



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

Appeal Number: IA/23015/2014

THE IMMIGRATION ACTS

Heard at Field House

On 4 August 2015

Determination

Promulgated

On 14 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RICHARD BAMFO
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr P. Duffy, Specialist Appeals Team

For the Respondent: Lady Tattey, Counsel instructed by Ronik Solicitors

DECISION AND REASONS

1. The Secretary of State (“SSHD”) appeals to the Upper Tribunal (“UT”) from the decision of the First-tier Tribunal (Judge Morgan sitting at Taylor House on 21 January 2015) allowing outright the claimant’s appeal against the decision by the SSHD to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the spouse or extended family member of an EEA national exercising treaty rights here. The First-tier Tribunal (“FTT”) did not make an anonymity order, and I do

not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a Ghanaian national, and his sponsor is a German national of Ghanaian heritage. The appellant entered the UK in April 2008 on a visit visa, and overstayed. He met the sponsor in 2011, and she gave birth to a son by him in Germany on 14 December 2012.
3. SSHD gave lengthy reasons for refusing the claimant's application. The burden was on him to prove that his asserted customary marriage by proxy to the sponsor on 11 March 2012 was valid, and he had not discharged this burden. The SSHD went on to consider in the alternative whether the claimant could be considered as unmarried partner under Regulation 8(5). To assess whether their relationship was durable, she would expect to see evidence of cohabitation for at least two years. No evidence had been provided that they had resided together as a couple prior to the issue of their marriage certificate, or even that they knew each other or had met prior to the issue of the certificate. The child's birth certificate did not name the claimant as the father, and the documents provided did not show that he was cohabiting with the sponsor and the child.

The Decision of the First-tier Tribunal

4. The judge dismissed the appeal under Regulation 7 as there was no evidence of the validity of the customary marriage by proxy under German law. The judge allowed the appeal under Regulation 8(5) as he was satisfied that the couple had been living together as husband and wife for a period of over two years, and they now had a young son.

The Application for Permission to Appeal

5. The SSHD applied for permission to appeal to the Upper Tribunal, arguing that the judge had erred in law in allowing the appeal outright as she had not yet considered whether to exercise her discretion under Regulation 17(4) to issue him with a residence card.

The Grant of Permission to Appeal

6. On 16 March 2015 Judge Andrew granted the SSHD permission to appeal on the above ground.

Reasons for Finding an Error of Law

7. If the claimant had established that he was married to his sponsor, he would have been entitled without more to be issued with a residence card pursuant to Regulation 7 (it not being disputed that his sponsor was exercising treaty rights here). But as an extended family member (referred to by the shorthand "OFM" in some of the leading UT authorities) under Regulation 8(5), the claimant did not, and does not, have this automatic entitlement.

8. Regulation 17(4) provides that the SSHD *may* issue a residence card to an extended family member if two conditions are satisfied. The second condition is that, “in all the circumstances it appears to the Secretary of State appropriate to issue the residence card”. In order to exercise discretion under Regulation 17(4) the SSHD is required by Regulation 17(5) to “undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal”.
9. The SSHD refused the application on the sole ground that the claimant had not shown himself to be in a durable relationship, and so he was not eligible to be issued with a residence card as an OFM. The SSHD did not purport to exercise the discretion under Regulation 17(4) to issue a residence card, if she deemed it appropriate, to a person who had demonstrated to her satisfaction that he was an OFM.
10. So the judge could not allow the appeal outright. The most that he was entitled to do was to allow the appeal on the ground that the decision was not in accordance with the law, “leaving the matter of whether to exercise this discretion in the appellant’s favour or not to the Secretary of State”: see **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340**.

The Remaking of the Decision

11. There is no challenge by the SSHD to the judge’s primary findings of fact. So the claimant has established that he is an OFM under Regulation 8(5). He thereby meets the gateway requirement for the exercise of the discretion to issue him with a residence card under Regulation 17(4). Only the SSHD can exercise this discretion.

Conclusion

12. The decision of the FTT contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant’s appeal is allowed on the ground that the refusal to recognise him as an OFM under Regulation 8(5) was not in accordance with the law, and the claimant’s application for a residence card as an OFM is remitted to the SSHD for the exercise of her discretion under Regulation 17(4).

Anonymity

No anonymity order is made.

Signed
Deputy Upper Tribunal Judge Monson

Date