Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35370/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 13th July 2016 **On 28th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

ROWLAND UCHENDU NWAOKELEME
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ikegwuruka, Counsel for Almonds Legals, Solicitors, London
For the Respondent: Ms Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 27th June 1978. He appealed against the decision of the Respondent dated 27th August 2014 refusing to issue him with a residence card under the Immigration (European Economic Area) Regulations 2006. His appeal was heard by Judge of the First-tier Tribunal Harris on 17th September 2015. The appeal was dismissed in a decision promulgated on 2nd November 2015.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Hollingworth on 17th May 2016. The permission states that the judge has set out an insufficient analysis of the evidence presented by

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the Appellant and his partner Ms Ndiaye before reaching his conclusions and he may have attached insufficient weight to the corroborative evidence produced. The permission states that at paragraph 15 of the decision the judge acknowledges that there is no requirement under the Regulations to show that a durable relationship has existed for at least two years. The grounds state that the judge accepted that supporting evidence of cohabitation had been produced. The documentation linking Ms Ndiaye to the address 11 Holly Tree Court, where it was claimed she and the Appellant currently cohabit, dated from 2014 and the judge has referred to this stating that the evidence goes back no further than 2014. The permission states that at paragraph 12 of the decision the judge has referred to doubts being raised about the intentions of the Appellant and Ms Ndiaye since the finding that the proxy ceremony in Nigeria did not comply with Nigerian law. Paragraph 21 of the judge's decision is referred to in which the judge refers to her being in France at the time of the hearing and this causing him to doubt her claim that at the date of the First-tier hearing she was exercising treaty rights in the United Kingdom.

3. Counsel for the Appellant handed to me new payslips for the Appellant's partner dated March 2015, July 2015, September 2015, November 2015 and June 2016. He said he had only received these on the date of this hearing from the Appellant. The Presenting Officer opposed their introduction. Counsel submitted that these had been put forward purely to help me when making my decision.

4. At the First-tier hearing Ms Ndiaye was in France and I asked Counsel where she is today and he said she is in the United Kingdom. I asked if she is at the hearing centre and I was told she is at work and had been unable to get the day off.

5. Both parties agreed that the issue in this case is whether there is a durable relationship between the Appellant and Ms Ndiaye.

6. Counsel submitted that what has to be considered is durable relationship and Regulations 8(5) and 8(6). He submitted that there is sufficient evidence to show that the Appellant and Ms Ndiaye are cohabiting. I was referred in particular to the life insurance document in the Appellant's bundle, in joint names of the Appellant and his partner, dated 30th April 2014. This relates to life insurance on both parties' lives. He submitted that the First-tier Judge did not take this into account when making his decision.

7. Counsel submitted that the Appellant accepts that the proxy marriage cannot be given weight. I was referred to the case of **Kareem [2014] UKUT 00024 (IAC)**. This case therefore hinges on durable relationship and he submitted that it is not necessary for parties to have cohabitated for two years under the Regulations. I pointed out that the judge does state this in his decision.

8. I was referred to the Appellant's bundle and the tenancy agreement at page 78 and the bank statements. I asked if there is anything in joint names and I was referred to the joint life insurance policy. I asked what there is in Ms Ndiaye's name and was referred to the television licence letter, the electoral document, a Tesco card, a letter

from Wales and the Boots document. Counsel submitted that the fact that the Appellant's wife did not attend the previous hearing does not mean that she is not exercising treaty rights. She was in France to visit her mother who was ill and she has been working in the United Kingdom. He submitted that even if Ms Ndiaye had not worked for a number of weeks, this does not mean that she has not been exercising treaty rights as she is normally employed in the United Kingdom, as is evidenced by the payslips.

9. Counsel submitted that based on the evidence before the First-tier Judge his negative decision was not justified and that there are errors of law in the decision and it should be set aside.

10. The Presenting Officer made her submissions submitting that there is no error of law in the judge's decision. She submitted that it is clear that the judge has considered all the evidence before him and I was referred to paragraph 19 of the decision which states that there is some supporting evidence of cohabitation. The judge states, (relating to Ms Ndiaye being out of the United Kingdom), "I find her behaviour signifies that her priority at the moment is to stay with her mother rather than reside in the UK with the Appellant. Ms Ndiaye has provided no information about when, if ever, she intends to return to the UK. This is also at odds with the claimed relationship subsisting". I was referred to paragraph 20 in which the judge states that he is weighing up the evidence before him and has doubts about the claimed subsistence of the relationship at the date of the hearing. At paragraph 13 the judge states that some supporting evidence has been produced of cohabitation and this may go back to February 2014 but no further.

