



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/35407/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 9 September 2014
Prepared: 29 September 2014

Determination Promulgated
On: 10 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

JIOKWU CHRISTOPHER AZI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr M Iqbal, counsel
For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria, born on 24th December 1974. He appeals with permission against the determination of First-tier Tribunal Judge James who, in a determination promulgated on 19th May 2014, dismissed his appeal against the respondent's refusal to issue a residence card pursuant to the Immigration (EEA) Regulations 2006 ("the 2006 Regulations").
2. The appeal before Judge James was on the papers.
3. The respondent was not satisfied that his marriage was conducted in accordance with the relevant Ghanaian law. Accordingly, the respondent did not accept that

the registration and statutory declaration submitted were validly and lawfully issued.

4. The application was also considered under Regulation 8(5) of the 2006 Regulations on the basis that he was the unmarried partner of an EEA National. The respondent concluded that he had not provided sufficient documentation to suggest that he was in a durable relationship. The respondent also noted that on 10th November 2012, he submitted two birth certificates – his father's and father-in-law's - in support of the application “.....to evidence the nationality of your parents”. Both these certificates had been dismissed by the Home Office as fraudulent. That was said to constitute a clear attempt to deceive the Home Office and this consequently harmed his credibility.
5. Further, the sponsor did not provide the Home Office with any “official evidence” to verify her claim that she missed a “marriage interview” in order to attend the medical procedure/hospital. That counted against the credibility his application. Accordingly, even if he did meet the criteria under Regulation 8(5), it would not have been deemed appropriate to issue him with a residence card. His application was accordingly refused under Regulation 17(4)(b) of the 2006 Regulations.
6. The application was also considered under Article 8 of the Human Rights Convention. The respondent referred to Appendix FM and paragraph 276 ADE of the rules, setting out the requirements for those seeking leave to remain on the basis of their right to respect for private or family life. The appellant was required to make a separate charged application using the appropriate specified application form should such an application be pursued.
7. Judge James noted [10] that the appellant had twice been refused following similar applications. She set out the basis for the respondent's contention that the two Ghanaian birth certificates of their respective fathers were fraudulent documents [10].
8. Judge James noted that the appellant submitted a Nigerian passport and his wife submitted a French passport. Neither demonstrated that their fathers have Ghanaian nationality. Accordingly, it was not accepted that the marriage by proxy was lawful or that the couple were married as claimed.
9. At paragraph 14, Judge James noted that there had been an application by the appellant for an extension of time to lodge documents. That had been granted by the duty Judge. However, there are no grounds of appeal on the notice of appeal. Accordingly, she found that there was no valid appeal before her “and this application must fail” [14].

10. Judge James found “in the alternative” that in any event the appeal would fail for reasons which she set out from paragraph 16-28. With regard to the tenancy agreement produced, dated 2011 in the names of the appellant and the EEA National, their signatures were witnessed by persons who only gave a single name without “a proper first name and surname.” No reason was given why the agreements were not properly witnessed or why they appear to have been accepted by the landlord despite not being properly witnessed. That raised concerns about the authenticity of the document itself [16].
11. There were no joint bills held at the address, only bank statements sent separately to the appellant and his claimed wife. It is not known whether this was shared accommodation of flatmates or spouses. There are no more recent documents with joint names other than the three year “out of date” tenancy agreement.
12. Although numerous payslips for the appellant at that address were submitted and similar payslips for his claimed wife, there is not a single further original document confirming that they are cohabiting as a couple as they claimed, or that they were in a genuine, subsisting marriage, or relationship.
13. There was a poor photocopy of a Lloyds bank statement in the name of the couple. However, their names have different font sizes and contradict the single name of the appellant on the following line, and the joint names are not flush to the line, so they are “tangential to the main document.” This is 'suggestive' that this is not a genuine photocopy document or alternatively it has been badly copied. These comments also applied to another poor quality photocopy document from Aviva [19].
14. There was a single letter from the Cooperative Bank referring to both names of the couple at their address, but this single original document was not sufficient to constitute evidence of an ongoing genuine subsisting relationship.
15. Although there were utility bills in separate names, what was concerning to the Judge was that the same utility bills are addressed to the same address but to different people, i.e. the appellant has been issued the utility bills in his name alone and then a duplicate set of bills are in the name of his claimed wife alone. This also raised concerns about the authenticity of these documents.
16. Judge James consequently found that the appellant failed to submit easily accessible documents to support his appeal. He could have obtained witness statements from the fathers and their apparent trip to Ghana, together with their travel documents and receipts. He could have submitted a witness statement from neighbours, work colleagues and friends, confirming when and how the relationship developed and details of the asserted relationship. This constituted a basic material omission.

