



IAC-HW-MP/DN-V1

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

Appeal Number: IA/43863/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11th November 2015**

**Decision & Reasons Promulgated
On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR ANDREW ADAMS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H. Gove of Counsel

For the Respondent: Ms S. Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Ghana, born on 20th August 1982. He appealed against a decision of the Respondent dated 21st October 2014 to refuse the Appellant's application for a residence card as a family member of his partner, Ms Edeva Edene Gama Jesus de Carvalho, a Portuguese national exercising treaty rights in the United Kingdom ("the Sponsor"). His appeal was allowed at first instance by Judge of the First-tier Tribunal Scott, sitting at Taylor House on 15th May 2015, who rejected the

Appellant's claim to be a family member of the Sponsor under Regulation 7 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") but accepted that the Appellant was an extended family member of the Sponsor as the Appellant and Sponsor were in a durable relationship. The Judge allowed the appeal outright under Regulation 8 of the 2006 Regulations. The Respondent appeals with leave against that decision. For the reasons which I have set out below (see paragraphs 14 to 16), I have found an error of law and have set aside the First-tier Tribunal's decision and re-made the decision in this case. For the sake of convenience I shall continue to refer to the parties as they were known at first instance.

2. The Judge summarised the Appellant's evidence at paragraphs 5 to 12 of his determination. The Appellant had arrived in the United Kingdom in 2009 and had lived here ever since. He met the Sponsor in July 2010 at a party and proposed to her on Christmas Day 2011. They decided to have a Ghanaian customary marriage which took place by proxy in Accra, Ghana on 12th February 2012. The Appellant applied for his residence card in June 2012 but the application was refused on the basis that the Sponsor was already married. That appears to have been a mistake, the Sponsor had a twin sister who is married and the Sponsor was mistaken for her. The Sponsor has never been married before but does have two children from a previous relationship now aged 7 and 4, both at school. The Appellant's evidence was that he had a good relationship with both children.
3. The Appellant made a fresh application for a residence card in June 2014 and he and the Sponsor were invited for interview in Liverpool on 8th October 2014 but did not attend. Their explanation was that it was the younger child's first day at school. The couple received a second invitation to attend for interview on 23rd October 2014 but could not confirm their attendance because the Sponsor's twin sister was ill and they were unable to arrange for the children to be picked up from school. By the time they were able to make suitable arrangements and sought to confirm their attendance they were told that it was too late the application was refused. The Sponsor gave similar reasons why neither she nor the Appellant had attended both interviews. The Judge noted that both the Appellant and Sponsor were asked in detail about their relationship, "questions which might have been asked at interview". The Judge also heard evidence from two other witnesses who confirmed they were family friends of the couple and confirmed the relationship.

The Explanation for Refusal

4. The Respondent refused the application citing Regulation 20B of the 2006 Regulations. On two occasions the Appellant and Sponsor had failed to attend for interview without good reason. Regulation 20B provides that where the Respondent has reasonable doubt as to whether a person has a right to reside under Regulation 14 (the right to reside for qualified persons and their family members) or wants to verify the eligibility of a person to apply for a residence card, she may invite the applicant to attend an interview. Sub-paragraph (4) of Regulation 20B states that if without good reason either the applicant or the Sponsor fail to provide the additional information requested or on at least two occasions fail to attend an interview if so invited, the Respondent may draw any factual inferences about the Appellant's

entitlement to a right to reside as appear appropriate in the circumstances. Sub-paragraph (6) states that the Respondent must not decide that the Appellant does not have or ceases to have a right to reside on the sole basis that the Appellant failed to comply with Regulation 20B and the Regulation may not be invoked systematically.

