



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

Appeal Number: UI-2021-001650
on appeal from **EA/50922/2020**
IA/00129/2021

THE IMMIGRATION ACTS

**Heard at Field House IAC
On the 4 August 2022**

**Decision & Reasons Promulgated
On the 22 February 2023**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**OMAR ABDEL FATAH ABDELMAJID ABOUSEKIN
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms K Anifowoshe of Counsel, instructed by Elkettas & Associates Solicitors

For the respondent: Mr Chris Avery, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 5 November 2020 to refuse him an EEA residence card as the claimed spouse of an EEA national pursuant to Regulations 6, 7, and 18 of the

Immigration (European Economic Area) Regulations 2016 (as amended).
The appellant is a citizen of Egypt.

2. The error of law hearing today took place face to face.
3. For the reasons I now set out, there was no valid appeal before the First-tier Tribunal and the First-tier Judge did not err in so finding. It follows that there is also no valid appeal before me today.

Background

4. On 27 November 2019, the appellant went through a form of marriage at the Egyptian Consulate in London with a Romanian woman said to be exercising Treaty rights in the UK. The marriage has been registered in Romania where it is said to be valid.
5. Witness statements from the appellant, his wife and his mother-in-law describe them as living together as a happy family at [~, Hitchin], which is a business address not a residential address.
6. The appellant made an application for an EU residence card on 13 July 2020. The respondent refused on 5 November 2020.
7. In December 2020, the appellant applied for voluntary return to Egypt, as his mother had suffered a heart attack and was in intensive care. His wife expressed herself willing to return to Egypt with him, to support him and to meet her mother-in-law. His mother recovered, and they did not leave the UK.
8. The appellant's wife later returned to Romania to await, and then recover from, an operation.

Refusal letter 5 November 2020

9. In a refusal letter on 5 November 2020, the respondent noted that the Consulate is not an approved premises within the meaning of the Marriage Act 1949.
10. The parties had not been invited to a marriage interview because the validity of the marriage was not accepted. The exercise of Treaty rights was not accepted, since the only evidence regarding any employment by the sponsor was a single 3-month temporary position from June 2020 to September 2020.
11. The evidence of the parties' cohabitation together was a letter dated 28 September 2019, stating that the parties were living at [~, Hitchin], business premises belonging to a Mr J S Lidder, 'with no responsibility for bills'. That address was not a residential address and was described in the refusal letter as 'itself attached to numerous other Home Office records'.

- 12.** The appellant had provided conflicting statements as to his home address. When arrested on 18 October 2016, he said he was living at [~, Peterborough].
- 13.** As part of an unsuccessful September 2019 application to be recognised as a stateless Palestinian (not an Egyptian, as he now admits), the appellant said he had lived at [~, Hitchin] from July 2015 onwards, giving the [~, Peterborough] address as his previous address from January 2013 to July 2015.
- 14.** The November 2020 refusal letter attracted no right of appeal.
- 15.** The appellant nevertheless appealed to the First-tier Tribunal and his appeal was heard by First-tier Judge Hawden-Beal on 1 February 2022.

First-tier Tribunal decision

- 16.** The appellant sought to bring himself within Regulation 36 of the EEA Regulations, which sets out which refusals may be challenged on appeal. At [20] of the First-tier Judge's decision, she held that there was no right of appeal.
- 17.** In the alternative, the Judge found that the appellant had produced no evidence that the Egyptian Consulate was a registered religious building, a register office, or a venue approved by the local authority for the celebration of marriages, nor any evidence to demonstrate that the Egyptian Consulate fell to be treated as Egyptian soil, such that he could be held to have contracted a valid marriage in Egyptian law.
- 18.** The marriage had been successfully registered in Romania, but the Judge considered that this made no difference to the outcome, as it had not been contracted in Romania.
- 19.** The First-tier Judge found there to be no extant appeal before her.
- 20.** The appellant nevertheless sought permission to appeal to the Upper Tribunal.

Permission to appeal

- 21.** The application for permission to appeal was not timely. First-tier Judge Shaerf extended time, on the basis of a procedural error made by the appellant's representatives, who had failed to file the application for permission to appeal electronically on MyHMCTS, instead attempting to lodge by email on the last day for appealing, 24 February 2022.
- 22.** Judge Shaerf did not engage with the First-tier Judge's finding that there was no valid appeal before her. He upheld the Judge's refusal to adjourn the First-tier Tribunal hearing.

- 23.** Permission to appeal was granted on the basis that the First-tier Judge arguably erred in law in her assessment of the legal standing of the Egyptian Consulate marriage certificate and/or its registration in Romania.

Rule 24 Reply

- 24.** There was no Rule 24 Reply on behalf of the respondent.