17. Further, the appellant failed credibly or properly to address the concerns raised in the respondent's reasons for refusal, which remain unchallenged. The lack of original documentation and the submission of poor quality photocopies and contradictory photocopy documents submitted with discrepancies raises concerns about the authenticity of the documentation submitted.
18. Accordingly, she found [25] that "on the whole" the appellant failed to address the respondent's concerns or present credible evidence of his claim to be in a relationship with an EEA national. She accordingly found that the appellant is not lawfully married according to Ghanaian law and is not in a genuine relationship with the EEA national. Her failure to provide credible evidence of a durable relationship of 'two years' also undermined the appeal.
19. She further found that the respondent has proven to the required standard that the appellant has deliberately and knowingly submitted forged documents with regard to the birth certificates of both his and his partner's father to support his application, which if true, would have meant that the fathers would have been only 6 and 11 years of age at the date of the couple's respective births [26].
20. There was no Article 8 appeal before her. In any event, on the face of the adverse findings, any such grounds would also fail [27].
21. On 6th June 2014, First-tier Tribunal Judge P J G White granted the appellant permission to appeal. He found that there was arguably an error of law. In particular, the Judge might have failed to have had due regard to the fact that an appeal fee had been taken and judicial directions had been previously given, indicating that the Tribunal had already accepted that the appeal was valid.
22. Further, in finding that the appellant had knowingly and deliberately submitted false documents, it is arguable that the Judge's approach did not accord with the **Shen (Paper Appeals; proving dishonesty) [2014] UKUT 00236 (IAC)**.
23. Further, it is arguable that the Judge failed to give proper weight and/or make adequate findings in regard to the documents sent individually but not jointly to the appellant and sponsor at the same postal address as evidence of cohabitation.
24. Judge White also noted that if the appellant still maintained that he and his sponsor should be regarded as lawfully married, rather than being simply in a "durable" relationship, the appellant would be expected to be able to deal with the issues set out in **Kareem [2014] UKUT 24** and in particular whether a marriage is recognised under the law of France, being the sponsor's "own country." Those issues had not been addressed in the determination.

25. Mr Iqbal, who had not been responsible for preparing the reasons for appealing, noted that the Judge agreed with the Home Office's assertions regarding the birth certificates.
26. Mr Iqbal very properly drew my attention to the fact that the grounds of appeal before the First-tier tribunal did not refer to the issue of the birth certificates as set out in the reasons for refusal.
27. At page 6 of the reasons for refusal, the respondent had expressly asserted that the appellant had submitted on 10th November 2012 two birth certificates in support of the application and to evidence the nationality of the parents. Those certificates were dismissed by the Home Office as fraudulent as they contradicted the laws of the country from which they would claim to have been issued. Furthermore, the ages of the claimed parents did not realistically correlate with the age of the appellant or his sponsor. This was asserted to be a clear attempt to deceive the Home Office and this consequently harmed his credibility.
28. Mr Iqbal also accepted that the finding by the Judge at paragraph 26 that the respondent had proven to the required standard that the appellant had deliberately and knowingly submitted forged documents with regard to the certificates was not a ground that was raised by the appellant. It was a matter raised by First-tier Tribunal Judge White in granting permission. I none the less consider its merit in this appeal.
29. In Shen, supra, the Judge also dismissed on paper the appellant's appeal against the respondent's decision. There was a subsequent appeal to the Upper Tribunal against that determination.
30. The appellant in Shen stated in answer to a question in her application that she had never used "deception" to gain leave to remain in the UK. Through routine checks made by the Home Office, she had not disclosed driving offences. Accordingly, her application for a Tier 4 (General) Student visa was refused. In the application form there was however no reference to convictions as including "traffic offences."
31. Ms. Shen appealed to the First-tier Tribunal stating that she had never used deception to gain leave to remain. She was not aware that she was required to disclose convictions and disqualifications relating to driving. At her appeal she stated that she was informed by the police that she would receive a letter by post disclosing the penalty charges. However, she had not received any letter when she moved accommodation elsewhere. She contacted friends who continued living at her previous address to inquire whether the letter had been received. However, the letter had still not been posted. She again moved address and updated her new address with the police. At that time she had still not received a letter "to my

previous address." As she had updated the police with her new address, she presumed that her case had been closed and that no further action would be taken.