11. The Presenting Officer submitted that all of these matters were in the judge's mind and the judge does not require to mention all the documents before him. She submitted that he took into account everything that was before him. She submitted that his findings were justified and it was open to him to dismiss the appeal. After considering everything that was before him he found there to be no subsisting durable relationship.

12. The Presenting Officer pointed out that not only did the Appellant's wife not attend the previous hearing she has not attended this hearing. She submitted that this underlines the judge's concerns. The reason given was that her employer would not give her time off work, but the Presenting Officer submitted that there is not even a statement from the Appellant's partner and based on what is before me, her work must be more important than her partner's appeal.

13. The Presenting Officer submitted that the judge's decision is clear and properly explained and the judge finds that there is a lack of satisfactory documentation. The Presenting Officer submitted that there is no material error of law in the judge's decision.

14. Counsel clarified that there is no human rights application by the Appellant.

15. I was asked to look at the evidence in the round and Counsel submitted that the judge did not do that. I was referred to the Appellant's good immigration history and I was asked to find that his relationship with Ms Ndiaye is genuine and subsisting and durable. He submitted that if I find that is the case, the judge's decision should be set aside and the Appellant's appeal should be allowed. I was referred to the case of **Miftari [2005] EWCA Civ 481**. Counsel submitted that the judge applied the wrong criteria in his assessment and misunderstood the facts when making his decision and this is an error of law.

16. The issue in this claim is durable relationship. The relevant Regulation is Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006. The First-tier Judge had to decide whether a residence card should be issued to the Appellant and he found that it should not.

17. The proxy marriage in this case is not satisfactory as proof that the couple is married. This is accepted by both parties. All the evidence has to be considered in the round. At paragraph 12 of the judge's decision he states that the Appellant and Ms Ndiaye have purported to have some sort of proxy ceremony in Nigeria but he states it did not comply with Nigerian law and this raises doubts about the intentions of the Appellant and Ms Ndiaye. This is a logical statement which he was entitled to make.

18. There are letters to each of the Appellant and Ms Ndiaye at the same address. The insurance policy has been referred to. This is in joint names and is part of the evidence before the judge but clearly the judge does not find that this can be given much weight. This is understandable as there is some correspondence from Liverpool Victoria setting up a policy in joint names for 30 years at a premium of £5 per month dated 17 March 2014 with a direct debit instruction. There is no policy on file and we do not know if the policy is still live. All the premiums were being paid up to March 2015. The judge finds it strange that there is nothing else in joint names apart from the tenancy agreement. It is dated 18th February 2014. It is clear from the decision that the judge is aware that a couple does not require to be living together for two years for there to be a durable relationship based on the terms of the Regulations.

19. The judge found it significant that Ms Ndiaye did not attend the First-tier hearing and I find it significant that she did not attend the First-tier hearing or this hearing. I was told that she is in the United Kingdom. The First-tier judge was told that Ms Ndiaye's mother was suffering from cancer but no medical evidence was produced. There has still been no medical evidence about this produced. There is also not even a statement by Ms Ndiaye on file and nothing from her employer to say that he would not give her the day off to attend this hearing. The judge finds that if this is a durable relationship Ms Ndiaye would have been at the hearing centre and again because of the lack of evidence about this he was entitled to this finding

20. At paragraph 20 of the decision the judge states that because of the findings in his previous paragraphs he has doubts about the subsistence of the relationship. Based on what was before him he was entitled to find that there is no durable relationship

between the Appellant and Ms Ndiaye within the meaning of the 2006 Regulations.

Notice of Decision

I find that there is no material error of law in the judge's decision and that this decision, promulgated on 2nd November 2015, refusing the Appellant's appeal for a residence card under the Immigration (EEA) Regulations 2006 must stand.

No anonymity direction is made.

Signed Date **28th July 2016**

Deputy Upper Tribunal Judge I A M Murray