



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

Appeal Number: IA/37937/2013

THE IMMIGRATION ACTS

Heard at Field House

On 31 March 2014

**Determination given orally on 31 March
2014**

Determination

Promulgated

On 11 April 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MATHEW OKEDGHENE AKPANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Ojukotola from S L A Solicitors

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

DETERMINATION AND REASONS

1. This is an appeal brought by the appellant against a decision made by First-tier Tribunal Judge Reed, promulgated on 24 January 2014 following

a consideration on the papers made at Bradford on 21 January 2014. Although the appellant had submitted a skeleton argument and a large bundle, an oral hearing had not been requested and nor had a representative within the UK been nominated. It is not suggested before me that there was any error in the judge's decision to consider this application on the papers and indeed in the circumstances there could not be such.

2. The appellant is a national of Nigeria who was born on 6 April 1975. In the papers before me it was not clear what his immigration history had been but I was told by his representative, Mr Ojukotola, on instructions, that the appellant claims to have arrived in this country as a visitor in 2008. It is accepted that whether or not he had permission to enter at that time as he claims, he overstayed and has been present in this country ever since without leave. It does not appear that this was a factor to which any weight was attached in Judge Reed's determination.
3. The appellant applied under Regulation 7 of the Immigration (European Economic Area) Regulations 2006 for a residence card, claiming to be the husband of one Aminata Camara, a French national exercising treaty rights in this country. This application was refused by the respondent on 26 June 2013 and the refusal letter is dated the same date. In that letter the respondent does not accept either that the appellant and Ms Camara are married as claimed or even that Ms Camara was in fact exercising treaty rights in this country. The basis of the marriage claimed is that in March 2011 the appellant and his alleged spouse had contracted a valid proxy marriage in Nigeria. It should be noted at this stage that the application was on the basis of Regulation 7 only. There was not an alternative application made under Regulation 8(5) coupled with Regulation 17 pursuant to which the Secretary of State may issue a residence card to someone who is in the words of Regulation 8(5) "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".
4. The appellant appealed against the respondent's decision and as already noted above, following consideration of the appeal on the papers in a determination promulgated on 24 January 2014 his appeal was dismissed. Although neither in the application itself nor in the skeleton argument submitted on behalf of the appellant, was an alternative claim made under Regulation 8, the judge considered this also but concluded that the evidence put forward on the appellant's behalf "is insufficient to demonstrate that there is a durable relationship between them or indeed that they are in any sort of relationship akin to a marriage".
5. The judge considered in the absence of a marriage certificate or other evidence supporting his claim to be married that he had not established that he was married as required under Regulation 7 and that in the absence of sufficient evidence to establish that he and Ms Camara were in a durable relationship his claim must fail under Regulation 8 also.

6. The appellant has appealed against this decision and was granted permission to appeal by First-tier Tribunal Judge Keane on 24 February 2014. Although when granting permission Judge Keane did not consider that there was any error of law in the judge's finding that there had not been a valid marriage, he did consider that it was arguable that the judge made an error of law "in not according more weight to the documentary evidence which suggested quite lengthy cohabitation between the appellant and his EEA national sponsor before the date when the appeal was determined" when considering whether or not he had a valid claim that he should have been allowed a residence card under Regulation 8.
7. Before me on behalf of the appellant it was acknowledged by Mr Ojukotola that the appellant could not realistically argue that the rejection of his appeal under Regulation 7 contained a material error of law. Although it was said that a marriage certificate had previously been submitted to the respondent, at an earlier time when a previous application had been made, it was accepted that that certificate had not been put before this judge and so he could not be faulted for not taking such document into consideration. It was also accepted that following the decision of this Tribunal in *Kareem* (Proxy marriages - EU law) [2014] UKUT 00024 in order for a Tribunal to find that such a proxy marriage was valid, "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" which in this case was France.
8. Although Mr Ojukotola informed the Tribunal that that decision was under appeal, he accepted that it was binding on me and that in this case there had been no evidence placed before the judge to establish that the proxy marriage which the appellant claimed to have contracted was valid in France. It was accordingly not argued before me that the decision insofar as it applied to the appeal under Regulation 7 was wrong in law but was open to the judge. However, Mr Ojukotola did seek to argue that insofar as the judge found that the appellant had failed to establish that he was in a durable relationship with his partner as required under Regulation 8, that decision was so contrary to the evidence before him as to amount to an error of law.
9. The appellant's case was that the evidence effectively was overwhelming such that the judge should have given more weight to it and found that the requirement under Regulation 8(5) was satisfied, that is that the appellant satisfied the condition in that paragraph because he had established that he was a partner of an EEA national and could prove that he was in a durable relationship with her.
10. I should add at this point that although the appellant lost his appeal before Judge Reed, he did find that Ms Camara was indeed exercising treaty rights in this country so the only issue with regard to Regulation 8 was whether or not the appellant and Ms Camara were indeed in a durable relationship and were "partners". If they were, then it is argued that he

should have found that the decision was not in accordance with the law and should have remitted the matter back to the Secretary of State to exercise her discretion under Regulation 17 as to whether or not to issue a residence card.

11. On behalf of the respondent Mr Jack submitted first that the decision with regard to Regulation 7 was clearly correct as there had been no evidence produced capable of establishing that the parties had undergone a valid ceremony of marriage. So far as Regulation 8 was concerned, the respondent asked the Tribunal to note first, that there had been no application made under Regulation 8. Secondly, that in the skeleton argument submitted Regulation 8 had not even been mentioned, and thirdly, in any event, the judge had been entitled on the basis of the evidence which had been before him, to conclude that the appellant had not established that the requirements of Regulation 8 had been satisfied, and that was even before any consideration was given to whether or not discretion should be exercised in the appellant's favour.

Discussion

12. I have summarised the issues above and, as acknowledged by both parties, the only substantive issue before this Tribunal now is whether or not the judge had been entitled to find on the basis of the evidence which had been put before him, that the appellant had not proven (on the balance of probabilities) that he was in a durable relationship with Ms Camara and that she was his "partner".
13. So far as the appeal against the decision under Regulation 7 is concerned, it is quite clear both from the fact that the judge did not have before him a marriage certificate but also from the fact that there was no evidence that such a marriage would anyway have been treated as valid according to French law (following the decision of this Tribunal in *Kareem* that it cannot be said that the judge's decision in this regard contained any error of law.
14. With regard to the subsidiary argument which was advanced on behalf of the appellant to the effect that the judge should anyway just have remitted this case back to the Secretary of State for a decision under Regulation 8, this could only be said to be even arguably appropriate if he had found first that there was such a durable relationship. In the absence of such a finding there was no decision left to make as the discretion could only be exercised in any event if there was first established such a durable relationship.
15. The judge's findings with regard to the argument under Regulation 8 is set out at paragraph 19 of his determination as follows:

"19. I confirm that I have considered in the alternative whether or not the appellant could be considered as an extended family member of the EEA national sponsor on account of being in a

durable relationship with her. Both the appellant and the EEA national sponsor have made statements, but in these statements say nothing about their relationship together or indeed even that they are cohabiting together in any sort of relationship. I have been left to assume this from the claim they are married and from some documents which show them sharing an address and having a joint life assurance policy taken out on 19 September 2011 for a 25 year period. This evidence in itself is insufficient to demonstrate there is a durable relationship between them or indeed that they are in any sort of relationship akin to marriage. There is no evidence [from] any friends or neighbours about their relationship, no photographs of them together and nothing to show that they are enjoying any sort of family life together as each other's partners. Whilst there is a joint life policy, this may be something akin to a commercial arrangement between them. I therefore find that on the evidence submitted to me the appellant has failed to show that he is the extended family member of an EEA national sponsor."

