



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

Appeal Number: IA/28487/2012

THE IMMIGRATION ACTS

Heard at : Field House

On : 26th April & 24th September 2013 + 9th January 2014

Determination Promulgated

On : 14th January 2014

Before

Upper Tribunal Judge McKee

Between

IGNATIUS CHINWEIKE UBAOHA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Keelin McCarthy, instructed by DF Solicitors, on 26/4/2013

For the Respondent: Mrs Monica Tanner (on 26/4/2013 only) and Miss Julie Isherwood of the Specialist Appeals Team

DETERMINATION

1. On 21st November 2012 Mr Ubaoha's application for a residence card as the husband of an EEA national was turned down. It was not accepted that he was validly married to a French citizen, since the marriage was said to be a customary one, celebrated in Nigeria by proxy while the couple were in the United Kingdom. Nor was it accepted that Hayette Issa-Filleul was employed at Saamtech Electronics,

so as to make her a 'qualified person' in terms of reg. 6 of the EEA Regulations 2006. An appeal to the First-tier Tribunal was dismissed 'on the papers' by Judge Obhi, who was satisfied that Hayette Issa-Filleul was a 'qualified person', but did not consider there to have been "*a valid proxy marriage*".

2. Judge Obhi made no mention of two other grounds which had been raised in the skeleton argument proffered by DF Solicitors, namely that the appeal could be allowed on the alternative basis that the couple were in a 'durable relationship' for the purposes of reg. 8 of the EEA Regulations, and that it would be a breach of Article 8 rights if the couple could not live together in this country. The omission of any reference to these grounds by Judge Obhi caused Designated Judge Barton to grant permission to appeal to the Upper Tribunal, and when the matter came before me today it was agreed on all hands that this omission was an error of law.
3. The case was adjourned, however, to await the outcome of a test case on Nigerian proxy marriages, due to be heard on 5th June. If it turned out that this appellant's marriage was valid, that would be the end of the matter. If not, the alternative contention that he was an 'extended family member' of a Union citizen would need to be considered by the Upper Tribunal, as would the Article 8 argument. To that end, the appeal was to be re-listed for hearing after the end of June, with directions for DF Solicitors to file with the Tribunal, and serve on the Specialist Appeals Team, witness statements by Ignatius Ubaoha and Hayette Issa-Filleul, who would be expected to give oral evidence, as well as any further documents relevant to the establishment of a 'durable relationship' for the purposes of Community law.
4. As it turned out, the 'test case' on 5th June was adjourned until the end of October, and the present case did not come back before me until 24th September. That morning, Mr Ubaoha came to the hearing by himself. His wife, he said, was feeling unwell, and could not attend. No legal representative would be in attendance either. Mr Ubaoha had just been to the office of Dorcas Falode, whom he was unable to pay for representation. Accordingly, he told her that he would represent himself. This was later confirmed in a fax received from DF Solicitors.
5. Miss Isherwood, who was now representing the Secretary of State, handed up details about Ms Issa's employer, which she had printed off from the website of Companies House. Saamtech Electronics, a private limited company, was dissolved on 3rd September 2013. This suggested that Ms Issa was no longer exercising Treaty rights'. Mr Ubaoha responded that his wife was self-employed as a hairdresser, and had been while she was working for Saamtech. Indeed, in a statement made by Ms Issa which was included in a bundle sent to the First-tier Tribunal in Birmingham, but not copied to the Home Office, she said this :