The Determination at First Instance

5. At paragraph 20 the Judge stated that the Ghanaian proxy marriage was insufficient to make the Appellant a family member of his Sponsor for the purposes of the 2006 Regulations if only because there was no evidence that such marriages were valid under the law of Portugal see **TA (Kareem explained) Ghana [2014] UKUT 00316**. Instead the Judge found the Appellant's position fell to be assessed as an extended family member under the 2006 Regulations. In order to qualify under that category the Appellant had to show that he was in a durable relationship with the Sponsor. The Judge noted a great deal of consistency between the evidence of the Appellant and the Sponsor.
6. There were said to be three matters relied upon by the Respondent as undermining the credibility of the Appellant and Sponsor's evidence set out at paragraph 22 of the determination. There was a discrepancy between the Appellant saying that only the Sponsor's twin sister and the children were present when he proposed marriage to the Sponsor whereas the Sponsor had said that the Appellant's friend and the Appellant's friend's wife were also there. The Judge did not find this discrepancy to be at all significant as the marriage proposal had occurred three and a half years ago. The second claimed discrepancy was that the Appellant had said that on the Sunday before the appeal hearing he had stayed at home while the Sponsor took her children to church. By contrast the Sponsor's evidence was that when she took the children to church the Appellant went to pray in the mosque. As the Appellant had said that he had gone to the mosque on the previous day with the children there was scope for faulty recollection. The third and potentially greater discrepancy was that the Appellant had said that apart from her twin sister who lived in the United Kingdom the Sponsor had two brothers in Portugal while the Sponsor said that she has one other sister and one brother who are both in Africa. The Appellant had not met the Sponsor's other siblings but was able to name them and knew that they both lived abroad. He may have assumed that they were in Portugal and could then have been confused as to the gender of one of those siblings. As the evidence was otherwise consistent the Judge did not find this discrepancy concerning the Sponsor's siblings to be sufficient to undermine the credibility of the account given.
7. Assessing other evidence the Judge noted that the council tax bill for 2015 had recorded the Sponsor as a single occupant but that explanation was plausible, because it reflected the position before the Appellant came to live with the Sponsor after their Ghanaian marriage. The council's record had not been altered since then. Of greater significance was a Post Office letter showing that in May 2012 the Appellant and Sponsor were taking out a life insurance policy in joint names. The Judge came to the conclusion that the Appellant and Sponsor had given him credible evidence and were in a genuine and subsisting relationship. He allowed the appeal outright under the 2006 Regulations.

The Onward Appeal

8. The Respondent appealed against this decision arguing that the Judge had made a material misdirection of law. The Respondent had not exercised her discretion in this case under Regulation 17(4) of the 2006 Regulations which provides that the Respondent may issue a residence card to an extended family member if it appears to the Respondent to be appropriate to issue the residence card. That confers a discretion on the Respondent which must be exercised before a residence card can be granted. The Judge had not specified under which part of the 2006 Regulations he was allowing the appeal. If the Tribunal's intention was to allow the appeal as an extended/other family member under Regulation 8(2), the Tribunal should have remitted the case back to the Secretary of State for consideration under Regulation 17(4) (see **Ihemedu [2011] UKUT 00340**).
9. The headnote to **Ihemedu** states:
- “i) Article 3(2) of Directive 2004/38/EC (“Citizens Directive”) treats other family members (“OFMs”) as a residual category and, in contrast to close family members (“CFMs”) within the meaning of Article 2(2), does not limit it to particular types of relatives (plus spouses or civil partners). There is nothing in the Immigration (European Economic Area) Regulations 2006 akin to the Immigration Appeals (Family Visitor) Regulations 2003 which in our domestic immigration law seeks to specify exhaustively the categories of family relationship that can qualify a person. Only relatives are covered, albeit with focus on those relatives with whom the Union citizen has significant factual ties.
- ii) An important consideration in the context of an OFM/extended family member case is that if a claimant had come to the UK without applying for a family permit from abroad (for which provision is made in reg 12 of the Immigration (European Economic Area) Regulations 2006), this will mean that the UK authorities have been prevented from conducting the extensive examination of the individual's personal circumstances envisaged by reg 12(3) and in the course of such an examination check the documentation submitted. If an applicant chooses not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right.
- iii) Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State.”
10. The Respondent's onward appeal was considered on the papers by First-tier Tribunal Judge Colyer on 20th August 2015 who granted permission to appeal writing:
- “It was arguable that the Judge made a material misdirection in law by allowing the Appellant's appeal outright. The Respondent has not exercised her discretion in this case under Regulation 17(4) of the 2006 Regulations. As the Appellant was found to be an extended family member under Regulation 8(5) it is arguable that the Immigration Judge should have remitted the case for the Respondent's consideration under Regulation 17(4) instead of allowing the appeal outright.”

There was no Rule 24 reply filed on behalf of the Appellant in response to the grant.

