



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/05153/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Determination

Promulgated

On 4 September 2014

On 5 September 2014

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS NAATEKIE CLOTTEYFIO

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr N Garrod, Counsel

(instructed by Justice and Law Solicitors)

DETERMINATION AND REASONS

1. The Appellant (the Secretary of State) appealed with permission granted on 18 July 2014 by First-tier Tribunal Judge Saffer against the determination of First-tier Tribunal Judge K F Walters allowing the Respondent's appeal seeking the issue of a residence card under regulation 7, alternatively regulation 8, of the Immigration (European Economic Area) Regulations

2006 (as amended) (“the EEA Regulations”). The determination was promulgated on 3 July 2014.

2. The Respondent is a national of Ghana, born on 27 January 1980. She claimed that she was married by proxy to an EEA national exercising free movement rights in the United Kingdom. The Respondent had no other basis of stay in the United Kingdom.
3. Permission to appeal was granted by Judge Saffer because he considered it arguable that the judge had erred by failing to apply TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC).
4. By notice under rule 24 of the Upper Tribunal Procedure Rules, in the form of a letter dated 25 August 2014, the Respondent indicated that she opposed the application for permission to appeal.
5. Mr Tufan for the Appellant submitted that the judge had manifestly failed to apply Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC) and TA and Others (above). The validity of the proxy marriage relied on depended on the home state of the EEA national. There was no finding on that central issue.
6. Mr Garrod for the Respondent relied on his skeleton argument. He submitted that Kareem and TA and Others were both wrongly decided by the Upper Tribunal. Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) showed that the burden of proof of invalidity of a marriage relied on by the spouse of an EEA national fell on the Secretary of State. Papajorgji (above) had been cited with approval elsewhere, e.g., in the High Court. Kareem had other deficiencies but even it supported the judge’s findings in the present appeal. In any event, the judge had effectively found in the Respondent’s favour on the Regulation 8(5) issue, the durable relationship.
7. The tribunal indicated at this point that it was unable to uphold the judge’s findings on the validity of the proxy marriage relied on by the Respondent. The judge had not had the benefit of TA and Others, which had clarified the need for evidence from the sponsor’s EEA state as to the recognition and status of the proxy marriage. There was an inadvertent material error of law in his approach to the issue of recognition of the marriage in question. That part of his determination would be set aside and remade. The appeal based on marriage would be dismissed.

8. As to the subsidiary or alternative claim based on Regulation 8(5), Mr Tufan submitted that there had been no adequate finding made and so that part of the appeal would have to be reheard. Mr Garrod's position was that at [27] of the determination, the judge had made it abundantly clear that, had he been asked to consider the Regulation 8(5) claim, he would have said "I am in little doubt that, given the evidence before me, I would have found in favour of the Appellant". Mr Garrod submitted that the tribunal should adopt the same approach as was taken in TA and Others and remit that part of the case to the Secretary of State so that the discretion under Regulation 17(4) could be exercised.
9. The tribunal agreed with Mr Garrod. On a fair reading of the determination, the judge had indicated what his alternative finding would have been on the durable relationship issue. The issue had been addressed in the reasons for refusal letter and thus had to be determined by the tribunal. The result of setting aside the judge's legal findings as to the validity of the proxy marriage brought into play his clear alternative finding. No rehearing was necessary.
10. The tribunal finds that the judge found that there was a durable relationship akin to marriage between the original Appellant and her EEA national sponsor, a finding which is accordingly preserved. There was no indication that regulation 17(4) had been considered by the Secretary of State, because she had denied that a durable relationship existed. The Respondent's application must accordingly be returned to the Secretary of State for that discretion to be exercised.

DECISION

There was a material error of law in part of the First-tier Tribunal's determination, which is set aside to the extent that the original Appellant's appeal under Regulation 8(5) was not finally determined. The following decision is substituted:

The original Appellant's appeal under Regulation 7 is dismissed

The original Appellant's appeal under Regulation 8(5) is allowed to the limited extent that the Secretary of State's mandatory discretion under Regulation 17(4) has not yet been exercised. The original application is accordingly returned to

the Secretary of State for Regulation 17(4) to be applied in the light of the findings in this determination.

Signed

Dated

Deputy Upper Tribunal Judge Manuell

TO THE SECRETARY OF STATE
FEE AWARD

Although the original Appellant's appeal has succeeded in part, the Appellant was responsible for the difficulties with her application to the Secretary of State. There is accordingly no fee award.

Signed

Dated

Deputy Upper Tribunal Judge Manuell