IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46956/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 September 2015	**On 9 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS FELICITY AGYEI BOAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. On 16 March 2015, the respondent's appeal against a decision to refuse to issue her with a residence card under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") was allowed by First-tier Tribunal Judge Buckwell ("the judge"). The Secretary of State was given permission to appeal against the decision of the First-tier Tribunal, on 8 May 2015. In directions made by the Principal Resident Judge, sent to the parties on 13 May, the parties were advised to prepare for the Upper Tribunal hearing on the basis that, if the decision of the First-

tier Tribunal were set aside, any further evidence that might be needed in remaking the decision could be considered at the hearing.

2. On 14 September 2015, two days before the hearing, the respondent's solicitors applied for an adjournment, on the basis that she was unwell and had taken tablets as she was in pain. The application was unaccompanied by any medical or other supporting evidence. The following day, an Upper Tribunal Judge refused the adjournment as there was nothing to show that the respondent was not fit to attend the hearing.

3. The appeal was listed for hearing at Field House at 10 a.m. on 16 September 2015. There was no appearance by the respondent or by her solicitors. Enquiries revealed that no message had been left. On my instruction, my clerk made a telephone call to the respondent's solicitors. She was told that the person with carriage of the matter was not in the office and that a telephone call would be made to the Tribunal with any further news. At 10.45 a.m., in the absence of any further information, I indicated that I would rise until 11 a.m. to enable the respondent or her solicitors to provide the Upper Tribunal with any update they might wish to provide. Shortly after 11 a.m., I returned to the court room, having been informed by my clerk that nothing further had been received.

4. It is apparent that there has been no failure of service, as the application for the adjournment shows. Notwithstanding the directions sent to the parties in May, no further evidence has been made available by the respondent or her advisors. The judge decided the appeal on the basis of the documentary evidence, the respondent having indicated that she did not require a hearing. The evidence before me is the same as was before the judge. I had regard to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I was satisfied that the respondent and her solicitors were notified of the hearing and that it was in the interests of justice to proceed. I could see no sensible reason to adjourn and neither party would benefit from any further delay. The respondent and her solicitors had clearly been given ample opportunity to prepare for the case and, indeed, to provide evidence in support of the application for an adjournment. At the very least, the Upper Tribunal might reasonably have expected an attendance by the solicitors, who have remained on the record as acting.

The Secretary of State’s application for permission to appeal

5. The judge took into account guidance given by the Upper Tribunal in Kareem [2014] UKUT 24 and found that the proxy marriage entered into between the respondent and her French national sponsor was recognised under the law of Ghana. The necessary formalities were complied with. He concluded that the marriage fell to be recognised by the United Kingdom and, as a result, the respondent was able to show that she fell within Regulation 7(1)(a) of the 2006 Regulations as a family member of an EEA national.

6. In the light of that finding, the judge concluded that there was no need to consider whether the respondent fell within Regulation 8(5) of the 2006 Regulations, on the alternative basis that she was able to show that she and her sponsor were in a durable relationship and that she was entitled to require the Secretary of State to exercise discretion under Regulation 17(4) of the 2006 Regulations with regard to the application for a residence card.

7. The judge went on to find that as he was satisfied that a valid marriage had been established, the respondent was entitled to exercise family life in the United Kingdom and so the decision to refuse to issue her with a residence card was unlawful as it amounted to a disproportionate response. She succeeded under Article 8 of the Human Rights Convention.

8. In the grounds, the Secretary of State contended that the judge erred in two respects. First, he failed to have regard to the requirement that a claimant must show that a marriage is recognised under the law of the EEA state of which her sponsor is a national. This requirement appears in paragraph 18 of the decision in Kareem, as explained in TA and Others [2014] UKUT 00316. The finding that the appellant fell within Regulation 7(1)(a) of the 2006 Regulations was flawed. The judge also erred in not making findings in relation to the respondent's claim that she and her sponsor were in a durable relationship, within the meaning of Regulation 8(5).

9. Secondly, the judge erred in allowing the appeal under Article 8 of the Human Rights Convention. In the respondent's case, the adverse decision was simply to refuse to issue her with a residence card. There was no removal decision and no service of a notice under Section 120 of the 2002 Act. In these circumstances, the respondent was unable to rely upon Article 8 and the judge erred in also allowing the appeal on this basis.

10. As noted above, permission to appeal was granted on 8 May 2015.

Submissions on Error of Law

11. Ms Fijiwala handed up copies of the judgments in TA and Others and Amirteymour and Others [2015] UKUT 00466. She submitted that the judge erred in relation to the validity of the proxy marriage conducted in Ghana. There was no evidence before the First-tier Tribunal that the marriage was recognised in the law of France, the country of nationality of the respondent's sponsor. She was not entitled to succeed under Regulation 7(1)(a). The judge also erred in failing to assess the case advanced under Regulation 8(5) of the 2006 Regulations.

12. So far as Article 8 was concerned, the decision of the Upper Tribunal in Amirteymour showed that Article 8 was not engaged.

Conclusion on Error of Law

13. The decision has been prepared by a very experienced judge and it contains a characteristically careful assessment of the evidence before him. With some reluctance, however, I agree with Ms Fijiwala that the decision contains errors of law.