The Hearing Before Me

11. Counsel for the Appellant argued that this was not a case to which **Ihemedu** applied because the decision in this case was based on Regulation 20B that the Appellant had not attended for interviews. The only issue in the case was what the Judge had in fact decided. Regulation 20B made clear that the Respondent must not refuse an application solely on the basis that the Appellant and Sponsor had failed to attend for interview. As there had to be other reasons the Judge was entitled to examine them and reach the decision he did. He had not made a direction that the Respondent must issue a residence card. The Respondent had misunderstood what the Judge had done and was now seeking to blame the Judge for doing the right thing.
12. For the Respondent it was argued that the case was on all fours with **Ihemedu** and the Judge should have remitted the case back to the Respondent. In conclusion Counsel for the Appellant stated that if one looked at the second paragraph on page 2 of the refusal letter the Respondent had stated that the reasons for inviting the Appellant and EEA national Sponsor for interview combined with the failure to attend the two interviews implied that the Appellant did not have a right to reside under the 2006 Regulations. The crucial word here was "combined". The Respondent was not refusing the application purely because of a failure to attend interviews, but rather because of the reasons why the Respondent had wanted to interview the Appellant and the Sponsor. Since the Judge had not taken against the Appellant and Sponsor that they had failed to attend the interviews it meant that the Judge had dealt with the reasons why the Respondent had wanted to invite the Appellant and Sponsor for interview. It was therefore open to the Judge to conclude that the parties were in a durable relationship.

Findings

13. This appeal came to me initially on the issue of an error of law. The Judge rejected the submission at paragraph 20 that the Ghanaian proxy marriage made the Appellant a family member of the Sponsor. I take the Respondent's point that at paragraph 28 of the determination the Judge did not make clear which Regulation he was referring to. However the earlier paragraph, 20, contained a clear indication that the Appellant could not satisfy Regulation 7 of the 2006 Regulations. The Judge's subsequent remark that the Appellant's position fell to be assessed as an extended family member indicated that the case had to be considered under Regulation 8.
14. Paragraph 2 of the determination stated that because the Appellant and Sponsor failed to attend for interview, the Respondent found they had not demonstrated that they were in a durable relationship. That was not in fact what the Respondent had decided. What the Respondent had decided was that the Appellant could not demonstrate he was entitled to reside under the 2006 Regulations. In other words the Respondent had not considered the issue of whether the parties were in a durable relationship as opposed to being family members in a marriage, contrary to the

impression given by paragraph 2 of the determination. It is not clear whether the Judge was referred in argument during the hearing to the case of Ihemedu but whether or not it was referred to him as the case was relevant it had to be taken into account. As it was not that was a material error of law. Following Ihemedu it was not open to the Judge to allow the appeal outright under Regulation 8 but rather to declare the Respondent's decision to be not in accordance with the law such that it remained outstanding before the Respondent to take a valid decision. .

15. It was argued before me that Ihemedu did not apply because the Respondent had refused the application for reasons other than the failure to attend the interview and the Judge had dealt with those reasons. I do not accept that argument. The Judge evidently felt he was dealing with a case where the Respondent had refused the application under Regulation 8. If that was right the Judge would have been entitled to allow the appeal outright but a careful reading of the refusal letter shows that that was not the case. What the refusal letter said (on page 1, paragraph 4) was:

“After assessing the above documentation [the application form], the Home Office noted that there was clear cultural differences between you and your EEA national spouse. The evidence of marriage that you had provided within the application was marriage via proxy in Ghana. Your Sponsor is not Ghanaian. The combination of all of these factors gives the Home Office cause to suspect that you do not have a right to reside in the United Kingdom. Therefore to verify that your right is genuine and in accordance with Regulations 20B, 1(b) and 20B, 2(b) of the 2006 Regulations the Home Office invited you and your spouse to attend an interview on 8th October 2014. You have failed to attend this interview and did not give the Home Office good reason for this failure. The Home Office then invited you to a second interview on 23rd October 2014. Again you failed to attend the interview and did not give the Home Office good reason for this failure.”

16. What the refusal letter makes clear is that the Appellant has not demonstrated that he has a right to reside under the 2006 Regulations because of the cultural differences between him and his EEA national spouse and the failure to attend the two interviews (which could otherwise have clarified matters). This led the Respondent to suspect the proxy marriage. In other words the Respondent had not at that stage even considered whether Regulation 7 applied let alone whether the application could be considered under Regulation 8. The confusion in this case may have been caused by the Judge reading the refusal letter as being a refusal of an application under Regulation 8 but that is not what the refusal letter in fact says. Allowing the appeal outright prevented the Respondent from conducting the extensive examination of the Appellant's personal circumstances envisaged by the 2006 Regulations.
17. There are two further issues arising out of the refusal letter, namely the failure to attend the two respective interviews offered. To explain the first failure the Appellant claimed that he and the Sponsor had had to attend the first day at school of the Sponsor's child. In support he produced a letter from Shaftesbury Primary School dated 3rd October 2014 which invited the Sponsor for an informal visit to the school. An informal visit is not the same as a child's first day at school. Indeed it would be somewhat unusual for a school term to begin as late as October when it

