Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52885/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th November 2014	**On 5th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR KWAME OFORI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Al-Rashid, Solicitor
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ghana born on 13th March 1974. The Appellant had applied on 2nd April 2013 for a residence card as a

confirmation of a right to reside in the United Kingdom. That application was refused by the Secretary of State on 13th March 2014.

2. The Appellant appealed and the appeal came before First-tier Tribunal Judge Symes sitting at Richmond on 11th June 2014. In a determination promulgated on 23rd June 2014 the Appellant's appeal under the Immigration (European Economic Area) Regulations 2006 was dismissed.

3. On 2nd July 2014 the Appellant through his instructed solicitors sought permission to appeal. On 26th August 2014 Designated First-tier Tribunal Judge Zucker refused permission to appeal. The renewed grounds for permission to appeal pointed out that the Appellant was a national of Ghana who underwent a proxy marriage on 4th June 2012 with a national of Belgium. The grounds noted that the refusal was on the ground that the marriage was not valid under English law and secondly in the alternative the couple were not in a durable relationship. They argued that on appeal the Immigration Judge in the First-tier Tribunal accepted that the marriage was valid under English law. However the Immigration Judge then relied on *Kareem [2014] UKUT 24 (IAC)* to determine whether the marriage was valid under Belgian law and the appeal was dismissed. It was submitted that the First-tier Tribunal had refused permission on the Kareem points as argued in the grounds. However Ground 6 argued that the durable relationship point remained undetermined by the Immigration Judge and that the determination was therefore flawed. Ground 6 had specifically argued that although durable relationship was a distinct point of refusal by the Respondent and evidence was led in the course of the hearing to show the existence of a durable relationship that the Immigration Judge had failed to make any findings in this respect and that the determination therefore remained incomplete.

4. On 14th October 2014 Upper Tribunal Judge Eshun granted permission to appeal. In granting permission Judge Eshun noted that the grounds relied on paragraph 6 of the earlier grounds which argued that although "durable relationship" was a distinct point of refusal by the Respondent and evidence was led in the course of the hearing to show the existence of a durable relationship the judge had failed to make any findings in this respect. Judge Eshun noted that the judge's typed Record of Proceedings did not indicate that evidence was led on this issue at the hearing nevertheless as it was raised in the Respondent's refusal letter it was arguable that the judge had erred in law in failing to deal with it.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law. The Appellant appears by his instructed solicitor Mr Al-Rashid. Mr Al-Rashid is familiar with this letter having appeared before the First-tier Tribunal and is I believe also the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Kandola.

6. I also note that on 7th November i.e. only a week prior to this hearing, the Secretary of State filed a response to the Grounds of Appeal under Rule

24. That Rule 24 response acknowledges that the First-tier Tribunal Judge appears to have failed to deal with the submission that the Appellant was in a durable relationship and goes on to state that if the Appellant did not seek to appeal the refusal in respect of a durable relationship then the issue was not live at the hearing. Paragraph 2 of the Rule 24 submission relies on the fact that the Presenting Officer's note of the hearing did not recite that the issue of her durable relationship was argued before the judge. The Rule 24 response contends that for the purpose of the marriage the Appellant was reliant on documentation to establish a legal marriage which was not one of convenience and that to establish a durable relationship required different evidence going to the scope and depth of the relationship. The Respondent had taken careful note of the inconsistencies in the evidence of the parties in respect of the dowry and under the circumstances the Respondent considered that there was evidence that this was a marriage of convenience.

Submissions/Discussions

7. Mr Al-Rashid points out that the Rule 24 response concedes, and he endorses, that it is clear that the First-tier Tribunal Judge did not deal with the issue of a durable relationship. He points out however that the durable relationship question was a live issue before the First-tier Tribunal Judge and that you only have to look at the witness statements produced in evidence to show that that issue was live before the judge. He also refers me to the Appellant's bundle and documents that were available before the First-tier Tribunal determination including the letter of support from the Church of Pentecost and bank statements showing a common address. He points out that none of these issues were addressed and that there is a material error of law and that the decision of the First-tier Tribunal should be set aside.

8. Mr Kandola starts by submitting that if a matter has not been particularised by way of a Ground of Appeal to the First-tier Tribunal and was not before the First-tier Tribunal then it is not before me but if I construe by virtue of the witness statements and evidence that was adduced that the issue is before me in any event it is not material as there is no cogent evidence to show that the Appellant was in a durable relationship. He points out that there is no evidence in the Secretary of State's view that the parties were cohabiting and that there are no photographs regarding the relationship produced.

9. Mr Al-Rashid in response points out that there was a live issue which needs to be determined and which has not been addressed. Mr Kandola indicates that if I find there is a material error of law he would wish me to remit the matter back to the First-tier Tribunal and Mr Al-Rashid agrees with this.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. There is clear evidence within the bundle of documents that was produced and before the First-tier Tribunal that witness statements from both the Appellant and the Appellant's partner Grace Owusu were before the First-tier Tribunal. Paragraph 6 of the Appellant's witness statement and paragraph 3 of Ms Owusu's make specific reference to the parties being in a durable relationship. In addition documentation was produced to the Tribunal with regard to that relationship by way of documents forwarded to the parties address and by the letter from the Church of Pentecost – UK Harlesden District.

13. In an otherwise thorough determination it is clear and conceded by the Secretary of State that the judge has failed to deal with the issue of the durable relationship that is contended. I agree with Mr Al-Rashid that not only is this an error of law but in failing to address the issue of the durable relationship that may well have tainted the findings of the judge and consequently is material. In such circumstances having heard the respective submissions of the legal representatives I agree that the correct approach is to remit this matter back to the First-tier Tribunal to be heard before any First-tier Tribunal Judge at Richmond other than Immigration Judge Symes and directions for the future conduct of this matter are attached in the decision paragraph herein.

Decision

14. The decision of the First-tier Tribunal Judge contains a material error of law. The decision of the First-tier Tribunal is set aside and is remitted to the First-tier Tribunal at Richmond for hearing before any First-tier Tribunal Judge other than Judge Symes on the first available date 28 days hence with an estimated length of hearing of two hours. No findings of fact are to stand. If it is the intention of the Appellants to submit a further bundle of documents upon which they seek to rely then such documents must be filed at the Tribunal and served on the Secretary of State at least seven days prehearing. No interpreter is required.

15. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris