



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

Appeal Number: IA/30481/2013

THE IMMIGRATION ACTS

Heard at Field House

On 25 July 2014

**Oral determination given following
hearing**

Determination

Promulgated

On 11 August 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR TEDDY EFEIZOMOR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hay, Counsel instructed by Samuel Louis Solicitors

For the Respondent: Mr G Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Nigeria born on 4 March 1978, appeals against the decision of First-tier Tribunal Judge Hodgkinson promulgated on 14 April 2014 following a hearing at Hatton Cross on 2 April 2014 in which the judge dismissed his appeal against the decision of the

respondent refusing to issue him with a residence card as the claimed husband and family member of the sponsor, Ms Mabintou Diomanade, a French national to whom the appellant claims to be married. The claimed marriage was a proxy marriage carried out in Nigeria at which the parties were not present.

2. The judge's findings can be summarised very shortly. First, the judge accepted that there was a valid marriage, supposedly in reliance on the decision of this Tribunal in *Kareem (Proxy marriages - EU law)* [2014] UKUT 00024 although I will make observations on that finding below.
3. However, the judge was not satisfied that Ms Diomanade had in fact been exercising treaty rights for reasons which he gave and which will be discussed below.
4. The judge did not consider whether or not the couple may have established that they were in a durable relationship which might have entitled the appellant to a residence card under Regulation 8 (if the respondent chose to exercise her discretion in his favour) but, as Mr Jack submitted before me, in light of his finding that Ms Diomanade had not been exercising treaty rights in this country the appellant could not have been entitled to a residence card under Regulation 8 either.
5. At paragraph 23 of his determination the judge found as follows:

“23. At the commencement of the hearing before me, I gave indication that I considered that there was no human rights appeal before the Tribunal, in the event that the appellant were found not to be able to satisfy any of the requirements of the 2006 Regulations, even though Article 8 appeared to be relied upon by the appellant. I confirmed that my view in this regard was based upon the fact that no Section 120 notice had been served, that the respondent had, consequently, indicated, in the relevant immigration decision, the limited grounds of appeal, and bearing in mind the judgment of the Court of Appeal in *Lamichhane* [2012] EWCA Civ 260. Whilst [Counsel for the appellant] indicated that she had proposed to make submissions on Article 8, she did not seek to disagree with my indication; nor did [the representative for the respondent]. Thus, for the avoidance of doubt, I confirm that I am satisfied that there is no human rights appeal before the Tribunal.”
6. In the grounds of appeal a number of points are taken, which have been pursued before me. It is argued that the judge misdirected herself in law in considering that “the relevant employment was the current employment with Transworld” because it is suggested that the relevant employment at Ivory Mini Market Business Centre had not properly been taken into account. This is a matter on which I will comment below. It is also suggested that the “findings on Article 8 was perverse and irrational (sic)”.
7. Permission to appeal was granted by Upper Tribunal Judge Renton on the basis that it might be arguable that the judge ought to have considered the appellant's Article 8 rights which had been relied upon in the grounds of appeal.

The Hearing

8. Before me I heard submissions which were advanced on behalf of both parties. I am grateful both to Mr Hay for the succinct way in which he put his submissions which were at times difficult to maintain and to Mr Jack who also put the respondent's case succinctly but also precisely.
9. I do not propose to repeat below everything which was said to me on behalf of the parties because the submissions are recorded in the Record of Proceedings in which I attempted to record contemporaneously everything which was said to me during the course of the hearing. I shall accordingly refer below only to such of the submissions as are necessary for the purposes of these proceedings.

Discussion

10. I shall deal first of all with the argument that the decision of the judge contained an error of law because he should have found that Ms Diomanade was exercising treaty rights. In my judgment this submission is not tenable. At paragraphs 33 and 34 the judge gave his reasons for rejecting the evidence which had been before her relating to whether or not Ms Diomanade was exercising treaty rights as follows:

“33. ... The documentary evidence before me, in relation to the question of whether the sponsor is currently exercising treaty rights in the United Kingdom, is sparse indeed, and comprises one original payslip relating to the sponsor's claimed employment by Transworld Business UK Ltd ('Transworld'). That payslip is dated 31 March 2014. It does not give an accurate figure for the hours worked by the sponsor during that month, as it indicates that she worked 1.00 hour, whereas the sponsor's oral evidence before me was that she works twenty hours per week. Additionally, the payslip shows no deductions for income tax and indicates that the sponsor's salary is paid into her bank via BACS. However, there are no bank statements of the sponsor before me and, indeed, in her oral evidence, the sponsor said that she is paid in cash, which is clearly inconsistent with the method of salary payment referred to in the single payslip produced by her.

34. I bear in mind that it is the sponsor's evidence that she commenced employment at Transworld several months ago, and yet there is no reasonable explanation before me as to why earlier payslips have not been produced. Further, there is no contract of employment available and no letter from the sponsor's claimed current employer. I bear in mind that, in the respondent's RFRL, the respondent specifically indicated that it was not accepted that the sponsor was exercising treaty rights in the United Kingdom.

35. Whilst I have taken into account the fact that the oral evidence of the appellant and the sponsor, regarding the sponsor's current place of work, was broadly consistent, nevertheless, I find the absence of documentary evidence to support the existence of that employment,

and the inconsistencies referred to in the payslip produced, to be of concern, such that I find that the requisite burden has not been discharged, in terms of establishing that the sponsor is currently exercising treaty rights in the United Kingdom.

