



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

Appeal Number: IA/42607/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 February 2016**

**Decision and
Promulgated
On 23 March 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

**MR MI
(ANONYMITY HAS BEEN DIRECTED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representative

For the Respondent: Ms Savage, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 28 October 1989. He appealed the Respondent's decision of 13 October 2014 refusing him a Residence Permit under the Immigration (European Economic Area) Regulations 2006. His appeal was heard by Judge of the First Tier Tribunal Geraint Jones and dismissed under the EEA Regulations 2006 and on human rights grounds in a decision promulgated on 26 June 2015.
2. An application for permission to appeal was made to the First Tier Tribunal and this was refused by Judge of the First Tier Tribunal Page on 21 September 2015. An application for permission to appeal was lodged with the Upper Tribunal and permission was granted by Upper Tribunal Judge Coker on 20 October 2015. The permission states that it is arguable that it

is perverse for the Judge to find that although the Appellant and his partner have been co-habiting for about a year and have a child, the relationship is not genuine and subsisting. It may also be that the Appellant's partner is not exercising Treaty Rights but that does not appear to have been explored in the appeal.

3. The Appellant handed additional evidence to the Tribunal. This evidence was not before the judge at the First Tier Tribunal Hearing. The Appellant was represented at the First Tier Tribunal hearing and I asked the appellant if he wanted representation for this error of law Hearing but he said he wanted to present it himself.
4. He submitted that the Upper Tribunal permission states that it is arguably perverse for the Judge to have found that he and his partner have been co-habiting for more than a year and have a child but do not have a genuine and subsisting relationship. He submitted that his is not a marriage of convenience.
5. The Appellant submitted that the Directive states that there can be no interference with the rights of EEA Nationals exercising free movement. He submitted that he and his EEA National wife are staying together and his wife is exercising her Treaty Rights. He submitted that the Judge had before him some of his wife's payslips and contracts. He submitted that his wife was on maternity leave at the date of the Hearing but she is working again now.
6. He submitted that even if the Judge does not accept that his marriage is legal, he can still qualify under Regulation 8(5). He submitted that he and his wife have been living together for almost two years and there is evidence of this. He submitted that they now have a baby and his wife is pregnant again.
7. He submitted that he and his wife have now been to the registry office and got married in the United Kingdom on 6 January 2016. This was after the date of the First-Tier Hearing. He submitted that the Home Office did not want to interview them before the marriage. He submitted that he and his wife are in a durable relationship and all the relevant evidence has now been provided. He submitted that at paragraph 16 of the decision the judge states that he, the appellant, stays with Ms Sissoko, now his wife and is the father of her child. He submitted that the reference to the Immigration Rules at paragraph 20 is irrelevant as it is the EEA Regulations which are being considered. He submitted that his representative only referred to Article 8 because he realised that the Judge was not going to allow the appeal.
8. He asked me to allow the appeal and set aside the First Tier Judge's decision.
9. The Presenting Officer submitted that she is relying on the Rule 24 response dated 15 December 2015. She submitted that the Judge was

entitled to find that the relationship was one of convenience and the Judge gave adequate reasons at paragraphs 17 and 18 for this finding. She submitted that for the finding of the Judge to be perverse there has to be an extremely high threshold and this threshold has not been satisfied.

10. The Presenting Officer referred to the relationship and its durability and submitted that the Judge made his findings based on what was before him and he found he did not have sufficient evidence before him to show that the appellant was in a durable relationship. In paragraph 18 he states *"The evidence speaking to an appeal based on Regulation 8 has been scant and in my judgment falls well short of satisfying me that it is more probable than not that the Appellant is in a durable relationship with Ms Sissoko."* She submitted that the finding was open to the First Tier Judge and his decision is supported by adequate reasons.
11. The Presenting Officer referred to the relationship between the Appellant and his now wife, starting with when the Appellant was in the United Kingdom unlawfully. This is referred to by the judge at paragraph 21 of the decision. At the date of the Hearing the period of co-habitation had been short, (paragraph 17). She submitted that the Judge noted that the Appellant`s name is on the child`s birth certificate. She submitted, however, that based on what was before the Judge he was entitled to find that there was a lack of evidence of a durable relationship between the Appellant and his partner. What the claim focuses on is co-habitation. She submitted that there is nothing in the decision and there was nothing before the Judge about the role the Appellant plays in the life of his partner and his child. He has not met his wife`s parents. The Judge noted this at paragraph 12.
12. The Presenting Officer then referred to the Judge`s Article 8 findings submitting that these cannot be material as the Judge had no jurisdiction to make a decision under Article 8 based on the case of Amirteymour and Others (2015) UKUT466(IAC). This is an EEA application for a Residence Card.
13. The Appellant submitted that the Judge overlooked important evidence, being his co-habitation with his wife and the birth of their child. I pointed out that the judge did not overlook this, he accepted both of these issues at paragraph 16. The appellant submitted that although he has not met his wife`s parents they call each other on Face time and he was in touch with them three days ago. He submitted that they are separated so it is her mother he speaks to.
14. He submitted that as he and his wife and child are living as a family it must be an error to find that this is not a durable relationship. He submitted that they are now married, she is pregnant again and he plays a large part in his child`s life. He submitted that he took his child to be immunised and everything to do with the child is addressed to him as his wife does not speak much English. He said he communicates with his child`s doctor and plays a big role in his child`s life.

