



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/02108/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 December 2014**

**Decision and Reasons
Promulgated
On 9 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR DANIEL NANA BOATENG
(NO ANONYMITY ORDER MADE)**

Claimant

Representation:

For the Appellant: Ms A Holmes (Senior Home Office Presenting Officer)
For the Claimant: Mr P Saini (Counsel)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Gillespie) who, in a determination promulgated on 22 September 2014 allowed the Claimant's appeal against a decision made by the Secretary of State to refuse to grant a residence card as confirmation of his right to reside in the UK in accordance with the Immigration (EEA) Regulations 2006 (EEA Regulations).
2. The Claimant whose date of birth is 23 December 1984 and he is a citizen of Ghana.

Background

3. In a Reasons for Refusal Letter dated 16 December 2013 the Secretary of State considered the Claimant's application and refused the same under Regulation 7 EEA Regulations and thereafter considered whether or not there was a durable relationship under Regulation 8(5). The Secretary of State considered that there was no evidence of cohabitation prior to the date of the customary marriage certificate and no evidence that the parties knew each other or had met prior to that date. The only evidence provided was of photographs, a shared address and emails from 2008/2009.
4. In a decision the First-tier Tribunal found that the evidence did not establish that the marriage entered into was valid and recognised either according to Ghanaian or Polish law. The appeal was refused under Regulation 7. However, the Tribunal went on to consider the applicability of Regulation 8(5) and 17(4) of the EEA Regulations. The Tribunal found there to be persuasive indications of a genuine relationship between the parties including an extended exchange of emails prior to the marriage, a comprehensive set of photographs showing dates from 2011 to 2012 together with oral evidence from the Claimant and his spouse. There was no issue as to whether the Sponsor was an EEA national and a "qualified person" for the purpose of the Regulations. Having determined that the parties were in a durable relationship the Tribunal allowed the appeal outright .

Grounds of Application

5. The Secretary of State submitted that the finding as to the existence of a durable relationship was founded on insufficient evidence. The issuance of a residence card to an extended family member was at the discretion of the Secretary of State and as such was a matter to be remitted for her consideration.

Permission

6. Permission to appeal was granted by First-tier Tribunal Judge De Haney as follows:

"the grounds of appeal amount to no more than an attempt to re-argue that which was before the judge and was already set out in the refusal letter. However the point that the appeal should have been allowed, on the basis that the decision was not in accordance with the law, and therefore should have been remitted to the respondent to exercise her discretion, is valid; **Ihemedu (OFMs - meanings) Nigeria [2011] UKUT 00340 (IAC).**"

The Hearing

7. This matter came before me for consideration as to whether or not there was a material error of law in the Tribunal's decision.
8. Ms Holmes confirmed that the Secretary of State specifically considered Regulation 8(5) of the 2006 Regulations in the Reasons for Refusal Letter. She conceded that the Tribunal made findings of fact that the parties were in a durable relationship and that thereafter the matter ought to have been returned to the Secretary of State for consideration of a grant of a residence card in accordance with Regulation 17(4) EEA Regulations 2006.
9. Mr Saini agreed and submitted that the findings made by the Tribunal should stand and should inform the consideration of the grant of a residence card under Regulation 17(4). He submitted that there was no material error of law rather that the Tribunal failed to expand on the nature and extent of the appeal allowed on immigration grounds.

Decision

10. Both parties were in agreement that the Tribunal had properly reached findings that were open to it on the evidence before it in finding that there was a durable relationship between the parties in accordance with Regulation 8(5) of the EEA Regulations 2006.
11. The Secretary of State in her grounds argued that there was an error of law to the extent that the issue of a residence card to a family member was at the discretion of the Secretary of State and as such the matter ought to have been referred back to her for reconsideration. All parties accepted that this was the correct course of action and that the decision should have been worded in terms. Accordingly I find no material error of law in the Tribunal's decision which shall stand, save for the fact that I add to the decision a direction for the matter to be remitted to the Secretary of State for consideration under Regulation 17.

Decision

12. **There is no error of law disclosed in the Decision which shall stand.**
13. **The appeal is allowed on immigration grounds under Regulation 8(5) of the EEA Regulations and the matter is to be remitted to the Secretary of State for consideration of the grant of a residence card under Regulation 17(4) of the 2006 Regulations.**

No anonymity order made.

Signed

Date 5.1.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT - FEE AWARD

The appeal was allowed and a fee award in the total amount is payable.

Signed

Date 5.1.2015

Deputy Upper Tribunal Judge G A Black