



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15328/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th August 2014

Determination Promulgated
On 26th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

ANTHONY OBADAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Owusu
For the Respondent: Mr G Jack, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ghana who has appealed against the Respondent's decision dated 17th March 2014 to refuse his application for a residence card as confirmation of a right to reside in the United Kingdom as the spouse of an EEA national. The appeal was allowed by Judge of the First-tier Tribunal Coutts on 23rd June 2014.

2. The Appellant claims to have entered the United Kingdom with a visitor's visa on 28th October 2006. He overstayed and has remained in the United Kingdom ever since. He claims to have met the Sponsor, a German citizen, on 22nd September 2012 at a party. The Appellant claims that he and the Sponsor were married by proxy in Ghana on 20th April 2013. The parties were represented by their respective fathers. At the date of the hearing before the First-tier Tribunal the Sponsor was 50 years of age and the Appellant 27.
3. Having heard evidence from the Appellant and the Sponsor, the First-tier Judge concluded that they were both credible witnesses. He was satisfied that they had validly contracted a customary marriage under Ghanaian law which is recognised in the United Kingdom. Accordingly, the judge concluded that the Appellant was entitled to a residence card under Regulation 17 of the 2006 Regulations.
4. The Respondent's representative applied for permission to appeal to the Upper Tribunal and permission was granted on 9th July 2014. The First-tier Judge who granted permission considered that it was "strongly arguable" that the First-tier Tribunal misdirected itself at paragraphs 14 and 16 of the determination, by focusing upon the question of whether the Appellant's proxy marriage was recognised by the law of England and Wales rather than by the law of the EEA national's country and domicile. The judge considered that it was further arguable, that insofar as the Tribunal allowed the appeal on the alternative basis that the Appellant was the extended member of an EEA national by reason of his durable relationship with that person, then it ought not to have allowed the appeal outright but ought instead to have left it open to the Respondent to exercise her discretion under Regulation 17(4).
5. That is the background against which the matter came before me in the Upper Tribunal on 28th August 2014. Representation was as mentioned above.
6. For the Respondent, Mr Jack adopted the grounds submitted in support of the application for permission to appeal. The grounds submit that the First-tier Judge materially erred in law by failing to take into account the guidance given in Kareem (Proxy marriage – EU law) Nigeria [2014] UKUT 24 (IAC). The head note states the following:

"In such an appeal, the starting point will be to decide whether a marriage was contracted between the Appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality".

It is further submitted that the First-tier Judge has focused on the validity of the marriage under UK law. Following the findings of Kareem, it is submitted that the judge materially erred in law by failing to consider if the proxy marriage conducted by the Appellant was valid in accordance with German law.

7. The grounds further submit that the First-tier Judge failed to follow the guidance given in YB (EEA Regulation 17(4), proper approach) Ivory Coast [2008] UKAIT 0062 upon finding that the Appellant was in a durable relationship. It is submitted that the judge should not have allowed the appeal outright under the 2006 Regulations as Regulation 17(4) is a discretionary power of the Respondent. This had not been exercised as the Appellant's application was as a spouse and not as an extended family member. As such it is submitted that the judge materially erred in law by

allowing the appeal under the Regulations. It is submitted that it was only in the judge's power to find that the decision was not in accordance with the law as the discretion under Regulation 17(4) had not been exercised.

8. For the Appellant, Mr Owusu accepted that he could not realistically contradict the Respondent's submission relating to the exercise of discretion under Regulation 17(4).
9. I am satisfied that the First-tier Tribunal erred in law in allowing the appeal outright in a situation where a discretion under the Regulations had not been exercised. That amounts to a material error of law as a result of which the decision falls to be set aside.

DECISION

The making of the decision by the First-tier Tribunal involved the making of a material error on a point of law. I set aside that decision and I make a fresh decision to allow the appeal to the limited extent that the Respondent's decision is not in accordance with the law and remains outstanding.

No anonymity direction is made.

Signed

Date 5th September 2014

Deputy Upper Tribunal Judge Coates

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal (albeit to a limited extent), and because a fee has been paid I have decided to make a whole fee award of £140.

Signed

Date 5th September 2014

Judge Coates

Deputy Upper Tribunal Judge Coates