card

17. – (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of –

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of –

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(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.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be entitled "Residence card of a family member of an EEA national" and be valid for –

(a) five years from the date of issue; or

(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,

whichever is the shorter.

(7) A residence card issued under this regulation shall be issued free of charge.

(8) But this regulation is subject to regulation 20(1).

8. It can be seen from these provisions that the appellant, as the son-in-law of an EEA national, cannot bring himself within any of the provisions of Regulation 7, which tells us who is, and so who is not, a family member. Similarly, as Mr Akohene conceded, the appellant cannot bring himself either within any provision of Regulation 8 as an Extended Family Member. Mr Akohene's submission is founded upon Regulation 17(4). He argues that the appellant should be treated as someone who became an Extended Family Member, as a relative of his wife's mother, upon marriage and so the usual requirement for qualification as an Extended Family Member of either pre-arrival dependency or membership of the EEA national's household, both of which are absent here, should be dispensed with.
9. There are a number of reasons why that argument must be rejected. First, there is simply no rational basis upon which one can simply sweep aside and disregard the provisions of Regulations 7 and 8 if, inconveniently, they do not deliver the outcome desired. In any event, even if one begins the analysis not by negotiating the provisions of Regulations 7 and 8 but by going directly to Regulation 17, the position is no different. Regulation 17(1) does not assist the appellant because he is not a family member as defined by Regulation 7. Nor is 17(2) engaged because this is not a case where there is a retained right of residence. The opening words of Regulation 17(4) make clear that it is concerned with the respondent's discretion to issue a residence card to someone who has already established that they are an Extended Family Member. That directs us back to Regulation 8, and possibly Regulation 7 if the nature of the relationship is in question, which provisions

establish clearly that this appellant is not an Extended Family Member and so the possibility of the exercise of discretion under regulation 17(4) to issue a residence card simply does not arise.

10. Mr Akohene advances one final submission, that being founded upon Article 3(2) of the Citizen's Directive 2004/38/EC. In summary, he argues that the purpose of the Directive is to facilitate and to eliminate any impedance to the free movement of EEA nationals. If the EEA national in this case, who has accepted the appellant as part of her household in the United kingdom, is unable to take him with her, her rights of free movement will be impermissibly impeded. However, when the provisions of the Directive are examined it is apparent that such submission leads nowhere:

"Article 2

Definitions

For the purposes of this Directive:

- 1) 'Union citizen' means any person having the nationality of a Member State;
- 2) 'Family member' means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) the direct descendants who are under the age of 21 or are the dependants and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
- 3) 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
 - (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

Article 3(2) treads the same ground as covered by the 2006 Regulations. The appellant cannot qualify either as a family member as defined in Article 2 nor as one of the "other family members" referred to in Article 3(2)(a) because absent is the prior dependency or membership of the EEA national's household.

11. In any event, it can be seen that the Tribunal has previously expressed the view that Article 3(2) of the Directive does not give rise to any substantive rights of residence: see: India [2007] UKAIT 00048. *AP and FP (Citizens Directive Article 3(2); discretion; dependence)*
12. For these reasons it is plain that no right of residence arises for the appellant such as to be recognised by the issue of a residence card and so his application was one that was bound to fail regardless of the view taken of the validity of his marriage. This means that the judge reached the right conclusion but for the wrong reasons. However, this is an appeal that is bound to fail because the appellant is not entitled to a residence card. Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 provides that if the Upper Tribunal finds that the decision under appeal involved the making of an error on a point of law the Upper Tribunal may, but need not, set it aside. As the error made by the judge was not material to the outcome no useful purpose would be served by re-determining the appeal and so his decision to dismiss the appeal shall stand.

Summary of decision:

13. First-tier Tribunal Judge Thew did not make an error of law that was material to the outcome of this appeal and so the decision to dismiss the appellant's appeal shall stand.

Signed



Date: 14 July 2016

Upper Tribunal Judge Southern