



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/13716/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 19th April 2018

**Decision & Reasons
Promulgated
On 3rd May 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**JESSE AFFUM KWAKYE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Appiah of Counsel, instructed by Vine Court Chambers

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge James promulgated on 13 October 2017, in which the Appellant's appeal against the decision to revoke his EEA Residence Card dated 16 November 2016 was dismissed.
2. The Appellant is a national of Ghana, born on 5 January 1986 who had been issued with an EEA Residence Card on 26 January 2015 as confirmation of a right to reside in the United Kingdom as a person in a durable relationship with an EEA national exercising treaty rights. That followed an initial application for an EEA Residence Card as the spouse of

an EEA national exercising treaty rights in United Kingdom, which was refused by the Respondent on the basis that there was no valid marriage, it having been conducted by proxy in Ghana but not in accordance with all of the required formalities. That decision was upheld on appeal by Judge Higgins in a decision promulgated on 2 October 2014, albeit also finding in the alternative that the Appellant was in a durable relationship and therefore could be considered by the Respondent for an EEA Residence Card as an extended family member under Regulation 17(d) of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations").

3. The Respondent revoked the EEA Residence Card on the basis that the Appellant's ex-partner has completed a public statement on 20 June 2016 confirming that the relationship no longer subsisted, they no longer live together nor do they intend to live together in the future. As a result, the Respondent considered that the Appellant was no longer in a durable relationship and therefore could not continue to satisfy the requirements in Regulation 8 of the EEA Regulations. The revocation was specifically under Regulation 8(5) and 20(2) of the same.
4. The Appellant's grounds of appeal to the First-tier Tribunal were on the basis that although he accepted he was now estranged from his EEA national partner, he had a new partner working in the United Kingdom who is a British citizen, with whom he began a relationship in March 2016 and they were expecting their first child together. The grounds set out the requirements of Appendix FM of the Immigration Rules for someone to be granted leave to remain as a partner, relying on satisfaction of the same and on Article 8 of the European Convention on Human Rights, such that he had an alternative basis of stay in the United Kingdom.
5. Judge James dismissed the appeal, having considered it on the papers, in a decision promulgated on 13 October 2017. It was noted in the decision that there was a lack of any documents submitted by the Appellant in support of his appeal and noted that having accepted that he was no longer an extended family member of an EEA national since at least March 2016, the EEA appeal against the revocation decision automatically failed and had to be dismissed. The conclusion being that the Respondent was correct factually and legally to revoke the residence permit. In relation to the ground submitted as to the grant of leave to remain on the basis of family life under Appendix FM of the Immigration Rules, it was noted that no such application had been made to the Respondent and therefore no decision by the Respondent to consider on appeal. Finally, the First-tier Tribunal stated that it had no jurisdiction to consider an appeal on Article 8 grounds.

The appeal

6. The Appellant appeals on two grounds, first, that the First-tier Tribunal was mistaken in considering that the Appellant was still seeking an oral

hearing when he had requested that the appeal should be determined on the papers, and secondly proceeded on the mistaken basis that the Appellant had failed to file and serve any evidence, a bundle having been faxed to the First-tier Tribunal on 2 October 2017 which contained written submissions, case law, marriage certificate and letter from the Ghana High Commission dated 25 April 2014.

