



**The Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/19595/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On January 29, 2015**

**Determination promulgated
On February 4, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS ESTHER ABERKAH
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Shiliday (Home Office Presenting Officer)

For the Respondent: Ms Hashmi, Counsel, instructed by Nasim and Co Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a citizen of Ghana. The appellant entered the United Kingdom in July 2009 and came to visit her brother. On October 15, 2013 she submitted an application for a residence card on the basis of a customary marriage to her partner, Kofu Adu. The respondent refused this

application on December 18, 2013 as she did not except the proxy marriage was valid in Germany (her partner's country of nationality) and she further found there was insufficient evidence submitted to demonstrate a durable relationship.

3. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the immigration (European Economic Area) Regulations 2006.
4. The matter came before Judge of the First-tier Tribunal Harris (hereinafter referred to as the "FtTJ") on October 2, 2014 and in a decision promulgated on October 28, 2014 he allowed the appeal under the 2006 Regulations and remitted the case back to the respondent to consider the exercise of discretion.
5. The respondent lodged grounds of appeal on October 31, 2014. She submitted the FtTJ erred by allowing the appellant's appeal without giving any reasons.
6. Judge of the First-tier Tribunal Chambers granted permission to appeal on December 9, 2014 stating there was an arguable error in law based on the grounds.
7. The appellant, her partner and her brother were in attendance in court and the appellant was represented as set out above.

ERROR OF LAW SUBMISSIONS

8. Mr Shiliday submitted the FtTJ had found there was little documentary evidence to support their claim and as he had also found the appellant's partner had given inconsistent evidence about it was incumbent upon him to give his reasons for allowing the appeal and he failed to do this in paragraph [15] of his determination.
9. Ms Hashmi submitted that documentary evidence was not needed and the FtTJ had allowed the appeal after hearing evidence. The FtTJ was satisfied the relationship was durable and allowed the appeal and there was no error in law.
10. Mr Shiliday maintained the FtTJ applied the wrong standard of proof bearing in mind his findings in paragraphs [12] and [14] and his conclusion in paragraph [15] was not sustainable.

ERROR OF LAW ASSESSMENT

11. The determination was brief and notably at paragraphs [12] and [14] the FtTJ made adverse findings about evidence that supported the appellant's case. Whilst there was a letter from the pastor at page 57 of the appellant's bundle this did not demonstrate at any level the appellant was in a durable relationship. The FtTJ allowed the appeal finding at paragraph [15] of his determination

“... I considered that overall both the appellant and Mr Adu demonstrated sufficient credibility and consistency in their evidence about their claimed relationship that I could attach weight to the claim each made about being a durable relationship since 2011”

12. The FtTJ failed to give his reasons for reaching this conclusion and he also failed to make any reference to the evidence that apparently was given by the appellant’s brother-in-law or friend. I am further persuaded there was a material error because in paragraph [16] the FtTJ further stated

“Weighing up the oral and documentary evidence before me I am satisfied on the balance of probabilities that the appellant had been in a durable relationship as claimed.....”

13. I therefore find there as an error in law. It is noted that the directions provided for the matter being concluded and after a short recess I took oral evidence from both the appellant and her partner. The appellant’s brother was present but was not required to give evidence by Mr Shiliday.

EVIDENCE

14. Both the appellant and her partner adopted their witness statements. They both gave consistent evidence about when they met, how the appellant’s partner proposed, when and where they presented themselves in church for their marriage to be recognised, details of their respective families and where they lived, the appellant’s partner’s place and hours of work, details of their own home, last night’s meal and in particular both confirmed they read Matthew 10 last night together and their journey to court today.
15. At the conclusion of their evidence Mr Shiliday indicated that he had no questions for the appellant’s brother and I agreed that his evidence would be admitted into evidence. I did not require any submissions from Ms Hashmi.

FINDINGS

16. This was an application for a residence card. The application was originally before the Tribunal on the basis the parties were married but when the matter came before the FtTJ Ms Hashmi indicated that the case was now to be argued on the basis of a durable relationship only. The respondent did not raise any jurisdictional issues either before the FtTJ or myself and I proceeded to hear the parties’ evidence.
17. The standard of proof is on the balance of probabilities and the burden of proof is on the appellant to prove that she was in a durable relationship.
18. There was a lack of documentary evidence but as already conceded by Mr Shiliday the Regulations do not require such evidence. I had previously found there was an error in law because the FtTJ failed to give reasons why he found the appellant’s evidence sufficiently credible and consistent.

19. I heard the parties' oral evidence and have set out the consistent evidence they both gave above. I am satisfied they have been in a durable relationship. Whilst there may be a lack of documentary evidence I am satisfied their oral evidence was credible and based on the consistency of that evidence I am satisfied they are in a durable relationship.
20. The appellant is an extended family member as defined by Regulation 8 of the 2006 Regulations.
21. Regulation 17(4) of 2006 Regulations provides discretion to the Secretary of State to issue a residence card to an 'extended family member'. In the appellant's case the Secretary of State has not yet considered the exercise of such discretion because he did not have the full facts available due to the failure to provide sufficient information to her when the application was made. It is not open to me to consider the exercise of discretion for myself, absent the Secretary of State first doing so: see FD (EEA discretion - basis of appeal) Algeria [2007] UKAIT. In such circumstances I am constrained to allow the appellant's appeal on the basis that the respondent's decision was not in accordance with the law.

Decision

22. The decision of the First-tier Tribunal did disclose an error in law but having considered all of the evidence I allow the appeal to the extent set out above in paragraph [21].
23. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order was not made in the First-tier and I see no reason to amend that order.

Signed:

Dated: **February 4, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the original decision on fees.

Signed:

Dated: **February 4, 2015**

Deputy Upper Tribunal Judge Alis