IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39835/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 5 March 2015	**On 12 March 2015**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ALUT LUKE LUETH DUENY
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Rashid, Counsel instructed by David A Grand
For the Respondent: Ms C Johnstone, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Sudanese citizen who appeals with permission against the decision of First-tier Tribunal Judge Martins, who dismissed her appeal against the respondent's refusal to issue her with a residence permit under the Immigration (European Economic Area) Regulations 2006 (as amended) as the spouse of a French national exercising Treaty rights in the United Kingdom.

Background

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2. The applicant is married to the sponsor and came to the United Kingdom using a family permit issued on 6 August 2012 under Regulation 7 of the EEA Regulations, there being at that point no question of the genuineness of the marriage or whether it was a marriage of convenience. The family permit was valid until 6 February 2013 and continued without revocation until its expiry.

3. On 10 January 2013, during the period of the family permit, the appellant applied for a residence card as a confirmation of her right to reside in the United Kingdom. The appellant and her husband were interviewed on 8 May 2013 at the Home Office in Liverpool. The interviewer was not satisfied by the answers which the couple gave during the interview, which is set out in the refusal letter but without further explanation as to the matters which caused the respondent to conclude that the claimed relationship was not genuine, and that she now doubted the validity of some of the appellant's documents.

4. On 4 June 2013, the respondent refused the application for a residence card and gave the appellant notice that as the marriage was considered to be one of convenience, she did not consider that her decision breached Article 8 ECHR. No detailed analysis of Article 8 appears in either the refusal letter or the notice of immigration decision.

5. The appellant appealed against that decision.

First-tier Tribunal determination

6. In her decision, First-tier Tribunal Judge Martins, who had heard evidence from the appellant and her sponsor husband, found that they were not credible. However, applying the case law on the point, in particular, *Papajorgji v Secretary of State for the Home Department* [2012] UKUT 0038 (IAC) and *IS (Serbia)* [2008] UKAIT 31, the judge directed herself that the assessment of whether a marriage was one of convenience, that is to say, whether it was entered into without the intention of cohabitation and primarily to secure admission into the country, was restricted to the actual time of the marriage. The assessment concerned the motive for, not the quality of, the marriage.

7. At paragraph 46 of her decision, the judge said this:

> "46. I find that on the issue of their marriage being one of convenience, on the case law on this matter, I find that I am in agreement with Mr Rashid's submissions. At the time of the application for entry clearance for the appellant to join the sponsor in the United Kingdom as a spouse, she submitted the evidence requested of her, the respondent saw no reason to investigate the marriage and therefore properly issued the appellant with a family permit to join her EEA national sponsor in the United Kingdom. If the Secretary of State subsequently as it appears, from their interview in this country in Liverpool, had concerns about the genuineness of the marriage, then it was open to her to revoke the family permit, which she did not. Having not done so, I find that the only basis on which the issue of the

> residence card can be questioned, is whether this couple are in a durable relationship in accordance with regulation 8(5)."

8. The judge then considered the durability of the relationship at paragraph 47-50. She was not satisfied that the relationship was durable, and she dismissed the appeal.

Permission to appeal

9. The appellant appealed, arguing that in referring to regulation 8(5), the First-tier Tribunal judge had misdirected herself, in that the durable relationship test applied only to unmarried couples. Alternatively, she contended that the questions which the appellant and sponsor had been asked, and which were set out in the interview, were insufficient to disprove the durable nature of the relationship. There was evidence of correspondence and communication between the parties before the appellant came to the United Kingdom, as well as evidence of financial remittances by the husband to the appellant from January 2012, and four visits made by him to visit the appellant in Sudan before she came to the United Kingdom.

10. On 9 January 2015, First-tier Tribunal Judge Holmes granted permission to appeal on that basis, noting that the family permit had not been revoked, and that the First-tier Tribunal Judge had failed to direct herself by reference to the guidance on the proper approach given in *Samsam (EEA: Revocation and Retained Rights) Syria* [2011] UKUT 00165 (IAC) and *Ewulo (effect of family permit – OFM)* [2012] UKUT 00238 (IAC), to which it appears that she was not specifically directed by Counsel for the appellant at the hearing.

11. He considered that the judge had arguably erred in seeking to go behind the original family permit and evaluate whether the marriage was one of convenience *ab initio,* and in addition, that it was unclear on what basis the judge sought to evaluate whether the couple had a durable relationship: either they were married, or they were not. He considered it arguable that such confusion had tainted the credibility finding in the First-tier Tribunal decision, since they were not made in relation to the narrow issue which should have been under consideration, following *Ewulo,* that is to say, whether there was a change in circumstances since the appellant had joined the sponsor in the United Kingdom.

12. That was the basis on which this appeal came before me for an error of law hearing.

The law

13. Regulation 17 defines the circumstances in which a residence card must be issued:

> **"17.— Issue of residence card**

(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is such a family member."

14. Where a family permit has been issued, applying *Ewulo,* the non-EEA national has already demonstrated that they are a family member, or extended family member, as appropriate. In *Ewulo,* the Upper Tribunal gave guidance on the approach to a residence card application following the issue of a family permit to an extended family member. The judicial headnote summarises the guidance given:

> "i) Where a family permit has been issued by an ECO after inquiry pursuant to regulation 12 of the Immigration (European Economic Area) Regulations 2006 and is used to enter the United Kingdom a subsequent application for a residence card is to be determined under regulation 7(3) of the Regulations.
>
> ii) Where the validity of the issue of the family permit is not contested by the Secretary of State and the permit has not been revoked, the issue is whether there has been a material change of circumstances since arrival with the consequence that the claimant no longer qualifies as an extended family member."

Discussion

15. There is no real dispute about the facts of this appeal. The appellant entered as her husband's spouse; the family permit was allowed to run for its full duration; and the respondent has not demonstrated that the parties have ended their marriage or that there is any other post-arrival material change of circumstances.

16. Where the family permit has not been revoked, applying *Ewulo,* that is determinative of the question whether the marriage is one of convenience. The First-tier Tribunal got that right. However, the judge misdirected herself by applying regulation 8, which is concerned only with extended family members, that is, those who are not family members as defined. The definition of 'family member' at regulation 7(1)(a) includes a person's spouse.

17. The question of the state of the parties' marriage is nothing to the point in the consideration of the correct test under Regulation 7(1). The interview questions which are recited in the refusal letter are not followed by any reasoning as to what is said to be the change of circumstances since arrival, and indeed, of the 32 questions which were asked, only the final 11 questions have any relevance to their life in the United Kingdom. The refusal letter does not explain why questions as to the working hours, salary, place of work, availability of Sky TV, and the colours of the rubbish bins and rubbish collection dates at the property where they live indicate a

change in circumstances since the marriage such that the appellant is not entitled to a residence card based on her status as her husband's spouse.

18. There being no other reason advanced for not complying with the mandatory terms of regulation 17, I allowed the appeal at the hearing and directed the issue of a residence card.

Conclusions

19. The First-tier Tribunal did make a material error of law in the making of its decision.

20. I set aside the First-tier Tribunal's decision and allow the appeal.

21. I direct that the respondent issue the appellant with a residence card.

Signed Date: 11 March 2015

Upper Tribunal Judge Gleeson