16. As already noted above, the judge did find that Ms Camara was exercising treaty rights so the challenge to the application on that basis obviously falls by the wayside.
17. With regard to the judge's findings, Mr Jack referred to paragraphs 53 and 54 of *Kareem* to the effect that in order to establish a valid proxy marriage it would be necessary in any event to establish that there had been the payment of a dowry and also that there was evidence of the parties' consent and that they had the capacity to marry and that there had been a formal giving away of the bride which was in effect the parental consent to the marriage. It was in this context, he submitted, that the judge was entitled to take note of the absence of any evidence other than the evidence referred to in paragraph 19.
18. On behalf of the appellant Mr Ojukotola submitted that there was such an abundance of evidence that the parties were living together that this, coupled with their claim to be married, should have been sufficient to persuade the judge that they were indeed cohabiting, that they were effectively partners and that they were in a durable relationship. Mr Ojukotola accepted, however, that there should be more in terms of documentary evidence, but in concluding his submissions he asked the Tribunal to find that there was sufficient documentary evidence before the judge to find that they were cohabiting and in a durable relationship, although this was a matter "entirely in your hands".
19. With respect to Mr Ojukotola and the persuasive manner in which he put his arguments before this Tribunal, the test is not whether or not there was sufficient evidence before the judge to enable him to find that the parties were cohabiting and in a durable relationship. The test that I have to apply is whether or not the judge was entitled to find on the evidence before him that there was not. In my judgement the judge was so entitled

to find. It is clear from what is set out at paragraph 19 that he considered all the evidence in this case. Not only did he consider the lack of evidence which might be expected such as evidence from neighbours or friends to show that the couple were enjoying any sort of family life together as each other's partners, and noting also the absence of evidence which might have been expected even in Ms Camara's statement regarding their relationship together, but he also took into account the evidence which was contained within the papers.

20. The judge's finding that this did not in effect amount to more than showing that they were sharing an address and had a joint life assurance policy was in my judgement open to him. It is true that there was evidence that they had phone bills in joint names but again this does not show what the relationship was between them.
21. It would have been open to the parties had they chosen to do so, to have elected to have an oral hearing in which Ms Camara and the appellant could have given evidence which could have been tested in cross-examination. They chose not to do so. In those circumstances, on the basis of the evidence before the judge, the judge was entitled to give such weight to that evidence as he considered appropriate. I do not consider be made any error of law in so doing.
22. I would add this. Although it is not necessary for me to make any finding as to whether or not I would have reached the same decision on the basis of the evidence before the Tribunal, in this case I am in a better position than the judge because I also know that the background to this application is that this appellant has been in this country for some years unlawfully, and even on his own case for getting on for three years before he claims to have married Ms Camara. Were I to be remaking the decision myself which I will not have to do because I find there was no error of law in Judge Reed's determination, that is a factor which I would have been entitled to and would have taken into account when considering whether or not it had been established that there was a real durable relationship between two partners or whether this was, as the judge concluded was a possibility, "something akin to a commercial arrangement between them".
23. On the basis of the evidence which has been put before the Tribunal I would have found it difficult to conclude that this was a genuine durable relationship. I note also that despite the clear direction which was made by this Tribunal that the parties should prepare for the hearing on the basis that if the determination was to be set aside, any further evidence would be considered at this hearing, Ms Camara did not attend. I have been told by Mr Ojukotola on instructions that this was because his instructing solicitors wrongly informed the appellant that she did not need to attend and that if the Tribunal was to find an error of law it should adjourn the hearing in order to give her an opportunity to be present.
24. In the event, as I do not find an error of law I do not need to consider whether or not it was appropriate to adjourn. I also note that, as Mr Jack

remarked in his submissions, it would be open to the appellant to make a further application if there is genuinely fresh evidence which is available but whether or not the respondent would be obliged to conclude that this was a fresh claim would be a matter that she would then have to consider. So far as today's appeal is concerned, it is sufficient that I record my finding that Judge Reed's determination does not contain any error of law and that this appeal must accordingly be dismissed.

Decision

The decision of the First-tier Tribunal containing no material error of law, this appeal is dismissed on all grounds.

Signed:

Date: 8 April 2014

Upper Tribunal Judge Craig