



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42657/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 20 June 2014

Determination Promulgated
On 30 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

ADOELA DAVID JEGEDE
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms V Akintola, Harrison Morgan solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria born on 1 July 1975, against the determination of First-tier Tribunal Judge Cope in which the Judge dismissed the Appellant's appeal against the Secretary of State's decision to refuse his application for a Residence Card as the family member of an EEA national following his marriage by proxy.

2. The Appellant's application was made on 27 November 2012 and refused by reference to regulations 7 and 8(5) of the Immigration (European Economic Area) Regulations on 19 September 2013. The Appellant exercised his right of appeal to the First-tier Tribunal and this is the appeal which came before Judge Cope on 20 March 2014 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Plumptre on 13 May 2014 in the following terms

It is clear both from the Appellant's written submissions and the Respondent's refusal letter that the primary case was based on the proxy marriage. However it may be arguable that judge Cope erred in law by not considering the alternative submissions namely a durable relationship and rights under Article 8 ECHR both of which were raised in written submissions and in the Respondent's refusal letter.

3. In a rule 24 letter dated 17 June 2014 the Respondent opposed the Appellant's appeal and in doing so accepted that the Judge had erred by not dealing with the question of durable relationship but said that such error was not material to the decision to dismiss the appeal.
4. At the hearing before me the Appellant was represented by Ms Akintola who submitted an indexed appeal bundle and a written skeleton argument. Mr Nath appeared to represent the Secretary of State and did not submit any additional documents.

Submissions - Error of Law

5. On behalf the Appellant Ms Akintola relied on the written skeleton argument. The Respondent had dealt with the durable relationship and Article 8 in the reasons for refusal letter and both were raised in the written submissions to the First-tier Tribunal. The failure of the Judge to deal with these aspects was a material error of law.
6. For the Respondent Mr Nath relied on the rule 24 notice and said that although the Judge had not dealt with these aspects the error was not material as the Appellant had failed to discharge the burden of proof to show evidence of a durable relationship.
7. I concluded that the Judge had materially erred in law in reaching her decision and reserved my written reasons. I proceeded to hear oral evidence to enable me to remake the decision.

Oral evidence

8. The Appellant gave evidence in English. He confirmed his identity and address and adopted his written witness statement as submitted to the First-tier Tribunal and dated 11 December 2013. He said that he and his partner are still together and they live at the same address where they have lived since November 2011. His partner is working. She is not at work at the moment, she is in Portugal. Her mother had an accident and his partner had to go to see her. His partner is expected back in this country in about 2 week's time. She works as a support worker and has held this job since May of last year. The Appellant is not working. He cannot work because of his lack of status documentation. He last worked in May 2012.
9. The Appellant referred to the tenancy agreement in his bundle of evidence. The rent is still £650 per month. His partner pays this and other household bills. The Appellant said that he and his partner could not live in Nigeria due to family issues. It is a security matter. His late father was a community leader and he was assassinated. The Appellant said that his partner has never been to Nigeria. She does not understand the language. They met in February 2010 and married in January 2012.
10. Cross-examined by Mr Nath in the Appellant said that he had never made an asylum claim because he did not need to. His father died in April 2012. The Appellant has not returned to Nigeria since arriving in the United Kingdom in 2008. He has never been to Portugal. The Appellant said that his wife transfers money to his account so that he can pay bills.
11. The Appellant said that he has met his wife's sister Miriam in Croydon. His wife went to see her mother in Portugal on Wednesday, 2 days before this hearing. He agreed that he had no corroborative evidence that this was the case. He said that her mother had a car accident. The Appellant's wife's mother lives with her husband but he is old.

Submissions - Remaking the decision

12. For the Respondent Mr Nath said that the refusal letter deals with the question of durable relationship. The Appellant has given oral evidence today that his partner is not here. The documentary evidence consists of a tenancy agreement and bills in the names of the Appellant and his partner. He claims to receive money by way of financial support but there is no real evidence to show how he has supported himself. The only member of his partner's family that he claims to have met is her sister. Mr Nath accepted that he had not put questions to the Appellant

doubting his relationship but said that the burden of proof is upon the Appellant and his wife is not here and there is no corroborative evidence of her whereabouts.

13. For the Appellant Ms Akintola referred to the bundle of evidence and in particular pages 25 to 128 and said that this shows ample evidence of a durable relationship. It shows that the Appellant and his wife are living together, sharing a home and household bills and supporting each other.

Decision

Error of law

14. The Appellant arrived in the United Kingdom on 14 September 2008 as a student with leave to remain until 31 January 2010. His leave was extended for post study work until 3 March 2012. He did not apply to extend his leave to remain but instead applied for a residence card as confirmation of a right to reside as the family member of an EEA national. His first application was refused on 8 May 2012 and his subsequent application made on 27 November 2012 was refused on 19 September 2013. That is the decision now under appeal.
15. In refusing his application the Respondent first of all considered the marital relationship between the Appellant and his claimed spouse. In a detailed reasons for refusal letter the Respondent took issue with the validity of the Appellant's claimed marriage which had taken place by proxy. Having concluded that the claimed marriage was not valid in law the Respondent went on to consider whether the Appellant qualified for a residence card on the basis of a durable relationship with his claimed partner. The Respondent concluded that there was insufficient evidence to suggest that the Appellant and his partner were in a durable relationship for the purpose of the EEA regulations. The application for a residence card was therefore refused. The Respondent did not go on to consider the application by reference to Article 8 of the Human Rights Convention because although the Appellant had asked for his case to be considered in this respect the appropriate application had not been made.
16. The appeal to the First-tier Tribunal took place on papers at the request of the Appellant. Prior to the consideration of the appeal the Appellant, through his legal representatives, put forward written submissions that clearly show that the Appellant took issue not only with the decision not to recognise the validity of the marriage but also the decisions made in respect of the durability of the relationship and Article 8 of the Human Rights Convention. The First-tier Tribunal carefully examined the