7. Permission to appeal was granted by Judge Mailer on 26 February 2017 on the basis that there was an arguable procedural unfairness in the hearing before the First-tier Tribunal.
8. At the oral hearing, there was some discussion between the parties as to the basis on which the appeal was proceeding given that the documents which were forwarded to the First-tier Tribunal but not before Judge James when making his decision, did not engage at all with the actual decision being appealed, namely the revocation of an EEA Residence Card issued under Regulation 8 of the EEA Regulations but instead focused upon whether or not the Appellant should in fact have been issued with an EEA Residence Card as a spouse rather than as an extended family member.
9. The thrust of the written submissions on behalf of the Appellant sent to the First-tier Tribunal were that the previous decision of Judge Higgins, which relied upon the Upper Tribunal decisions in Kareem (proxy marriages) Brazil [2014] UKUT 00024 (IAC) and TA and others (Kareem explained) Ghana [2014] UKUT 00316 (IAC), was in error given that the Court of Appeal had overturned those decisions in Awuku v Secretary of State for the Home Department [2016] EWCA Civ 1303. As such, it was claimed that in fact the Appellant had entered into a valid customary marriage recognised under Ghanaian law (with a letter from the High Commission confirming its validity) and should have been issued with an EEA Residence Card under Regulation 7 of the EEA Regulations as a spouse. At the time of the hearing before the First-tier Tribunal, the marriage was still subsisting and therefore there would be no grounds to revoke a Residence Card issued on the correct basis under Regulation 7. There were no written submissions about the actual decision taken by the Respondent nor any further evidence about the new relationship relied upon.
10. Separately, it was apparent by the date of the hearing before me, that the Appellant claimed to have divorced his EEA national spouse such that whether or not he should have been issued with an EEA Residence Card as a spouse or an extended family member, he could not arguably now rely on either Regulation 7 or 8 of the EEA Regulations as a basis of stay in the United Kingdom. However, Counsel for the Appellant confirmed at the oral hearing that although the Appellant considered himself to be divorced, this was completed further to customary practice and had not been recognised as a legally valid divorce in the United Kingdom. For this reason, I accepted that the appeal had not been rendered academic by a change in the Appellant's circumstances.
11. Counsel for the Appellant pursued the appeal before me on the basis that it was required to protect the Appellant's position and that there was an

important issue outstanding as to whether or not he should have been issued with an EEA Residence Card on a different basis. It was suggested that this historic matter could validly be resolved in the context of the current proceedings by either the Upper Tribunal or if the case is remitted, to the First-tier Tribunal.

Findings and reasons

12. In relation to the two grounds of appeal before the Upper Tribunal, on the first ground, I do not find that there was any error or mistake by the First-tier Tribunal as to whether the Appellant had requested an oral or paper hearing. It is clear from the file and reading the decision as a whole that although an oral hearing was originally requested, there was a later request for a decision on the papers, together with an indication that further evidence or documents would be forthcoming on behalf of the Appellant.
13. On the second ground, there is no dispute that there was a procedural irregularity on this case. The Appellant had submitted further documents in support of the appeal within the deadline directed by the First-tier Tribunal which were not before Judge James when making his decision on the papers. However, this is what is likely to be a very rare case in which a procedural irregularity could have made no material difference to the outcome of the appeal. This is because the nature of the additional documents filed by the Appellant and the written submissions made, still do not actually challenge in any way the decision made by the Respondent to revoke an EEA Residence Card on the basis that he was no longer in a durable relationship and therefore could not satisfy the requirements for an EEA Residence Card as an extended family member under Regulation 8 of the EEA Regulations.
14. The case put on behalf of the Appellant in those written submissions and reiterated before me today, is not one which the First-tier Tribunal could have adjudicated upon in the context of the decision under appeal, nor is there any legitimate route by which what is essentially now a historic dispute over a previous decision could have been resolved by the First-tier Tribunal or the Upper Tribunal. The Appellant was of course at liberty to appeal the previous decision of Judge Higgins if he considered it contained an error of law (because the decisions it relied upon were themselves in error, as in Awuku or otherwise), or in the alternative, the Appellant has always been at liberty to make a further application to the Respondent for an EEA Residence Card on the basis that he was the spouse of an EEA national exercising treaty rights in the United Kingdom. Although that relationship is accepted to have broken down, the current circumstances are that the divorce has not been recognised as valid such that if the Appellant is correct as to the validity of his marriage, he still remains married to an EEA national and there is potential scope for the historic

position to be resolved. It is not clear whether there would be any real benefit to the Appellant in so doing, but that is a matter for him to consider outside context of this appeal.

15. I dismiss the Appellant's appeal on the basis that although there was a procedural irregularity in that the documents submitted by the Appellant were not before Judge James when making his decision on the appeal, this was not material to the outcome of the appeal which would inevitably have been dismissed. There was no challenge to the legal or factual basis for the Respondent's decision to revoke the EEA Residence Card issued under Regulation 8 of the EEA Regulations. The Appellant has always accepted that that relationship had broken down at the latest by March 2016 such that he could not continue to satisfy the requirements of Regulation 8 of the EEA Regulations.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed  2018

Date 27th April

Upper Tribunal Judge Jackson