"I also run my own business as a freelance hairstylist. I have registered with HM Revenue & Customs as self employed and I have provided evidence of payment of Class 2 National Insurance contribution with my husband's appeal bundle."
6. No evidence of these Class 2 contributions appears actually to have been included in the Appellant's Bundle, and Mr Ubaoha had no other evidence with him to substantiate his assertion that his wife was now a 'qualified person' under regulation 6 of the EEA Regulations as self-employed, rather than as a worker. Very fairly, Miss Isherwood took the view that an adjournment would be needed, in order for the

requisite evidence of self-employment to be provided. A French interpreter had been booked for today's hearing, in the expectation that Ms Issa would be giving evidence on the issue of 'durable relationship'. That too would need to be canvassed at the next hearing, if it turned out that Ms Issa was currently exercising Treaty rights but could not be considered as validly married to the appellant. Miss Isherwood and I being both available on 22nd November, that date was chosen for the resumed hearing, at which all the issues arising from this appeal would finally have to be resolved. Mr Ubaoha asked that DF Solicitors be kept on the record, in case they could be put in funds for the next hearing. Further directions were given, that the appellant was to file with the Upper Tribunal, and serve on the Presenting Officers' Unit, any documents which demonstrated that Hayette Issa-Filleul was currently engaged in genuine self-employment.

7. On 20th November, however, DF Solicitors faxed a request for an adjournment, attaching a photocopy of a one-way ticket for a coach departing that night from Victoria Coach Station to Paris. The passenger was named as Miss H. Issa, and according to the solicitors she had been summoned urgently to her mother's bedside. Her mother resides in France, and had been suddenly taken ill.
8. The request was granted, and the appeal was relisted for 9th January 2014. On 7th January, however, DF Solicitors faxed another request for an adjournment, saying that their client's wife was still in France, as her mother continued to be very ill and wanted her daughter to be by her side. The fax went astray at Field House, and was not dealt with before the day of the hearing, when the appellant attended in person. DF Solicitors confirmed that they had not been instructed to attend, and that the appellant would be representing himself.
9. I indicated to the appellant that the case could not be adjourned yet again. There was no medical evidence to back up the claim that Miss Issa's mother had been taken ill in France, or to explain what that illness was and why Miss Issa could not be spared for a single day to return to London and give the oral evidence which was necessary for a 'durable relationship' to be established. There was not even a witness statement, despite the direction for that given last April. I could see no realistic prospect of Miss Issa making herself available for a hearing in the foreseeable future, and could not countenance a further waste of public money in arranging a hearing and booking a French interpreter.
10. I was able to indicate that, as far as the proxy marriage was concerned, the long-awaited test case was now on the point of being reported, and it meant that this appeal was bound to fail on that issue. The purported registration of the appellant's marriage by a Customary Court in Ikeja is of no legal effect, and some of the essential ingredients of a valid customary marriage ~ such as the consent of the bride's parents, the presence of members of both families at the wedding (even if the bride and groom are not present), and the giving of a dowry by the groom's family to the bride's family ~ have not been shown in the instant case. The test case also now makes it clear that the appellant must prove that the Union citizen is entitled, under the law of the Member State of which she is a national, to contract a customary marriage by proxy and to have that marriage recognised in her own Member State. There is no proof before the Tribunal that such is the position under French law.

11. As for the 'durable relationship' alternative, Miss Isherwood pointed out that, Saamtech Electronics having gone out of business, Miss Issa must now demonstrate that she is genuinely self-employed in order to be a 'qualified person' under the EEA regulations. DF Solicitors had sent in a small bundle last November, which included two reminders to Miss Issa from HM Revenue & Customs, dated October 2012 and March 2013, that Class 2 National Insurance contributions, both of £68.90, were due. The appellant now produced a further reminder dated October 2013, requesting £70.20 for the next six-month period. But that is the only documentary evidence of Miss Issa's self-employment. We do not know how much income it generated, although it would not appear to be much if the NI contributions are only around £70 per six months. It may be that Miss Issa's prolonged absence in France also affects her claim to be a 'qualified person'.
12. In any event, however, not enough evidence has been adduced to prove that the appellant is in a durable relationship with a French national, even if she is exercising 'Treaty rights'. The appeal therefore falls to be dismissed. No decision has been taken to remove the appellant, and it is open to him to make a fresh application for a residence card, if he can provide sufficient evidence in future that he is in a durable relationship with an EEA national who is a qualified person.

Decision

The First-tier determination has been set aside, and the decision on the appeal is to be re-made by the Upper Tribunal. The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

10th January 2014