32. When she made her application therefore, she did not understand that she should disclose information about traffic offences as she believed the police had taken no further action to convict her.
33. Shen's appeal was also heard on paper. It was explained to the Upper Tribunal that internally, the secretary of state had no process or mechanism pursuant to which appeals submitted to the First-tier Tribunal on paper were appraised with a view to being responded to in the course of the paper appeal process. Accordingly the facts and matters set out by the appellant in her appeal documentation would not put in issue or challenge.
34. The First-tier Tribunal Judge in Shen dismissed the appeal. He found that the burden was on the secretary of state. He recited paragraph 322(1A) of the rules and recited the appellant's arguments. He found that although the appellant stated that she informed the police of her change of address there was no sufficient evidence from her to support that contention.
35. He also concluded that the appellant has not been entirely honest in her approach to this application as demonstrated by the fact that she asserted that she believed the police were taking no further action, but that would not have justified answering the question concerning charges in the negative. Whilst the legal burden is upon the respondent, in the face of sufficient evidence there was an evidential burden on the appellant to refute what was being said against her.
36. The Upper Tribunal found upon analysis of that reasoning that the Judge had erred. The only evidence before the Judge as to the facts surrounding the appellant's state of mind, and whether this amounted to dishonesty, were those set out in the form. The respondent had not adduced any evidence to gainsay this account. Although the respondent did not adduce evidence in the present case, there was nothing that prevented her as a matter of principle or law from adducing evidence. She had a copy of the appellant's application and was aware of the position adopted by the appellant in relation to her decision. On the face of the appellant's explanation it is plausible. Nothing leaped out from the page which would lead a reader to doubt its veracity. The appellant provided a plausible explanation for the mistake.
37. The Tribunal in Shen asked what inferences it was possible to draw from the state of affairs about dishonesty.
38. It ultimately found [20] that in the circumstances and upon the basis of the Judge's logic, they could not see a basis whereby it was proper in law to uphold a finding of

dishonesty. The Judge evidently became sceptical of the appellant's case and proceeded to act upon his scepticism.

39. In the absence of evidence from the respondent putting the appellant's prima facie plausible explanation into doubt, it was wrong to find dishonesty. The appellant's versions of events were credible and unchallenged. It was more than sufficient to switch the burden of proof back to the respondent to prove her case on deception and dishonesty. For whatever reason, she declined to do so.
40. At paragraph 27, the Tribunal stated that if the Judge entertained doubts as to the appellant's story, he should have sought to investigate further. He could have exercised powers pursuant to Rules 44 and/or 51 of the 2005 Procedure Rules to require, for example, the appellant to adduce supporting documentary evidence, or the secretary of state to comment upon the appellant's evidence and adduce such evidence as she considered appropriate to refute the appellant's evidence. He could even remit the matter for oral hearing.
41. The Tribunal found that dismissing the appeal was not the proper way to resolve any doubts outstanding in his mind in a case of dishonesty. In the circumstances, the Tribunal concluded that the First-tier Judge had erred in a manner material to the decision.
42. Mr Iqbal contended that the present case was also a paper case and the Judge should have used the powers identified in Shen. He accepted that the allegation of dishonesty referred to in the reasons for refusal had not been responded to by the appellant.
43. Further, he contended, relying on paragraph 2(c) of Judge White's permission, that the Judge had failed to give proper weight and/or failed to make adequate findings in regard to the documents sent individually but not jointly to the appellant and sponsor to the same postal address as evidence of cohabitation.
44. In the grounds seeking permission, it was contended that as proof of their living together at the same address, the couple "have many documents as proof of their address on joint name and on separate name of the same address" (sic). Despite all these documents, the respondent still made the decision carelessly. Although there was no specific contention as to how the Judge had erred, Judge White nevertheless found it was arguable that the Judge failed to give proper weight and/or make adequate findings with regard to those documents.
45. Mr Iqbal submitted that if the Judge was not satisfied with the tenancy agreement, the Judge should have given the appellant an opportunity to deal with that. He further submitted that the 2006 Regulations do not require any specific evidence.

The appellant must simply show on the balance of probabilities that he was in a durable relationship.

