



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

Appeal Number: IA/36361/2013

THE IMMIGRATION ACTS

Heard at Field House

**Judgment given orally at hearing
On 6th June 2014**

**Determination
Promulgated
On 08th July 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR EDISON LAWRENCE

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr T Melvin

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellant is a citizen of India born on 26th February 1969. He made an application on 14th November 2012 for a residence card as

confirmation of his right to reside in the UK as the family member of an EEA national, his spouse being a French national. That application was refused in a decision dated 29th June 2013.

3. Before me there was no appearance by the appellant or by his representatives, who are A. Bajwa & Co., solicitors. Enquiries made by court staff revealed that a letter was said to have been written by the solicitors asking that the appeal be 'withdrawn'. A copy of the letter that was sent was faxed again and it refers to the appeal listed for today, 6th June. It is from the solicitors and is dated 27th May 2014 stating that the appellant wishes to withdraw his appeal and that he had signed as confirmation of his withdrawal. The letter sent to the Tribunal on 6th June 2014, confirmed the same.
4. The Upper Tribunal procedure rules do not make provision for a party to withdraw an appeal before the Upper Tribunal. They make provision in rule 17 for a party to withdraw his or her case or part of the case, subject to the consent of the Upper Tribunal.
5. It is not necessary for me to elaborate on what is the appellant's case before the Upper Tribunal, except to say that his case is that he is entitled to a residence card. I do not consider that it is appropriate for consent to be given to a withdrawal of the case at this stage even if the appellant and his solicitors did write to the Upper Tribunal on 27th May 2014. This is because there is an issue that needs to be resolved in relation to the decision of the First-tier Tribunal. So consent is not given and I will explain why I am satisfied that there is an error of law in the decision of the First-tier Tribunal and why the decision needs to be set aside.
6. The appeal against the Secretary of State's decision came before First-tier Tribunal Judge Ghaffar, who dealt with the appeal on the papers, that is to say without an oral hearing because that was what the request was by or on behalf of the appellant. In determining the appeal he allowed it because he was satisfied that the appellant and his spouse were validly married and alternatively concluded that they were in a durable relationship.
7. The Secretary of State's decision refusing the application raised, aside from the question of the validity of the marriage, the issue of the sponsor's exercising Treaty rights in relation to her employment. That issue was resolved in favour of the appellant for the reasons that appear in the determination at paragraph 5. No complaint is made about that aspect of the judge's decision.
8. Mr Melvin relied on the grounds of appeal. The grounds make reference to the decision in Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC). It seems to me that the effect of that decision is that for the appellant to be able to establish that he is validly married to the sponsor he has to establish that the marriage is valid in France, the country of which his sponsor or spouse is a national.

9. The headnote to Kareem, perhaps, does not make that entirely clear but the decision itself does, at paragraphs 17 and 18. That decision is of significance in this case because it is said that this case is a proxy marriage that took place in Burkina Faso. The documents in relation to the marriage on one view are ambiguous as to whether it is a proxy marriage but that is the way the case is presented on behalf of the appellant and that is the way in which I will determine the issue.
10. Although the decision in Kareem was promulgated prior to the hearing before the First-tier Tribunal, that decision was not referred to. Kareem establishes what the true position is in relation to arguments about the validity of a marriage.
11. So, in terms of the judge having found that the parties are validly married, I am satisfied that he erred in law with reference to the decision in Kareem. There is no evidence of the validity, under French law, of their marriage. That conclusion would not necessarily have mattered in one sense given that the judge found that they are in a durable relationship. However, the evidence in relation to a durable relationship is slim in the extreme.
12. I allowed permission for Mr Melvin to amend the grounds of appeal at the start of these proceedings to include a ground that relates to evidence of a durable relationship, the ground contending that there was insufficient evidence for the judge to find that the parties were in a durable relationship. I do not consider that there is any prejudice to the appellant in allowing the amendment. As already indicated, a request had been made in writing for the appeal to be 'withdrawn'. However, neither the appellant nor his representatives were entitled to assume that consent would have been given by the Upper Tribunal for the appellant's case to be withdrawn, and that there would therefore not be a hearing, and that the attendance of neither the appellant nor his representatives was necessary. I would in any event have allowed the grounds to be amended even if there had been objection on behalf of the appellant, the question of evidence in support of the claim of a durable relationship being a matter that would clearly have needed to have been resolved.
13. At paragraph 6 of the determination Judge Ghaffar refers to the couple maintaining that they are in a durable relationship. The conclusion that they are in such a relationship is to be found at paragraph 13 of the determination. It is a conclusion that is made in the alternative.
14. Having stated that there is no evidence to support the assertion by the respondent that the marriage is not valid the judge stated as follows: "In any event, I find that they are in a durable relationship and nothing to the contrary has been put before me to suggest otherwise." That is the judge's analysis of whether they are in a durable relationship. It is an analysis which, it seems to me, is light on facts and the facts in turn here are difficult if not impossible to discern. The bundle of documents put before the First-tier Tribunal includes evidence of the sponsor's address

and her employment but little, if any, evidence that the appellant resides with her at that address.

15. There is a photograph of the appellant and his partner together; a single photograph, seemingly taken in a park whereby they are standing side by side. That evidence, it seems to me, is insufficient to establish that they are in a durable relationship and the marriage certificate does not establish it either.
16. The witness statements of the appellant and his partner are identical in the sense that the only differences between them are the necessary changes as between one making the witness statement or the other; male or female and so forth; husband/wife.
17. There is no other evidence as to their being in a durable relationship, for example in terms of where the appellant lives, or evidence from other people, written or oral evidence. The fact that it was a 'paper case' means that there could at least have been some further written evidence in support of the claim that they are in a durable relationship. Of course, the fact that it was an appeal that was dealt with on the papers meant that neither the appellant nor the sponsor attended to give evidence, thus allowing for their evidence to be tested.
18. So, in all those circumstances I am not satisfied that there is sufficient evidence of a durable relationship. I am satisfied that the judge erred in law in that respect also. It follows then that the conclusion that the appellant is either (a) a family member or (b) an extended family member under regulation 8(5) of the EEA Regulations, of a person exercising Treaty rights, is a conclusion that is erroneous in law.
19. I set the decision aside and in the light of the observations I have made about the state of the evidence I re-make the decision by dismissing the appeal.
20. In any event, even if they were in a durable relationship the judge's conclusion that the appellant is entitled to a residence card is also not correct because the grant of a residence card to an extended family member is discretionary, under regulation 17(4) of the EEA Regulations. The Secretary of State "may" issue a residence card, if in all the circumstances it appears to the Secretary of State appropriate to issue one.
21. So, at best in terms of "durable relationship" and an extended family member, all that could have been achieved was a decision that the Secretary of State's decision was not in accordance with the law and for it to be remitted for consideration of a grant of a residence card in the Secretary of State's discretion. But in any event, one does not get to that point in this appeal because I am not satisfied that the evidence establishes a durable relationship.

Upper Tribunal Judge Kopieczek

7/07/14