Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/43106/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Sent to parties on**
On 17 November 2015	**On 22 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

FAUSTINA OSEI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE OF THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hawkin, Counsel instructed by Arlington Crown Solicitors
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-Tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. The Appellant is a Ghanaian national born on 24 November 1964. She applied on 12 August 2014 for a residence card as confirmation of a right of residence in the UK as the family member of an EEA national. The Respondent refused her application in a letter dated 14 October 2014. The Appellant had entered into a proxy marriage with an EEA national and the Respondent concluded that it had not been properly executed and

consequently was not valid. The Respondent also concluded that the Appellant was not in a durable relationship with an EEA national under Regulation 8 (5) of the EEA Regulations 2006 as insufficient evidence had been submitted.

2. The Appellant appealed against that decision and that appeal was dismissed by First-tier Tribunal Judge Geraint Jones QC in a decision promulgated on 15 May 2015. He found that there was no admissible evidence to demonstrate that the alleged Ghanaian proxy marriage would be recognised in Belgian, the EEA sponsor's country of nationality, and hence the marriage was not valid. He further found that Appellant and her sponsor were not in a durable relationship for the purpose of the Regulations.

3. The Appellant sought permission to appeal against that decision. Permission was granted on renewal to the Upper Tribunal by Upper Tribunal Judge Kopieczek on 8 September 2015. The Appellant had sought to adduce evidence after the hearing and without having made any application to do so in relation to the validity of the proxy marriage. The First-tier Tribunal did not take that evidence into account and Upper Tribunal Judge Kopieczek commented that service on the Respondent prior to the promulgation of the First-tier Tribunal's decision would have to be established. He concluded that there was arguable merit in the general proposition in the grounds that the findings as to a durable relationship were insufficiently reasoned, although it could be said that at the very least the judge was entitled to take into account the Appellant's illegal status in the UK as an indication of her desire to use some means to secure residence. It was also arguable that the sponsor ought to have been given the opportunity to comment on the suggestion that he would not leave the UK to be with her if she was removed.

The Grounds

4. The grounds for permission to appeal assert that the First-tier Tribunal should have taken account of the evidence from a Belgian lawyer that the marriage was valid under Belgian law notwithstanding the fact that it was submitted post-hearing. The evidence had been served on the Respondent prior to promulgation. Further, the First-tier Tribunal erred in finding that the Appellant was not in a durable relationship with her EEA sponsor because the Appellant had been cohabiting with her partner for a period 3 weeks short of two years; the two year period referred to by the Judge at paragraph 26 (vi) was a guide, not a requirement of the Regulations; the Judge's comments in relation to the illegality of the Appellant's status were of concern as the fact that she was an overstayer should have been a neutral factor and the reliance on it was contrary to the Regulations and Citizen's Directive (2004/38/EC) neither of which mentioned it as being of relevance. The fact that the Appellant had overstayed was not in itself relevant to the quality, depth and commitment of the relationship and the Judge's view that the spouse "inferentially asserted" that if the Appellant were required to leave the UK he would not accompany her was highly problematic as it was not raised in the Respondent's decision; it was not put to him during cross-examination; he never said it in terms and it was not

relevant to the issues in any event. The First-tier Tribunal had made no proper findings on whether the relationship should be regarded as durable.

The Rule 24 Response

5. The Respondent asserts that the First-tier Tribunal correctly refused to admit post-hearing evidence. The First-tier Tribunal did not rely solely on the length of cohabitation but on his assessment of the witnesses and their oral evidence in finding that they were not in a durable relationship.

Submissions

6. Mr Jarvis conceded that there was an error of law in relation findings regarding the durable relationship under Regulation 8 (5). The parties agreed that in the light of the fact finding required, the matter should be re-heard de-novo in the First-tier Tribunal.

Decision and reasons

7. Mr Jarvis conceded that the First-tier Tribunal made a material error of law in relation to the findings regarding the durability of the relationship. The First-tier Tribunal in paragraph 26 of the decision found that the Appellant and her EEA national sponsor started to reside together in the summer of 2013 and that the relationship was sufficient to allow them to describe each other as "partner" from that point. He further found, that at the date of the hearing on 6 May 2015 they continued to reside together. However, he found that they were not in a durable relationship because the period of residence was less than two years; the "fact that the Appellant is an illegal overstayer is ample evidence of the fact that she will manipulate the immigration system to suit her own intentions and to gain advantage for herself" and her sponsor "inferentially asserts" that if the Appellant is required to leave the United Kingdom, he will choose not to accompany her.

8. Article 3.2 of the Directive provides that a host Member State shall, in accordance with accordance with its national legislation, facilitate entry and residence of, the partner with whom the Union citizen has a durable relationship, duly attested. Regulation 8(5) of the EEA Regulations correspondingly states that a person will be an extended family member of an EEA national 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. A "durable relationship" is not defined by the Regulations. In **YB (EEA reg 17(4) - proper approach) Ivory Coast** [2008] UKAIT 00062 the Tribunal held that in determining whether the appellant is "in a durable relationship" the Tribunal should have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules in order to ensure the like treatment of extended family members of EEA and British nationals and to ensure compliance with the general principle of Community law prohibiting discrimination on the grounds of nationality. The fact that a person meets or does not meet the

requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence card should or should not be issued. The comparable Immigration Rules are set out in Appendix FM of the Immigration Rules. Appendix FM paragraph GEN 1.2 states that a partner includes a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application unless the contents otherwise requires. Appendix FM paragraphs E-ECP.2.6 and 2.10 require that the relationship of an applicant and a partner must also be genuine and subsisting and that they must intend to live together permanently in the United Kingdom.

9. On the First-tier Tribunal's findings, the Appellant had cohabited for a period a month or so short of two years. The First-tier Tribunal, correctly, did not treat this as determinative, although it was clearly a factor in his assessment of the durability of the relationship. However, notwithstanding the fact that he found that the Appellant and her EEA national partner had cohabitated for nearly two years, he found on the basis of the Appellant's immigration history and status as an overstayer since 2012 that she was not in a durable relationship. Whilst this may be a relevant factor, the First-tier Tribunal gave insufficient reasons for finding that this meant the relationship was not durable in the light of the previous findings as to cohabitation. It also appears that the EEA sponsor did not state in evidence that he would not return to Ghana with her but that the First-tier Tribunal inferred this (paragraphs 8 and 26 of the decision). This was not put to the sponsor in cross-examination in order to give him the opportunity to comment. In the circumstances, the finding that there was no durable relationship was insufficiently reasoned and the reasons given did not rationally lead to the adverse findings made.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

The Practice Directions of the Upper Tribunal indicate that the remaking of the decision should be undertaken in the First-tier Tribunal in the light of the judicial fact-finding required.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge L J Murray