Directions

- 25.** On 7 July 2022, Upper Tribunal Judge Rintoul directed that the core issue in this case was the validity in UK law of a marriage contracted in the Egyptian Consulate, and required the parties to address the decisions of the High Court (Family Division) in *Dukali v Lamani* [2012] EWHC 1748 Fam, the Court of Appeal in *Awuku v Secretary of State for the Home Department* [2017] EWCA Civ 178 and the Court of Justice of the European Union in *Coman and Others (Right of Union citizens to move and reside freely in the territory of the Member States - Judgment)* [2018] EUECJ C-673/16 (05 June 2018).
- 26.** The parties were to prepare and serve skeleton arguments addressing that issue, which would be determinative of the appeal.
- 27.** That is the basis on which this appeal came before the Upper Tribunal.

Skeleton arguments

- 28.** Both parties filed skeleton arguments as directed.
- 29.** For the appellant, Ms Anifowoshe addressed the validity of the marriage. She relied on the decision of the Court of Justice of the European Union in *Metock and Others (Area of Freedom, Security and Justice)* [2008] EUECJ C-127/08 (25 July 2008), arguing that the *Van Gend en Loos* principal of the primacy of EU law over national law made the decisions in *Dukali* and *Awuku* distinguishable as 'both dealing with the validity of a marriage under English law and not EU law' and thus irrelevant to the grant or refusal of an EU right of residence.
- 30.** In the alternative, Ms Anifowoshe sought to introduce a 'durable relationship' argument which had never previously been advanced. She relied on a letter from Jasbinder Singh on 28 September 2019, stating that the couple 'live in the flat behind the 85 Bar and they are not responsible for any bills' and also on Council tax bills and bank statements which had been provided.
- 31.** The appellant had provided payslips, P60s and an employer's declaration relating to his claimed spouse, confirming her address and that she was a worker. These submission, she argued, should have been considered in the alternative.

- 32.** For the respondent, Mr Chris Howells set out the effect of *Dukali*, a case concerning the validity of a marriage contracted at the Moroccan Consulate in London which would be regarded as valid and subsisting in Morocco. Mr Justice Holman at [44] had ‘reached the firm view...that the word ‘marriage’ in section 12 and Part III generally of the 1984 [Matrimonial and Family Proceedings] Act must mean, and can only mean, a marriage which is, or under English law is recognised as, a valid or at least a void marriage’.
- 33.** The decision of the Court of Appeal in *Awuku* confirmed that the formal validity of a marriage is governed by the *lex loci celebrationis*, that is to say, the law of the country where the marriage was celebrated and that therefore, the marriage relied upon in these proceedings was non-existent in national law.
- 34.** The decision of the Court of Justice in *Coman*, which took account of the *Metock* reasoning, did not alter the effect of the national judgments.

Analysis

- 35.** This appeal is entirely misconceived and is an abuse of process. The decision under challenge carries no right of appeal to the First-tier Tribunal, or to the Upper Tribunal, and the First-tier Judge did not err in law or in fact in so finding.
- 36.** The proper course, if the appellant wished to challenge a decision carrying no right of appeal, would have been to bring judicial review proceedings promptly against it. Such proceedings would now be seriously out of time.
- 37.** Even if this had been a valid appeal, it is without any arguable merit. The marriage relied upon was not valid in UK law and the appellant is therefore not a ‘spouse’ under the EEA Regulations.
- 38.** In *Metock*, the Grand Chamber of the Court of Justice held that:

“1. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

2. Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from

the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.”

All of that guidance applies to a ‘spouse’ and requires that the appellant can show that he meets the EEA definition of ‘spouse’.

39. In *Coman*, dealing with a same-sex marriage, the Court of Justice decided as follows:

“1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a *marriage lawfully concluded in the host Member State*, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex....” [*Emphasis added*]

40. The reference to a marriage ‘lawfully concluded in the host Member State’ is determinative of Ms Anifowoshe’s contention that EU law requires the Tribunal to disregard national interpretations of ‘marriage’. The appellant is not a ‘spouse’ because his marriage is not lawful in UK law.

41. I accept that *Dukali* is a case about a different provision and is of less assistance in understanding the EEA Regulations, but *Awuku* is on all fours with the present appeal and would have been dispositive, had there been any valid appeal before the First-tier Tribunal.

42. The late attempt to extend the appellant’s contentions into Regulation 8 is similarly without any arguable merit. In oral submissions, Ms Anifowoshe accepted that the application to the Secretary of State for settlement had not been advanced on the basis of a durable relationship and permission had not been granted on that basis.

43. There is no valid appeal before the Tribunal.

DECISION

44. For the foregoing reasons, my decision is as follows:

There is no valid appeal before the Upper Tribunal.

Signed [Judith AJC Gleeson](#)
2022

Date: 15 August

Upper Tribunal Judge Gleeson