



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/22046/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
On 18 February 2016**

**Decision & Reasons
Promulgated
On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**OLUWAFEMI SAMUEL ORESAJO
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills (Home Office Presenting Officer)

For the Respondent: Mr A Chohan (Citadel Immigration Lawyers)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal (of 9 April 2015) allowing the original appeal of Oluwafemi Samuel Oresajo, a citizen of Nigeria born 10 September 1986, against the decision to refuse him an EEA residence card (of 6

May 2014) based on the durable relationship he claimed to enjoy with his Irish partner Adebisi Moriam Taiwo.

2. The application was originally refused on 7 March 2014, and reconsidered and again refused on 6 May and 17 November 2014. The refusal letter against which the appeal was brought to the First-tier Tribunal found that the relationship was not established to be a genuine one because email correspondence supplied on the application was too intermittent to show that theirs was a loving relationship between partners as opposed to being simply a friendship, and that the other evidence of cohabitation was unsatisfactory given that it demonstrated only that they had lived together for some ten months in Coventry: their account that they had subsequently lived separately because of rental costs was not accepted as plausible. The evidence from friends and family was considered insufficient to displace these concerns. Accordingly it was not accepted that the relationship was a genuine one. The fact of Ms Taiwo's exercise of Treaty Rights in the United Kingdom was not challenged in the refusal letter.
3. The First-tier Tribunal evaluated the oral and documentary evidence before it, and noted that their relationship had begun in earnest in 2011 when the Sponsor visited the Appellant in Nigeria for an extended period. On balance of probabilities the First-tier Tribunal accepted that the relationship was a genuine one, bearing in mind that their evidence was wholly consistent as to its details. It was true that for a time they had lived separately for some days of the week, as noted by the decision maker, but this could be seen as occasioned by the Sponsor's need to work in London, typical of the circumstances of many couples in the modern era, and driven by economic circumstances, and was not suspicious in the light of the weight of material they had put forward that affirmatively supported their case: indeed the Judge concluded that the Secretary of State's case theory to the contrary was somewhat baffling.
4. The First-tier Tribunal concluded that the appeal should be allowed, as the relationship was a genuine one and so discretion should have been exercised in favour of the Respondent.
5. Grounds of appeal did not dispute the lawfulness of the findings as to the durability of the relationship, but took issue with the decision to allow the appeal outright rather than to a limited degree, leaving the question of the propriety of the exercise of discretion outstanding before for the Secretary of State. Judge of the First-tier Tribunal Lambert recognised the force of these grounds and granted permission to appeal on 8 June 2015.

Decision and reasons

6. Before me the parties were agreed that the decision of the First-tier Tribunal was flawed for the reasons contended by the Secretary of State.

7. Regulation 8 as amended by the Immigration (European Economic Area) (Amendment) Regulations 2011 (in force from 2 June 2011) is headed "Extended family members". At Regulation 8(2) it provides:

"(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national ...

17 Issue of residence card ...

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

- (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
- (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

8. The Tribunal in *YB (EEA reg 17(4) - proper approach) Ivory Coast* stated at [23] that "We cannot see that such reference can be assimilated to an examination of whether the comparable national law criteria are met. To seek to reduce it solely to such criteria would run contrary to a general principle of Community law, namely that of proportionality. It would also overlook that the power given by the Directive to decide such cases "in accordance with national legislation" is paired with another Directive principle or requirement that there be "an extensive examination of the personal circumstances". This demonstrates that the existence of a durable relationship is essentially a question of fact, one which has been resolved in the Respondent's favour by the First-tier Tribunal without challenge by the Secretary of State.
9. However, as stated in *YB (EEA reg 17(4) - proper approach) Ivory Coast* [2008] UKAIT 00062: "Neither the Citizens Directive (2004/38/EC) nor regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 confers on an "other family member" or "extended family member" of an EEA national exercising Treaty rights a right to a residence card; consistent with the Directive, reg 17(4) makes it discretionary."
10. So it can be seen that bare acceptance of an individual as an extended family member is not sufficient to call for the grant of a document attesting to her EEA rights, however, as there remains the discretion in Regulation 17(4) "if in all the circumstances it appears ... appropriate to issue the residence card". As stated in *Aladeselu & Ors (2006 Regs - reg 8) Nigeria* [2011] UKUT 253 (IAC) at [31]: "Whilst we can consider whether a discretionary power should have been exercised differently, we cannot seek to do that if there has as yet been no exercise of that power. It follows that the appeal can only be allowed to the extent that it remains outstanding before the Secretary of State."

11. Accordingly it can be seen that the decision of the First-tier Tribunal contains a material error of law. Given the pragmatic stance of the parties, it is appropriate to move directly to consideration of the appeal's substance.
12. Given the findings of the First-tier Tribunal, the durability of the claimed relationship with an EEA national exercising Treaty Rights is clearly established. The appeal is allowed to the extent that, whilst the decision of the First-tier Tribunal as to the genuine nature of the relationship stands, its decision to allow the appeal outright is replaced by one that instead allows the appeal to the extent that the EEA decision refusing the residence card is set aside. The application for a residence card remains outstanding for lawful determination based on the discretion of the Secretary of State, who will doubtless take account of the findings as to the genuine nature of their relationship and thus of the need to respect private and family life, rights protected not only by the Human Rights Convention but additionally by the Charter of Fundamental Rights.

Decision:

The making of the decision of the First-tier Tribunal was flawed by material error of law.

The appeal is allowed to the extent that the decision refusing a residence card is identified as not in accordance with the law. The application remains outstanding before the Secretary of State.

Signed:

A handwritten signature in black ink, appearing to read 'MAS', with a long, sweeping underline that extends across the width of the signature area.

Deputy Upper Tribunal Judge Symes
February 2016

Date: 22