



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/48070/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 September 2014

Determination promulgated  
On 15 September 2014

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Millicent Opoku Mensah  
(Anonymity direction not made)

**Appellant**

and

Secretary of State for the Home Department

**Respondent**

**Representation**

For the Appellant: Mr. O. Oke of Counsel instructed by Calices Solicitors.  
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Oakley promulgated on 27 June 2014, dismissing the Appellant's appeal against the Respondent's decision dated 12 June 2013 to refuse to issue a residence card under the Immigration (European Economic Area) Regulations 2006.

**Background**

2. The Appellant is a national of Ghana born on 18 February 1979. An application for a residence card as confirmation of a right to reside in the United Kingdom was made based on a Ghanaian customary marriage by proxy between the Appellant and Mr Justice Ampofo ('the sponsor'), a Dutch national, said to have taken place in Ghana, in the absence of the parties to the marriage, on 24 November 2011.

3. The Appellant's application was refused: a Notice of Immigration Decision dated 12 June 2013 made reference to Regulations 7, 8(5) and 17(1)(a) of the Immigration (European Economic Area) Regulations 2006. The Respondent did not accept that the Appellant had produced a valid marriage certificate, was not satisfied that the Appellant had shown she was in a durable relationship with the sponsor, and was not satisfied in respect of the sponsor's identity and nationality.
4. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination. The Judge followed the decision in **Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC)** in respect of recognition of the proxy marriage; in the alternative, although the Judge was satisfied that there was a 'durable relationship' between the Appellant and the sponsor, he was not satisfied as to the sponsor's nationality and so the relationship could not avail the Appellant under the Regulations.
5. The Appellant sought permission to appeal; the grounds in support of the application for permission to appeal focused solely on the finding in respect of the sponsor's identity. Permission to appeal was granted by First-tier Tribunal Judge White on 16 July 2014 essentially on the basis that it was arguable that the Judge had given no adequate reasons in respect of the adverse assessment of the sponsor's nationality.
6. The Respondent has filed a Rule 24 response dated 25 July 2014 resisting the appeal, and also raising an issue in respect of the Judge's favourable finding in respect of 'durable relationship'.

### **Consideration**

7. As noted above the Appellant has not raised any challenge in respect of the First-tier Tribunal Judge's consideration and application of the principles set out in the case of **Kareem** to the facts of this particular appeal. At no point has any relevant material been filed in respect of the validity of the Appellant's marriage under Dutch law. The appeal is now pursued on the basis of the challenge to the assessment of the sponsor's identity, together with the favourable finding in respect of 'durable relationship'.
8. The Respondent had raised concerns about the documentation produced in support of the claim that the sponsor was a Dutch national. In particular the

identity card produced was said by the Respondent to have been reported lost or stolen. On appeal, the sponsor was unable to produce his original current passport because, he said, it had been submitted to the Ghanaian embassy in Holland in order to obtain a visa to visit Ghana. He did, however, produce a new identity card dated May 2014. Concerning the identity card the Judge said this: *“There was a new identity card that was produced dated May 2014 but the Sponsor provided an unsatisfactory explanation of how he obtained that identity card from the Dutch authorities in Amsterdam. I cannot therefore be certain that the Appellant’s Sponsor is an EEA national exercising treaty rights in the United Kingdom”* (determination at paragraph 19).

9. At the commencement of the hearing before me Mr Jarvis appropriately and frankly acknowledged that it was not possible to discern from the determination either what the sponsor’s explanation had been concerning obtaining the replacement identity card, or why it was considered by the Judge to be unsatisfactory. Mr Jarvis conceded that this deficiency of reasoning amounted to an error of law that required the issue to be reconsidered and the decision remade.
10. In this context Mr Oke indicated that the sponsor’s Dutch passport was now available, and produced it. Mr Oke directed my attention to the visa for Ghana that was endorsed in the passport with an issue date of 20 June 2014 – which it was noted was consistent with the sponsor’s explanation for not having his original passport available at the time of the appeal hearing. Mr Jarvis had sight of the passport, and indicated that he accepted it as sufficient evidence of the sponsor’s nationality.
11. As regards the issue raised in the Respondent’s Rule 24 notice in respect of durability of relationship, again very properly, Mr Jarvis directed my attention to the decision in **EG and NG (UT rule 17: withdrawal; rule 24: scope) [2013] UKUT 143** to the effect that a party cannot use a Rule 24 notice as a device to raise a challenge to a decision where permission to appeal would be required. Further, he indicated that he did not now seek to raise a cross-appeal on the Judge’s finding in respect of durability of relationship.
12. In the circumstances it was common ground between the representatives that the appeal should be allowed on the basis that the Appellant was the extended family member of a qualified person by reason of regulation 8(5) of the 2006 Regulations.

13. At the time I understood the common ground between the representatives to extend to an understanding that the Appellant was consequently entitled to a residence card. However, unfortunately, neither party drew my attention to regulation 17(4) of the 2006 Regulations, in respect of which I have only reminded myself during the course of preparing this determination.
14. Because of the unchallenged adverse decision in respect of the issue of marriage taken pursuant to **Kareem**, the Appellant cannot benefit from regulation 17(1), and as such there is not an obligation (“*must issue*”) on the Respondent to provide her with a residence card. Rather, because the Appellant is an ‘extended family member’ within the meaning of the Regulations by reason of the durable relationship, the Respondent “*may issue a residence card... if... in all the circumstances it appears to the Secretary of State appropriate*”: see regulation 17(4)(b).
15. I note that the Respondent has never turned her mind to the assessment inherent in 17(4)(b) because of the basis of the initial decision on the Appellant’s application. I also note the observations in **Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC)**: see headnote at (iii): “*Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being 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 further at paragraph 12:
- “Regulation 17(4) of the 2006 Regulations confers on the decision-maker discretion as to whether a person found to be an OFM/extended family member is to be granted a residence card. In exercising that discretion matters such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative: see **YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062** and **Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253 (IAC)**). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was allow the appeal as being not in accordance with the law leaving the matter of whether to exercise the reg 17(4) discretion in his favour to the Secretary of State: see **Yau Yak Wah [1982] Imm AR 16; MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061.**”*
16. In my judgement it follows that the appeal herein can only succeed to the extent that the matter be remitted to the Respondent for consideration of the exercise of the discretion under regulation 17(4).

17. Because I did not hear argument on this point I have given consideration to whether it would be appropriate to reconvene the hearing. However, in light of the clear guidance in **Ihemedu** in respect of the limitations of the Tribunal's jurisdiction, in my judgement there is only one possible outcome and accordingly, bearing in mind also the overriding objective inherent in the Procedure Rules, no useful purpose would be served in reconvening the hearing.
  
18. Accordingly, in all of the circumstances I allow the Appellant's appeal on the basis that the Respondent's decision was not in accordance with the law, and on the basis that the case is remitted to the Respondent to undertake the assessment and exercise the discretion inherent in regulation 17(4)(b) on the basis of the favourable findings of fact made by the First-tier Tribunal Judge and those matters indicated above.

### **Decision**

19. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.
  
20. I remake the decision in the appeal. The Respondent's decision was not in accordance with the law: the appeal is allowed to the extent that the case is remitted to the Respondent to consider regulation 17(4)(b).

**Deputy Judge of the Upper Tribunal I. A. Lewis      11 September 2014**