



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

Appeal Number: IA/49514/2013

THE IMMIGRATION ACTS

Heard at Field House

On 2 July 2015

**Determination
Promulgated
On 2 July 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

**Benjamin Carlos Jakpor
[No anonymity direction made]**

Claimant

Representation:

For the claimant: Mr A Ikie, instructed by Ikie Solicitors

For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Benjamin Carlos Jakpor, date of birth 6.7.76, is a citizen of Nigeria.
2. The Secretary of State has appealed against the determination of First-tier Tribunal Judge Russell promulgated 9.10.14, allowing the claimant's appeal against the decision of the Secretary of State, dated 2.11.13, to refuse his application made on 13.5.13 for an EEA residence card as confirmation of a right to reside in the UK as the spouse of an EEA national exercising Treaty rights, pursuant to the Immigration (EEA) Regulations

2006, as amended. The Judge heard the appeal on 24.9.14.

3. First-tier Tribunal Judge TRP Hollingworth granted permission to appeal on 24.11.14.
4. Thus the matter came before myself on 21.1.15 as an appeal in the Upper Tribunal. For the reasons set out in my error of law decision, the decision of the First-tier Tribunal was set aside. In summary it was found that the First-tier Tribunal Judge had no regard to the marriage interview and the issue of marriage of convenience, as relied on by the Secretary of State, which infected the findings as to whether there was a durable relationship.
5. It was not possible to proceed immediately to the rehearing of the appeal, as the claimant's wife was unwell and due to undergo surgery. In the circumstances, the continuation hearing was adjourned to 7.5.15. However, at that hearing, before Mrs Justice McGowan and myself, Mr Ikie raised a preliminary issue arising from a challenge to the accuracy of the interview record. As I have previously stated, it is unfortunate that Mr Ikie did not ask the respondent, or sought a direction from the Tribunal to the same effect, to produce the original interview transcript, whether an audio, typed, or hand-written document. Mr Clarke was able to produce a handwritten completed proforma for the interview, but did not have any copy of the interview record, other than as embedded within the refusal decision. He could not confirm whether the interview was recorded or not. He further explained that it would likely not be possible to have any answer to such a query within the day.
6. In the circumstances, we agreed to adjourn the hearing of the appeal and issued directions for the production of the record of the marriage interview.
7. The matter came back before me on 2.7.15, whereupon I was presented with a letter from the Home Office, date 24.6.15, stating that it has not been possible to provide a witness statement from the interviewing officer as he has left the Home Office. The original marriage interview no longer exists and there are no copies. It was apparently typed on a word-processor with no back up or recording of the interview. In the light of Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC), it would not be fair to the claimant to rely on the interview extracts set out in the refusal decision when issue has been taken as to the accuracy of the record and the record is no longer available for disclosure. It follows, as accepted by Mr Clarke, that the Secretary of State has failed to discharge the initial burden of proof to show reasonable grounds of suspicion that the marriage is one of convenience.
8. The consequence is that the basis on which I considered that the First-tier Tribunal Judge's durability assessment was flawed falls away. I remind myself that it was conceded at the First-tier Tribunal appeal hearing that the claimant could not prove that his proxy marriage was valid and recognisable in law. Instead, Mr Ikie relied on regulation 8(5), on the basis

of the claimant being an extended family member as the partner in a durable relationship with a qualifying EEA national. It was in respect of that issue that Judge Russell was satisfied that the claimant met the requirements of the EEA Regulations.

9. The Secretary of State's grounds of appeal are quite narrow. No challenge is in fact made to the judge's durable relationship findings. Instead, it is pointed out that pursuant to regulation 17(4) the Secretary of State "may" issue a Residence Card to an extended family member on application if "in all the circumstances it appears to the Secretary of State appropriate to issue the residence card." It is, therefore, a discretion which vests in the Secretary of State and not the Tribunal. The grounds submit that the correct course of action should have been for the First-tier Tribunal Judge to allow the appeal on the limited basis that as it has been found as a fact that the appellant is in a durable relationship with a qualifying EEA national partner, the decision of the Secretary of State is not in accordance with the law and it remains for the Secretary of State to make a decision which is in accordance with the law.
10. Mr Ikie said he could not ask for more than such a course of action and, as it is the course of action contended for in the grounds of appeal, Mr Clarke could not resist it. I found that once the marriage of convenience issue fell away, there was in any event no basis to interfere with the durable relationship findings of Judge Russell. For those reasons this appeal should be allowed on the limited basis set out above.

Decision

11. The appeal is allowed on the limited basis that I find that the decision of Secretary of State is not in accordance with the law.
12. It remains for the Secretary of State to make a decision which is in accordance with the law and the findings of fact of Judge Russell.



Signed:

Date: 2 July 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, we make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I make no fee award.

Reasons: The appeal has been allowed, but only on the limited basis set out above.



Signed:

Date: 2 July 2015

Deputy Upper Tribunal Judge Pickup