46. Finally, Mr Iqbal took issue with the Judge's finding at paragraph 25 that the appellant is not in a genuine relationship with the EEA National. That, he submitted, was an impermissible finding in the circumstances. It is one thing to find that he had failed to provide credible evidence of a durable relationship of two years which undermined the appeal. It did not however follow that they were not in a genuine relationship. That, he submitted, potentially affected the findings.
47. On behalf of the respondent, Ms Kenny submitted that the Judge had directed himself appropriately. Even though the Judge concluded that there was no right of appeal, he nevertheless continued to consider the issue substantively from paragraph 16-26 of the determination.
48. She also submitted that Shen is not an authority for concluding that in a paper case an appellant is necessarily absolved from the evidential burden upon him to make his case.
49. In particular, the appellant had been given the reasons for the contention that the birth certificates that had been submitted in November 2012 in support of his application had been dismissed by the Home Office as fraudulent for the reasons contained at page 6 of the refusal letter.
50. No attempt had been made to refute those allegations. They were not even referred to in the grounds of appeal, nor in the application seeking permission to appeal to the Upper Tribunal. Unlike in **Shen**, no explanation has been given by the appellant or the sponsor as to the birth certificates. It is evident from paragraph 27 in **Shen** that the appellant had given his explanation, which the Judge should in those circumstances have investigated further.
51. She submitted that Mr Iqbal's submission that there is no requirement to provide bills and documents under the 2006 Regulations was "out of context." The Judge had from paragraph 15 onwards given the reasons why the appellant's appeal could not succeed. It was not simply on the basis that the documents had not been provided in joint names. It was the appellant's duty to show that they had been in a durable relationship. The Judge moreover had concerns about the authenticity of the tenancy agreement [16]. She furthermore analysed the documentation before the respondent that had been relied on. She found that the appellant had failed to address the respondent's concerns regarding the documentation [24]. She has given proper reasons for discounting the documentary evidence tendered in support of the application. Even the photographs submitted were not clear.

52. Ms Kenny submitted that the Judge had summarised at paragraph 25 the effect of the appellant's failure to address the concerns of the respondent or to present credible evidence of his claim. From the earlier findings, she found that the appellant was not lawfully married and was not in a genuine relationship. In particular, there had been a failure to provide credible evidence of a durable relationship which undermined the appeal. The finding that he was not in a genuine relationship with an EEA National was in the circumstances a justifiable inference from the lack of evidence provided with regard to that relationship.

Assessment

53. The respondent had set out clearly in the reasons for refusal that the two birth certificates in support of an earlier application made on 10th November 2012 had been dismissed by the Home Office as fraudulent, particularly having regard to the ages of the claimed parents which did not correlate with the age of the appellant or his sponsor. That constituted a clear attempt to deceive the Home Office and harmed his credibility.
54. As already noted, the appellant did not seek to dispute that assertion in the grounds of appeal before the First-tier Tribunal. Nor did he adduce any evidence either from his own witness statement or from other documentation in rebuttal of that assertion. Accordingly, that assertion remained unchallenged.
55. In his witness statement, he simply maintained that since his alleged marriage, he has been living at his address with his wife. The respondent had he claimed, refused his application "...on technical issues". He stated that he disagrees with the decision.
56. He asserted that both are working full time. The refusal is incorrect and disproportionate. Moreover, it is an interference "into my family life" contrary to Article 8. He has established his family life here with his wife and has made lots of "family friends and personal and common friends in the UK." He has also produced documents relating to his employment including payslips sent to him at the address. He has produced a copy of a letter from Aviva sent to both him and Ms Cabral at the address.
57. Judge James has proceeded to determine the appeal on the basis that the appellant had submitted a ground of appeal challenging the reasons for refusal.
58. She has analysed the documentation including the tenancy agreement and bank statement. She has analysed the documents individually, stating that in some respects, the photocopy from Lloyds Bank in the name of the couple have different font sizes and contradicts the single name of the appellant on the following lines. She also found that the joint names are not flush to the line.

59. Moreover, she has regard to the fact that the appellant failed properly to address the concerns raised in the respondent's reasons for refusal which thus remained unchallenged. She ultimately found that the lack of original documentation and the submission of poor quality photocopies and contradictory photocopy documents with discrepancies, raises concern about the authenticity of the documentation submitted.
60. It is furthermore to be noted, as pointed out by Judge White in granting permission, that the appellant had not adduced any evidence as to the validity of the proxy marriage in accordance with French law.
61. The finding in these circumstances that the respondent had proved to the required standard that the appellant had deliberately and knowingly submitted forged documents in regard to the birth certificates in support of his application was justified in the circumstances. As noted, no attempt had been made to place that assertion in issue, before either the first-tier or the upper tribunal, unlike the appellant in Shen.
62. The finding that the appellant had not provided credible evidence relating to the durability of the relationship was based on proper reasons set out at pages 3 and 4 of the determination. The finding that theirs is not a genuine relationship was not necessary in this case but in any event, having found from the evidence relating to the passports as well as the findings in respect of a lack of credible evidence in respect of the durability of the relationship, the inference drawn was available on the evidence.
63. I have already referred to the grounds seeking permission. There is only one ground relied on in respect of the determination dated 19th May 2014. It is contended that Judge James erred without properly looking into the appellant's evidence requiring the "impugned decision" to be reviewed and reversed.
64. However, for the reasons already given, I am satisfied that the Judge has given proper and cogent reasons justifying her conclusions.

Decision

The determination of the First-tier Tribunal Judge did not involve the making of any material error of law and shall stand.

Signed

Date 29/9/2014

Deputy Upper Tribunal Judge Mailer