would otherwise be expected that a school term would begin in or about the first week of September. The Judge merely noted the existence of the letter and stated that it was “regarding attendance” at the school on the same day as the intended first interview. The Judge does not in terms say that he accepted that explanation and some further enquiry of the Appellant and Sponsor could be made why they could not postpone an informal visit as opposed to the child’s first day at school.

18. The Respondent cancelled the second interview because she did not receive confirmation from the Appellant and Sponsor within a certain time limit that they would be able to attend the second proposed interview which was to be on 23rd October. The Appellant’s solicitors appear to have sent an email to the Respondent on 15th October 2014 after time for confirmation had expired indicating that the Appellant and Sponsor were still willing to attend on 23rd October at 12 noon and that they had been unable to confirm attendance within the required period because they were unable to arrange childcare. That explanation given in the emails is again noted by the Judge but it sits uneasily with the explanation recorded at paragraph 8 of the determination that the Appellant and Sponsor were unable to attend for interview on 23rd October 2014 “because the Sponsor’s twin sister was ill and they were unable to arrange for the children to be picked up from school”. It is difficult to see how the Appellant and Sponsor would know on 15th October 2014 that the Sponsor’s twin sister was going to be ill in eight days’ time.
19. The explanation given by the Appellant and Sponsor why they failed to attend for interview is not satisfactory but it is a matter for the Respondent to explore generally in the light of my finding that the decision on the application remains outstanding for the Respondent to take. If the Judge had analysed the explanations and given adequate reasons why those explanations could be accepted they would not still be an issue but for the reasons which I have set out above they still are. It is not for me to make a final decision on the Appellant’s explanations for his non-attendance on two occasions. Since the Respondent’s decision is not in accordance with the law all matters remain to be considered.
20. It was an error for the Judge to have allowed the appeal outright rather than declaring the decision to be not in accordance with the law and thus remaining outstanding before the Respondent. The ratio in **Ihemedu** applies to this case. The parties are not validly married for the reasons given by the Judge (which are preserved) and therefore the Appellant cannot come under Regulation 7. It will be for the Respondent to consider whether this is an appropriate case to exercise discretion under Regulation 17(4) and issue a residence card thereafter.
21. The Respondent has not thus far been able to interview the Appellant and Sponsor. Although the Judge makes reference to the Appellant being cross-examined in questions which the Appellant might have been asked at interview, he did not set out those questions and answers in the determination itself but instead referred to his notes of the hearing. The Respondent may wish to see the Judge’s notes of evidence (I do not consider it necessary for the Judge to produce a typed transcript). If so the Respondent can write in and ask for a copy which can be then sent to the Respondent and Appellant for consideration prior to any further interview the Respondent might

wish to have with the Appellant. The Respondent will have before her the evidence filed by the Appellant for the purposes of the hearing including the statements of the parties. Alternatively the Respondent may be satisfied on the basis of the determination that this is an appropriate case to issue a residence card under Regulation 8 without further interview. At this stage it is a matter for the Respondent.

- 22. I allow the Respondent’s appeal against the decision of the First-tier Tribunal which I set aside. There was a material error of law in the Judge’s decision to allow the appeal outright rather than to declare the matter still outstanding before the Respondent for discretion to be exercised under Regulation 17(4) following the authority of **Ihemedu** .

Decision

The decision of the First-tier Tribunal involved the making of an error of law. I therefore set aside the decision of the First-tier Tribunal and remake the decision by allowing the Appellant’s appeal against the Respondent’s decision to the extent that the Respondent’s decision is not in accordance with the law and remains outstanding before the Respondent to take.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 9th day of December 2015
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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The Judge made no fee award in this case notwithstanding that he had allowed the appeal because the outcome of the appeal had been due to the submission of evidence which was not before the Respondent. In my view that decision was entirely correct, and I uphold his decision to refuse to make a fee award in this case.

Signed this 9th day of December 2015
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Deputy Upper Tribunal Judge Woodcraft