14. On page 8 of the Secretary of State's letter of 4 November 2014, in which reasons were given for the decision under appeal, there is a summary of Kareem which expressly refers to the need to consider, as a "starting point", whether the marriage relied upon is recognised in the law of the EEA sponsor's country of nationality. In the present appeal, the respondent claimed that she was validly married to a citizen of France. With great respect to the judge, although he has referred to Kareem and other authorities bearing on the need for an assessment of the formal requirements for marriage in the law of other countries, this "starting point" has not been considered. That it remains an important part of the assessment is confirmed by the Upper Tribunal in TA and Others. In the absence of any evidence showing that the proxy marriage conducted in Ghana was recognised in the law of France, the respondent could not succeed under Regulation 7(1)(a) of the 2006 Regulations.

15. It follows that the judge ought not to have concluded that it was unnecessary to consider the alternative case that the respondent and her sponsor met the requirements of Regulation 8(5) of the 2006 Regulations. Although there was very little evidence indeed regarding this case (see below) the judge was obliged to engage with it, as he was with the Secretary of State's adverse findings on this aspect.

16. So far as Article 8 of the Human Rights Convention is concerned, the judge cannot be faulted for failing to take into account Amirteymour and Others, as this important decision was only promulgated in late July 2015. Nonetheless, it is clear that in the absence of a removal decision (under Regulation 19 of the 2006 Regulations) and notice under Section 120 of the 2002 Act, where the decision under appeal is to refuse to issue a residence card, a claimant cannot rely on human rights grounds. Article 8 is not engaged.

17. For these reasons, the decision of the First-tier Tribunal, containing material errors of law, is set aside and must be remade.

Remaking the Decision

18. It will be convenient in this part of the decision to refer to the respondent, Ms Boah, as the claimant and to the Secretary of State as the respondent. I again had regard to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Taking into account the failure of the application for an adjournment, the directions served on the parties and the absence of the claimant and her solicitors, I was satisfied that it was appropriate and just to proceed.

19. Ms Fijiwala said that very little supporting evidence had been produced by the claimant. She provided the Secretary of State with bank statements in her sponsor's name but there were none in her own name or in joint names. A tenancy agreement was made available but this was not accepted as reliable evidence by the Secretary of State. There was no evidence showing any cohabitation between the claimant and her sponsor before the date of the proxy marriage.

20. The judge summarised the claimant's case briefly, at paragraph 8 of the decision, as he did the Secretary of State's response to it.

21. There was nothing further from the claimant. Ms Fijiwala submitted that the Upper Tribunal should draw an adverse inference from her absence. There was no opportunity to cross-examine her or her sponsor on the durability of the claimed relationship between them. The appeal fell to be dismissed.

Findings and Conclusions

22. In this appeal, the burden lies with the claimant to prove the facts and matters she relies upon and the standard of proof is that of a balance of probabilities.

23. The appeal was decided in the First-tier Tribunal on the basis of the documentary evidence made available, the claimant having indicated that she did not require a hearing. Nothing further has been provided and there was no appearance in the Upper Tribunal by or on behalf of the claimant.

24. The documentary evidence provided in support of her case is extremely thin. The Secretary of State took into account bank statements in her sponsor's name and a tenancy agreement. There was, however, no evidence showing cohabitation before the date of the proxy marriage conducted in Ghana. The overall conclusion reached by the Secretary of State was that the evidence did not show a valid marriage or a durable relationship between the claimant and her sponsor.

26. Dealing first with the claimant's contention that she falls within Regulation 7(1)(a) of the 2006 Regulations as the spouse of an EEA national present here exercising treaty rights, that case is simply not made out. She has not produced evidence at any stage showing that the proxy marriage is recognised in the law of France. That is sufficient to dispose of her appeal in this context.

27. Moving on to Regulation 8(5) of the 2006 Regulations, the grounds of appeal contain no detail at all. The copy tenancy agreement, dated 1 March 2014, purporting to record a joint tenancy of a room in a house in Dagenham, was not accepted by the Secretary of State and there has been no response of any substance at all to that adverse finding. In isolation, it falls woefully short of showing a durable relationship. There

has also been no substantial challenge to the Secretary of State's findings regarding the absence of evidence of cohabitation prior to the proxy marriage and, again, the submission of bank statements in the name of the claimant's sponsor is insufficient to make out her case.

28. The claimant has not shown that she and her French national sponsor have ever been in a durable relationship together. She has not shown that she falls within Regulation 8(5) of the 2006 Regulations.

29. So far as Article 8 of the Human Rights Convention is concerned, the claimant's human rights are not engaged in this appeal. The adverse decision was simply to refuse to issue her with a residence card. There is nothing to show that a removal decision has been made or that she has been served with notice under section 120 of the 2002 Act. In these circumstances, the decision in Amirteymour and Others falls to be applied.

30. For these reasons, the grounds of appeal to the First-tier Tribunal have not been made out and the appeal is dismissed.

Notice of Decision

31. The decision of the First-tier Tribunal having been set aside, it is remade as follows: appeal dismissed.

Signed Date 17 September 2015

Deputy Upper Tribunal Judge R C Campbell

Anonymity

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Fee Award

As the appeal has been dismissed, no fee award may be made.

Signed Date 17 September 2015

Deputy Upper Tribunal Judge R C Campbell