question of the validity of the marriage and concluded that the Appellant had not shown that the marriage was valid. However despite noting, at paragraph 44 of the determination, that the Respondent had gone on to consider the application on the basis of the durability of the relationship the First-tier Tribunal Judge explicitly declined to consider the appeal in this respect. The Judge's reasoning was simply that the application was made as a spouse and not as an extended family member. The comments of the Respondent regarding extended family members were said not to be relevant to the Appellant. Further the judge went on to say that there was no need to deal with Article 8 because the Respondent had not made a decision to remove.

17. In the grounds of appeal to the Upper Tribunal the Appellant does not challenge the decision so far as it relates to the validity of the marriage. Similarly there is no challenge to the decision in respect of Article 8. The grounds assert that the judge failed to consider the evidence of the durability of the relationship.
18. The rule 24 response filed on behalf of the Respondent accepts that the Judge erred in finding that the part of the refusal letter dealing with the question of durable relationship was not relevant to the Appellant. However the statement and Mr Nath's submissions suggest that this error was not material to the decision to dismiss the appeal. In my judgement such a conclusion cannot properly be reached. The error of law is manifest. Not only did the reasons for refusal letter deal with both the validity of the marriage and the durability of the relationship but also the Notice of Refusal itself dealt with both issues. It was apparent from the facts being put forward by the Appellant that he claimed that his relationship was durable. The legality or otherwise of the marriage ceremony was on the facts being put forward irrelevant to the durability of the relationship. Where such a fundamental issue is excluded from consideration the error of law apparent from such exclusion could only be immaterial if it was manifestly obvious that the judge could not have been satisfied with the durability of the relationship even if he had considered the evidence. On this basis the decision of the First-tier Tribunal falls to be set aside.

Remaking the decision

19. In remaking the decision I have taken into account the documentary evidence contained in the Appellant's bundle the oral evidence of the Appellant and the written and oral submissions of both representatives. The documentary evidence includes a tenancy agreement that purports to corroborate the fact that the Appellant and his partner share their living accommodation. It also includes letters, bills, payslips, bank

statements and other documents to show that the couple share the same address. One of the documents is a joint life insurance policy by which for a monthly premium of £10 the life of each party is insured for £65,925. There is a written statement from the Appellant dated 11 December 2013 and a brief statement of the same date from his partner adopting his statement as a true account of events.

20. The oral evidence from the Appellant confirmed the contents of his statement. The Appellant said that he and his partner continued to live together. He explained that she was not present as she was out of the country having travelled to see her mother who had been injured in a road accident.
21. The burden of proof is upon the Appellant and the standard of proof is the balance of probabilities. Where the durability of a relationship is the substance of an appeal hearing it is rarely going to be the case that the burden of proof will be satisfied without oral evidence. This is not because the standard of proof is a high one it is simply because the satisfaction of that standard normally requires a specific type of evidence being the assurance of the parties to the relationship of its existence and quality. In this case neither party gave oral evidence to the First-tier Tribunal. The Appellant relied solely on documentary evidence. Whereas this evidence speaks to cohabitation it does not in my judgement speak to quality or durability. In particular the written statement of the Appellant's partner adds nothing. The joint life policy is not explained in the written statement of the Appellant and does not in my judgement add any value. For a relationship to be durable the Judge must be satisfied on the day that he considers the evidence that the relationship is continuing and it is very difficult to reach such a conclusion without hearing oral evidence.
22. At the hearing before me the appellant gave oral evidence. This oral evidence did not in my judgement add significantly to the evidence contained in his statement. He was not questioned in any detail about the quality of his relationship with his partner. There was no up to date statement from the Appellant's partner despite the appeal to the Upper Tribunal being based upon the durability of their relationship and despite the date of the Upper Tribunal hearing being known long before the Appellant's partner's claimed emergency trip to Portugal. The Appellant's explanation for his partner's absence was, in my judgement, remarkably vague. He did not appear to have any clear idea of what injuries the Appellant's mother had suffered, why she needed to travel to Portugal at short notice or when she would return. The Appellant did not explain why he had no evidence to corroborate his partner's whereabouts or even any up-to-date statement from her to corroborate the durability of their relationship.

23. The issue before me is a simple one. I need to determine whether the Respondent was right not to be satisfied that the Appellant and his partner have a durable relationship. Where the issue in question is the durability of a relationship it will normally be necessary to hear from both parties to the relationship to satisfy the burden of proof. The onus is not on the Respondent to show that the relationship is not durable but on the appellant to show that it is. In my judgement and for the reasons given above the Appellant has not satisfied the burden of proof to show that he has a durable relationship with an EEA national. It must follow therefore that his appeal in this respect is dismissed. It must equally follow that his appeal by virtue of Article 8 of the Human Rights Convention is also dismissed since the basis of that appeal was the family life that he shares with his partner. Not being satisfied that the Appellant and his partner share a durable relationship I am not satisfied that they share a family life. No submissions were put forward to suggest that the Appellant had established a protected private life in the United Kingdom. The appeal is therefore dismissed.

Summary

24. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision.
25. I remake the decision by dismissing the appeal both in respect of the EEA regulations and Article 8 of the Human Rights Convention.

Signed:

Date:

**J F W Phillips
Deputy Judge of the Upper Tribunal**