15. I asked him if this was brought out at the First Tier Hearing and he stated that it was not and that is why he is no longer represented.
16. The Appellant referred me to the Upper Tribunal permission to appeal, submitting his wife has been working and is now working with Best Connection Agency and there is evidence of this in the new bundle supplied. He referred to the case of MRAX v Belgian State [2002] ECR1-6591 which states that it would be wrong to say that an Appellant could not be issued with a Residence Card solely because of his previous status as an over-stayer.

Decision & Reasons

17. This is an application for a Residence Card under the EEA Regulations. Article 8 has not to be considered. There are no Removal Directions (said case of Amirtymour).
18. The Judge has not dismissed the appeal against the refusal of a Residence Permit because the Appellant was an over-stayer. Under Regulation 8(5) of the 2006 Regulations the appellant must establish that he is the partner of an EEA National exercising her Treaty Rights and he must be, on the balance of probabilities, in a durable relationship with her. I am considering the evidence that was before the Judge as this is an error of law hearing. Each case has to be assessed on an individual basis.
19. The Appellant's application was made on 5 August 2014. At that date and at the date of the First Tier Hearing, the Appellant and his partner had been married by proxy. The fact that they have now married in a Registry Officer in the United Kingdom cannot be considered at this hearing. The marriage certificate produced to the First Tier Judge was a Ghanaian customary marriage certificate. There was no statutory declaration with this. At the date of the application the Appellant showed that he is Ghanian descent but not his wife. At the date of the application the Appellant's marriage was deemed not to have been contracted in accordance with the law so he was considered as an unmarried partner under Regulation 8(5) of the EEA Regulations 2006. To succeed he had to be in a durable relationship. It is clear from the First Tier Judge's decision that he did not find that the Appellant was in a durable relationship with the EEA national. The judge considered the personal circumstances of the Appellant and his partner. For a durable relationship to exist it would be expected that the Appellant and his sponsor would have been living together for two years with intent to live together permanently.
20. In the decision the Judge deals with the background to this case in paragraphs 6 to 8 and paragraph 10. In paragraph 11 of the decision the Judge states "*there is no evidence of a durable relationship over and above co-habitation since June 2014 a period of about one year*". He goes on to state that there is now the birth of a child. Based on the evidence before him the Judge was asked to decide whether the Appellant was in a

lasting relationship with Ms Sissoko. He accepted that they reside together and that the Appellant's name is on the child's birth certificate but he found that that was not conclusive in the issue of a lasting relationship in the modern age. He states that he has to balance this evidence against the desire of an illegal over-stayer finding some basis on which to procure continued but lawful residence in the United Kingdom and he then states that the period of time they have been co-habiting is inadequate to allow him to conclude that the relationship is lasting.

21. He states that the evidence produced was originally to support an appeal under Regulation 7 but this is now an appeal under Regulation 8 and he finds that for Regulation 8 to be satisfied there is not sufficient evidence before him of a lasting relationship between the appellant and Ms Sissoko. No evidence was before him about the Appellant's role as a partner or a father.
22. Based on what was before the Judge he was entitled to reach his conclusion. The evidence now produced by the Appellant cannot be considered. Article 8 cannot be considered as there are no Removal Directions.

Decision

23. I find there is no material error of law in the First Tier Tribunal's decision promulgated on 26 June 2015 and that this decision must stand.
24. Anonymity has been directed.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray
Judge of the Upper Tribunal