Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
IA/20864/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 27th July 2016	**On: 28th July 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Jones Awuah
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Bassiri-Dezfouli, Counsel instructed by Bernard Owesu**
For the Respondent: **Ms Ahmed, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Ghana date of birth 18th September 1983. He appeals with permission the decision of the First-tier Tribunal (Judge RA Cox) to dismiss his appeal against a refusal to issue him with a residence card confirming his right of permanent residence in the United Kingdom under the Immigration (European

Economic Area) Regulations 2006 ('the Regs').

2. The background to this appeal is that on the 10th March 2010 the Appellant was granted a residence card as the family member of an EEA national exercising her treaty rights. His wife is a Ms Agnes Stillemunkes, a German national. The couple had married in 2009 according to Ghanaian customary law, by proxy. The Secretary of State was at that time satisfied that this marriage should be recognised, and the card was duly issued in accordance with Regulation 7 (1)(a).

3. The couple remained living together in the UK. Ms Stillemunkes continued to exercise treaty rights as a worker. They did so in the belief that their marriage was recognised, that the Appellant had his residence card, and that he was accruing such periods of continuous residence in compliance with the regulations that he would eventually be able to apply for permanent residence.

4. That application, for confirmation of his right of permanent residence in accordance with Regulation 15 (1)(b), was made in November 2014. The Respondent's decision is dated the 18th May 2016. The Respondent noted that the Appellant's marriage to Ms Stillemunkes had been conducted by proxy in Ghana. Although it had previously been accepted that this marriage may be considered valid in Ghanaian law, the Respondent now doubted that this was the case, having regard to the requirements of the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. Further the Appellant had not demonstrated it to be valid as far as the German law was concerned. Since the Upper Tribunal promulgated the decision in Kareem (proxy marriages – EU law) [2014] 00024 (IAC) that had been deemed to be a prerequisite to recognition of validity, and therefore any residence rights under Regulation 7. The Respondent further queried whether this was a genuine and subsisting relationship at all.

5. That latter issue was resolved decisively in the Appellant's favour by the Judge of the First-tier Tribunal, who having heard the live evidence of the Appellant and Ms Stillemunkes, and having had regard to all of the documentary evidence produced, was quite satisfied that this is a genuine and subsisting relationship and that the parties have been living together as man and wife for some seven years. As to the legal matters raised by the refusal the Tribunal's findings were as follows:

    a) The fact that the Secretary of State had previously recognised this marriage as valid did not estop her from reviewing that decision. Kareem clarified the law and as such the Respondent was entitled to rely upon it at the date of decision;
    b) In the absence of evidence that the marriage was

recognised by the Ghanaian and German authorities it could not now be relied upon to demonstrate compliance with Regulation 7;

c) Whilst the Tribunal accepted that the couple had been in a durable relationship for in excess of seven years the Applicant had never been issued with a residence card on that basis (ie under Regulation 8 as an 'extended family member'). Having regard to the discretionary powers in Reg 17(4) the Tribunal was not prepared to infer that one would have been issued had the Respondent been asked for one;

d) There was therefore no basis upon which the Tribunal could conclude that the Appellant had been living for a continuous period of five years in accordance with the Regulations and the appeal was dismissed, albeit with a recommendation that the Respondent take the positive findings of fact into account in assessing whether the exercise her discretion under Reg 17(4).

6. The grounds of appeal are that the First-tier Tribunal erred in retrospectively applying the requirements of Kareem, and that it had failed to consider that Regulation 15 (1)(b) draws no distinction between 'extended family members' and 'family members'.

Error of Law

7. I am not satisfied that the First-tier Tribunal erred in its approach to the question of whether the proxy marriage could found a free movement right under Regulation 7. Ms Bassiri-Dezfouli submitted that the application of Kareem amounted to a retrospective change in the law. This is not correct. As the determination points out, Kareem did not change the law, it clarified how it should be interpreted. That said there is an obvious unfairness in the position that the Appellant now finds himself in. The Respondent recognised his marriage in 2010 and treated him as a family member. He cannot be blamed for relying on that acceptance and not having applied for a residence card on the alternative basis that he was an extended family member. I need not consider the question of estoppel however, since it is clear that the appeal falls to be allowed on the basis of the second ground.

8. Ms Bassiri- Dezfouli submitted that Article 15(1)(b) applies equally to the Appellant whether he is a 'family member' or an 'extended family member'. Ms Ahmed helpfully submitted the Respondent's policy on this matter, '*Extended Family Members of EEA Nationals* – v2.0, valid from 7 April 2015. That sets out what case-owners must consider when assessing if an extended family of an EEA national sponsor is allowed to live in the UK on a permanent basis. As it makes clear,

such an individual qualifies for permanent residency if

a) They have lived in the UK for a continuous period of five years and
b) They have lived in line with Regulation 8 during that period

9. The guidance goes on to say the following:

> "There may be circumstances where the five year qualifying period is made up of residency as a family member and as an extended family member. This is acceptable provided that the total five year period in question is continuous…."

10. In light of that guidance Ms Ahmed very properly conceded that the Appellant had made out her grounds in respect of Regulation 15(1)(b). There is no requirement that the Appellant has had five years' continuous residence as a family member, nor is there any requirement that he has held confirmation of his right to residence in either category. It follows that the decision of the First-tier Tribunal is set aside and the appeal is allowed.

Decisions

11. The determination of the First-tier Tribunal contains an error of law and it is set aside.

12. The decision in the appeal is remade as follows:

"The decision is not in accordance with the law (the Immigration (European Economic Area) Regulations 2006)"

13. I was not asked to make an Order for anonymity and having regard to the nature of the evidence I see no reason to do so.

Upper Tribunal Judge Bruce
28th July
2016