



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

Appeal

Number: IA/24311/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham**

**Decision &  
Promulgated**

**Reasons**

**On 29 January 2016**

**On 8 April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

Appellant

**MR FRANK OWUSU  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer  
For the Respondent: Ms H. Masih, Counsel instructed by Brys Immigration Consultants

**DECISION ON ERROR LAW**

1. For ease of reference I shall continue to refer to the parties as the Appellant and the Respondent as they were in the First-tier Tribunal, although it is the Secretary of State who brings this appeal to the Upper Tribunal.
2. The Appellant's appeal is against the decision of First-tier Tribunal Judge J Pacey whereby she had dismissed his appeal against the Respondent's decision to refuse a Residence Card under the Immigration (EEA) Regulations.
3. Permission to appeal was granted by First-tier Tribunal Judge J.M. Holmes noting that:
  - (a) The Respondent had considered that there was no lawful marriage or if there was then it was a marriage of convenience;
  - (b) It was arguable that the Judge either failed to apply guidance from case law or failed to give adequate reasons as to why the Appellant was a spouse as defined in the EEA Regulations;
  - (c) If the Appellant was an Extended Family Member then the Judge did not refer herself to the case law;
  - (d) Even if the requirements of Regulation 8 were made out, the Judge should not simply have allowed the appeal because in doing so neither she nor the Respondent had considered how the Regulation 17 discretion should be exercised. The grant of a Residence Card to an EFM is a two stage process and the second stage had yet to be undertaken.
4. Mr Mills said that an agreement had been reached. The First-tier Tribunal Judge had allowed the appeal based on Regulation 7. The Judge had done this with reference to **Kareem (Proxy marriages- EU Law)** [2014] UKUT 24. The significance of **Kareem** was that the evidence was insufficient on its own. The Panel had said it did not know how it applies in practice. Had the Judge properly understood **Kareem** in this case then there needed to be specific evidence from the EEA country of nationality. References to codes are never sufficient. But then the Judge allowed the appeal outright. But the discretion is to Secretary of State to do so. It should be sent back for that discretion to be applied. Mr Mills said the decision should be set aside. It should be remade and then a lawful decision would be awaited before the Secretary of State in respect of Regulation 17(4).
5. Ms Masih referred to the Rule 24 Reply. That said in summary that:
  - (a) Contrary to the grant of permission by Judge Holmes the Appellant had valid leave to remain at the time of the

application and the Reasons for Refusal Letter does not detail a poor immigration history;

- (b) There is no error of law in Judge Pacey's decision because (i) The Judge had noted that there was an expert report which confirmed the validity of the customary marriage, (ii) The Judge referred to the guidance in **Kareem** and she noted that there was no challenge by the Presenting Officer to the provisions of the Dutch Civil Code and (iii) it was open to the Judge to allow the appeal;
  - (c) Judge Pacey's findings in respect of "durable relationship" ought to be preserved because the Secretary of State had not challenged the same.
6. Ms Masih said that the Judge was entitled to make the finding that she did. She said she had no evidence that Holland would accept the marriage as a valid marriage. Ms Masih said she did not have evidence one way or the other. However the case of **TA and others (Kareem explained) Ghana** [2014] UKUT 00316 does say you need more. Ms Masih submitted that there were findings in respect of Regulation 8(5) and those findings ought to be preserved. The grounds were not challenged. The Respondent does not challenge Regulation 8(5) and the Appellant does not challenge Regulation 17(4) regarding the exercise of discretion. The grant of permission by Judge Holmes says that the Appellant is an overstayer but that is incorrect. Ms Masih said I should set aside the decision of the Judge. I should remake it and the send the matter to the Secretary of State for her to apply her discretion in respect of the durable relationship.
  7. Mr Mills in reply said that although marriage of convenience is referred to in the grant of permission it was never the Secretary of State's case that that it was such. I was invited to allow the appeal to the extent referred to.
  8. I had reserved my decision.
  9. I note the generally agreed position in respect of both parties. I also note the Judge's findings in respect of the alternative case in respect of the durable relationship. Those facts remain unchallenged and in view of the concessions made by both parties my decision is as follows.
  10. Firstly, there was a material error of law when the Judge found that there was a valid marriage according to Ghanaian Law. In view of the decision in **TA** that was the wrong decision. The parties were in agreement about this aspect. There was insufficient evidence of a valid marriage.

11. Secondly, the remaining issue is in respect of Regulation 8 of the Immigration (EEA) Regulations 2006. The Appellant seeks to contend he is an Extended Family Member because he is in a durable relationship with Ms Abrebese, a Dutch national.
12. Judge Pacey's decision at paragraphs 25 and 26 remains unchallenged and were conceded before me. The Judge found that the Appellant was indeed in a durable relationship. She noted the property documents, council tax documents, utility bills, business documents and more. The couple had been living together for much more than two years.
13. In my judgment it is clear that therefore Regulation 8(5) is clearly met in this case. The evidence of the couple having lived together for more than two years (since at least March 2013) was and is strong. The evidence of their everyday bills and general life was clearly set out and accepted by the Judge and has remained the case with the further documents submitted before me. There is no aspect which is not met.
14. I therefore conclude that Regulation 8(5) is met.
15. The matter does not end there though. The issue of a Residence Card to an Extended Family Member is a two stage process. The second stage is a matter of discretion. That discretion has not yet been considered by the Secretary of State. I allow the appeal to the extent of requiring that discretion to be applied. Namely I find that the Appellant is in a durable relationship for the purposes of Regulation 8(5). I leave the matter of whether discretion will be exercised in the Appellant's favour or not to the Secretary of State pursuant to Regulation 17(4).

### **Notice of Decision**

The Judge's decision contains a material error of law. I set it aside. I remake the decision and allow the appeal to the limited extent referred to above in respect of Regulation 8(5) of the Immigration (EEA) Regulations 2006 with discretion to be considered by the Secretary of State pursuant to Regulation 17(4).

**There is no anonymity order made.**

Signed

Date

Deputy Upper Tribunal Judge Mahmood