36. Consequently, and for the reasons I have given, I conclude that it has not been established that the sponsor is a qualified person, with reference to Regulation 6 of the 2006 Regulations.”

11. In my judgment whether or not the sponsor had previously been employed by Ivory Mini Market Business Centre is not relevant to this part of the decision because as at the date of the judge’s decision which was the relevant date for the purposes of this appeal it was not suggested that she was still working for this organisation. So when the judge considered whether or not at the time that was relevant the sponsor was exercising treaty rights he was entitled to find that she was not for the reasons he has given.
12. This part of his decision is adequately reasoned and the reasoning was open to him. As he noted there were inconsistencies between the documents produced and the oral evidence given which had not been explained. The judge was entitled for the reasons that he gave not to accept the case advanced on behalf of the appellant that the sponsor was exercising treaty rights in this country, and accordingly any claim under Regulation 7 could not succeed.
13. I would add just one other matter with regard to the claim under Regulation 7, and that is that the judge’s understanding of the decision in *Kareem* was not in fact correct because it is quite clear from that judgment that in order to establish that a proxy marriage is valid for the purposes of an application for a residence card an applicant has to establish not just that the marriage is valid in the country in which it was said to have taken place but also that it is recognised as valid in the country of nationality of the EEA national from whose treaty rights the right to residence is said to derive. In this case that means that it would be necessary for the appellant to establish that this alleged marriage would be regarded as a valid marriage in France.
14. There was no evidence before the Tribunal to this effect, and had the appeal turned on this point I would have had no hesitation in finding that the judge had made an error of law insofar as he found in the appellant’s favour on this point. However, it is not necessary for me to do so because the judge’s finding that the sponsor had in any event not been exercising treaty rights in this country is unimpeachable.
15. It may have been open to the appellant to argue that consideration should have been given to whether or not he was entitled to a residence card under Regulation 8 as someone who is in a durable relationship with an EEA national exercising treaty rights but in view of the finding that the sponsor was not exercising treaty rights this was also unarguable and so an appeal cannot succeed on this basis either.

16. I turn now to consider whether or not an appeal can succeed under Article 8. It is fair to say that it is not entirely clear whether or not in circumstances where an application had been made under the EEA Regulations for a residence card and where an appeal against a refusal has been dismissed the judge should then go on to consider an Article 8 application which has been made.
17. There is a proper basis for arguing that an article 8 appeal should not then be considered by the Tribunal because the grant of a residence card does not of itself confer any rights but merely recognises the rights which an applicant would have. The refusal of a grant is not an immigration decision and does not of itself have the consequence that removal will necessarily follow.
18. I do, however, recognise that there is also an argument which can be made the other way and that this may be an issue which will have to be determined by another Tribunal in another case. However, I do not propose to express a definitive view on this issue within this determination because it is not necessary for me to do so in this appeal for the reasons which I now give.
19. The reason why I consider that it is not necessary in this case for me to give a formal decision as to whether or not the judge was right not to entertain an Article 8 appeal is because it is quite clear that in the circumstances of this case on the evidence which was before the judge an appeal under Article 8 (even if the judge had entertained it) could not possibly have succeeded.
20. In fairness to Mr Hay, who did argue robustly in support of the arguments which he felt might have some chance of success, even he recognised that he was in difficulty in arguing the Article 8 point after the Tribunal had informed him that his arguments in relation to whether or not the sponsor was exercising treaty rights could not succeed. In his words “the pyramid begins to crumble”.
21. The difficulty in this case is that in light of the finding that the sponsor was not exercising treaty rights at the relevant time there is really no basis upon which an Article 8 claim can properly be founded. It is not suggested that the appellant has any freestanding Article 8 claim and his claim would seem to be entirely dependent on that of the sponsor.
22. Although there is some dispute as to whether or not the appellant originally entered the United Kingdom illegally and has remained here unlawfully ever since or as the appellant asserts he arrived originally lawfully with the benefit of a six month visit visa, it is common ground that ever since he has been here without lawful leave and he appears to have made at least three applications for a residence card in 2008, 2009 and 2010, all of which were refused.

23. It seems clear having considered the appellant's immigration history that other than such rights as he might derive through this or any other sponsor he might find, he has no Article 8 argument capable of succeeding. As his current sponsor was found not to be exercising treaty rights there was no alternative basis upon which his Article 8 claim could possibly succeed and accordingly whether or not the judge might have entertained such an application could not have made any difference at all.
24. As the courts have made clear in recent jurisprudence such as in the decisions of the Administrative Court in *Nagre* and this Tribunal in *Gulshan* it is not necessary in cases where an Article 8 appeal cannot possibly succeed for the Tribunal to dot every i and cross every t to show why it cannot succeed.
25. It follows that this appeal must be dismissed and I so find.

Decision

There being no material error of law in the determination of the First-tier Tribunal this appeal is dismissed.

Signed:

A handwritten signature in blue ink that reads "Ken Craig". The signature is written in a cursive style with a large, looped 'C' at the end.

Upper Tribunal Judge Craig
August 2014

Date: 11