



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

Appeal Number: HU/04516/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> May 2017**

**Determination Promulgated  
On 18<sup>th</sup> May 2017**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**LOVE NII BOYE ODAMTTEM  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: None

**DECISION AND REASONS**

*Introduction*

1. The claimant is a citizen of Ghana born on 2<sup>nd</sup> December 1967. He arrived in the UK in December 2002 with a visit visa. He then overstayed. He made a human rights application in 2012, which was refused without a right of appeal in 2013. In May 2015 the claimant was asked to make a statement of additional grounds which he did: on 7th August 2015 the claimant's application, via this statement of additional

grounds, to remain in the UK on human rights grounds was refused. His appeal against this decision was allowed by First-tier Tribunal Judge Morgan in a determination promulgated on the 13<sup>th</sup> October 2016.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Grimmer on 4<sup>th</sup> April 2017 on the basis that it was arguable that the First-tier judge had erred in law in allowing the appeal on the basis that the decision was not in accordance with the law due to lack of reference to the EEA Regulations when all the claimant had before the First-tier Tribunal was a human rights appeal.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law. The claimant and his representatives (BWF Solicitors) did not attend the hearing, but I was satisfied from a letter of 26<sup>th</sup> April 2017 to the Upper Tribunal that they were aware that it was due to take place and that it was fair and just for the hearing to proceed.

#### *Submissions – Error of Law*

4. The Secretary of State in her grounds of appeal firstly submits that it was an error of law by the First-tier Tribunal to fail to determine the issue of whether the claimant has a genuine and subsisting relationship with his partner. Secondly it is argued that it was an error of law to allow the appeal on the basis of an EEA right to a residence card when the claimant had only made a human rights application to remain in the UK, and in the context of the First-tier Tribunal having to determine the appeal under s.86 of the Nationality, Immigration and Asylum Act 2002.
5. The claimant made no written or oral submission on the contended errors of law.

#### *Conclusions – Error of Law*

6. EEA rights exist whether or not the claimant has made a relevant EEA application on the correct form, and where they exist they must be recognised by the Secretary of State and the First-tier Tribunal.
7. The First-tier Tribunal satisfied itself that the claimant was validly married to his Dutch wife, Mrs Grace Mensah at paragraphs 1, 2 and 6 of the decision and that there is no evidence that this marriage is one of convenience. These facts are not contested in the grounds of appeal. I find that this was a sufficient finding by the First-tier Tribunal that family life existed in this case. In accordance with EU law, it was not relevant to consider whether the marriage was genuine and subsisting but merely that it had not terminated (see Diatta v Land of Berlin) and was not one of convenience in order to give the claimant a right to remain in the UK with his wife in the context of evidence of Ms Mensah's employment in the UK (which clearly existed in the bundle before the First-tier Tribunal and includes an employer letter and payslip, and bank statements).
8. It might have been ideal if the First-tier Tribunal had, having established family life existed, made it plain firstly that the claimant could not meet the requirements of the family life Immigration Rules at Appendix FM as

there was no evidence of insurmountable obstacles to family life taking place abroad so as to satisfy EX1, and then explained that it was appropriate to look at the matter outside of the Rules given the EU aspects of this matter provided a potentially compelling element. However, I do not find that a failure to articulate these matters amounts to a material error of law.

9. As it was plain that removal of the claimant would interfere with his family life with his wife and her children, the next Razgar step is to decide whether the decision is “not in accordance with the law”. No reasons are given in the grounds as to why a decision on this point was not properly open to and required by the First-tier Tribunal given that this is a human rights appeal and a human rights analysis was clearly required.
10. The decision also accords with the authority cited by the First-tier Tribunal at paragraph 6 of the decision, Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629, in that the disposal is simply to allow the appeal (it is not remitted) but as per (iv) of the headnote this First-tier Tribunal makes: “a decision the effect whereof is that the Secretary of State either must, or may, make a fresh decision”.
11. Further at paragraph 25 of Greenwood (No. 2) it is said: “Similarly, in circumstances where the Secretary of State has not made a decision on whether the appellant has a Community law right to remain in the United Kingdom or in respect of the best interests of an affected child, the FtT must make the primary decision: see VM (Zambia) v Secretary of State for the Home Department [2009] EWCA Civ 521 and DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305.” So clearly it was right, and in accordance with this authority for the First-tier Tribunal to determine this relevant issue of the appellant’s EU rights as a spouse of a Dutch citizen.
12. I find it was therefore lawfully open to the First-tier Tribunal to allow the appeal on human rights grounds on the basis that the decision of the Secretary of State was not in accordance with the law for failure to acknowledge or deal with the fact that the claimant was married to an EU national working in the UK and for that decision to have implicit in it that the Secretary of State should now make a decision on the issue of whether the claimant is entitled to an EEA residence permit given the findings with respect to his valid marriage to a Dutch citizen.

#### Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I uphold the decision of the First-tier Tribunal allowing the appeal.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

Date: 16<sup>th</sup> May 2017

