**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: EA/03413/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 January 2018** | **On 9 January 2018** |

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**MOJISOLA ABIOLA DESIYE**
(ANONYMITY ORDER NOT MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms O Ogundipe of Fountain Gate Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a Nigerian national born on 22 March 1981. She entered the UK as a student in September 2011. Her leave was curtailed to expire on 6 July 2015 when the college lost its licence. The appellant then overstayed and in October 2015 made an application for a residence card under the EEA Regulations as the unmarried partner of a dual Nigeria and Irish national. That application was refused under reg. 8(5) on 11 March 2016 and the appellant now challenges the determination of First-tier Tribunal

Judge Devittie promulgated on 5 October 2017 dismissing her appeal against the respondent's decision.

2. The respondent considered that there was no evidence to show when cohabitation commenced but observed that the earliest evidence of the relationship was a proxy marriage certificate dated 23 March 2015. She noted that the only other evidence was in the form of bank statements which covered a four-month period between June and September 2015. She was, therefore, not satisfied that the appellant had been in a durable relationship akin to marriage which had subsisted for at least two years with evidence of cohabitation.

3. When the matter came before the First-tier Tribunal, the appellant appears to have changed the basis of her case and argued through her representatives that she was entitled to a residence card as a family member because she was legally married. She submitted various documents confirming that a proxy marriage had taken place. The judge observed that these documents had not been placed before the respondent who had not, therefore, had an opportunity to check their authenticity. He stated that in the circumstances he was not in a position to consider the merits of the claim that the appellant and sponsor were married. He then made various observations about the documents which he stated would have impacted upon the weight he would have given to them had he considered them. He proceeded to consider whether the parties were in a genuine and durable relationship but concluded there was a paucity of evidence to establish that.

4. Permission was granted by Judge Murray on 26 October 2017 on the basis that the judge had arguably been procedurally unfair as he had not put the issue of authenticity to the appellant at the hearing. The matter then came before me on 4 January 2018. The appellant attended the hearing. The sponsor did not.

**Submissions**

5. Ms Ogundipe submitted that the appellant's marriage certificate had been submitted to the respondent and that the judge had therefore been wrong to maintain that it had been submitted for the first time shortly before the hearing and that the respondent had been wrong to state in her Rule 24 response that she had not seen it previously. She submitted that it was plain from the decision letter that the respondent had seen the certificate, that the supporting documents were part of the certificate and so must have been sent with the application and that no issue about authenticity had been raised before. She argued that the affidavits of support copied in the

appellant's bundle would all have been sent with the application as they formed part of the marriage certificate.

6. Mr Avery responded. He pointed out that the application had been made as an unmarried partner as was plain from the application form. The marriage certificate may have been submitted as evidence of a subsisting relationship but there was no evidence to support the submission that the additional documents were also submitted and the grounds did not maintain they were. Nor was there anything on the Home Office file to show that they had been submitted with the application. He submitted that for the appeal hearing the appellant had changed the basis of her appeal and argued that she was legally married. He submitted that given the fact that the entire basis of the appeal had changed, it was incumbent on the appellant to deal with the fresh evidence and to resolve any deficiencies within the documents such as those identified by the judge.

7. Mr Avery submitted that there was no indication of whether the case referred to in the grounds was reported; no name was given for it. He repeated that the grounds did not assert that the additional documents had been submitted to the respondent or that the judge had been wrong to say that they had not been. There was no challenge to that finding or to the finding on the durability of the relationship and there was no error or law.

8. Ms Ogundipe submitted that the judge had failed to attach weight to the proxy marriage. She submitted that he had no right to assert the documents were not authentic; only the issuing authorities could determine that. The statutory declarations were issued after the marriage which is why they did not bear the same date. She submitted that findings had to be made on evidence and not just by looking at documents. His decision was based on that assertion that the documents had not been shown to be authentic and as such was wrong. The appellant and sponsor were still living together. The marriage was genuine. Had the appellant been represented by the present solicitors they would not have made such an application. She may have been wrongly advised. The appellant and her husband had been together over two years. The husband was at work and so had not attended the hearing.

9. Ms Ogundipe referred me to a Rule 15(2)(a) application made on 21 December 2017 which did not appear on my file but which was copied in the appellant's bundle. She submitted that there was evidence in the form of a witness statement from the appellant's mother and a tenancy agreement to show cohabitation.

10. Mr Avery submitted that even if the fresh evidence was admitted, it did not assist as it had not been before the judge. Secondly, the documents now adduced went to the durability of the relationship but that was an issue not pursued in the grounds.

11. Ms Ogundipe argued that the court could admit documents even if they had not been before the decision maker if they would assist in the determination of the appeal. She submitted there had been no adverse finding as to the claimed relationship or about whether the appellant and sponsor were together.

12. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

## Discussion and Conclusions

13. I have considered the submissions and the evidence with care. I deal first of all with the application to admit further evidence under rule 15 (2)(a) of the Upper Tribunal Procedure Rules. Although this had not made it to the Tribunal file, it was included in the bundle of documents submitted by Ms Ogundipe at the commencement of the hearing. The evidence the appellant seeks to adduce consists of a witness statement from the appellant's mother, a copy of the mother's tenancy agreement dated 15 June 2009 and a copy of a tenancy agreement in the name of the sponsor and the sponsor dated 25 November 2017. The application contains no explanation for why the documents from the appellant's mother could not have been provided for the hearing or why they were not sent to the respondent with the application. I note that the initial hearing listed for August 2017 was notified to the appellant in March 2017; it was then adjourned at the request of her sponsor for one month. There was ample opportunity to gather the evidence for the appeal. The more recent document post-dates the appeal hearing. Despite these difficulties, there having been no objection raised by Mr Avery who had the opportunity to make submissions on them, I admit the evidence. I shall deal later with whether they assist the appellant.

14. I now turn to the grounds and the submissions made. The application to the respondent was for a residence card as an extended family member and not as a spouse. That is plain from the application form which is contained in the respondent's bundle and on which the appellant maintains that she is *"not yet married"* (possibly she means no civil marriage has taken place) and from the accompanying letter from her representatives dated 1 October 2015. Ms Ogundipe submitted that her firm of solicitors would not have made such an application and she suggested that the appellant acted on advice given to her by her previous representatives. I have

no evidence of the circumstances in which the application was made. There is no evidence from the appellant about this and I am, therefore, not prepared to accept Ms Ogundipe's submissions on this point. I have seen no evidence of any complaint made by the appellant against her previous representatives and indeed she seemed content to instruct them to represent her at the hearing and to make an application for permission to appeal. I, therefore, proceed on the basis that it was her decision to apply as an unmarried partner. I note that both she and the sponsor signed the application form and confirmed the contents to be true and accurate. The respondent considered the application on that basis and appeal was lodged on that basis.

15. The problem arose at the hearing. On 24 July 2017, a bundle of documents was received by the First-tier Tribunal. The bundle contained a witness statement from the appellant dated 17 July 2017 maintaining that she was married to the sponsor and should be issued a residence card as a spouse. There were also three statutory declarations sworn before a court in Ibadan on 23 March 2015, three further copies of the same documents certified on 19 June 2017 as being true copies and a letter / statement dated 19 June 2017 from the registrar who oversaw the marriage on 21 March 2015. It is the appellant's case that these documents were sent to the respondent with her EEA application. That was emphatically confirmed by Ms Ogundipe in her submissions before me although she was unable to point to any evidence to support that.

16. The judge noted that the appellant's bundle contained these documents and he then said: *"It seems to be the case therefore that the respondent has not had the opportunity to consider the authenticity of the documents submitted in the appeal bundle to demonstrate that a lawful proxy marriage has taken place…I consider that this is a decision to be made in the first instance by the respondent upon consideration of all the relevant evidence. It is clear from the amended grounds of appeal that even at that stage the documents now relied upon for the proxy marriage were not placed before the respondent"* (at 9). I note that the judge refers to documents from Ghana at paragraphs 8 and 9 but this is plainly a typographical error and does not impact upon the outcome of the appeal. I note that the representatives themselves maintain that error in paragraph 5 of ground 1.

17. The appellant's grounds and her representative's submissions take issue with those comments and essentially argue that as the respondent had not raised the issue of authenticity, the judge had no authority to do so and that he erred in dismissing the appeal on the basis that the proxy marriage certificate raised serious questions as to authenticity. It was also argued that these matters should have been put to the appellant at the hearing. Issue was also taken with

the observations the judge made about the documents themselves and it was argued that the marriage certificate was not given due weight as evidence of a committed relationship.

18. I take the complaint about the authenticity of the documents first; this was the appellant's main argument both in her grounds and at the hearing before me. Tied in with this was the question of whether the documents had been included with the EEA application form completed on 29 September 2015.

19. I have noted the submission that the documents would have been sent with the application form as they formed part and parcel of the marriage certificate but there is no evidence to support that contention; indeed, the evidence points in the opposite direction. First, the letter from the appellant's representatives accompanying the application form lists all the documents sent, and I accept that the marriage certificate itself was included; but the sworn statements, registrar's letter and certified copies are not mentioned. Secondly, the documents received and considered by the respondent are listed in her decision letter and once again, there is no mention of these additional documents. Third, had they been submitted to the respondent, I consider they would have been reproduced in the respondent's appeals bundle as have all the other documents listed in the application form. Fourthly, and most significantly, they could not have all been sent with the application because that was made in 2015 and at least four of these documents post-date that. Whilst Ms Ogundipe forcefully submitted that the later documents had different dates to the marriage certificate because they were prepared subsequently, she apparently completely overlooked the fact that four of the documents are dated 19 June 2017 (I accept that the judge wrongly cited a date of 17 June 2017 at paragraph 10 of his determination but nothing turns on that). It would not have been possible for them to have been served with the application form two years previously and, indeed, if they had been, that would certainly give rise to serious issues about their reliability. I find, therefore, that the judge was entitled to state that the respondent had not seen the documents supporting the marriage certificate prior to receiving the bundle for the hearing before the First-tier Tribunal.

20. Ms Ogundipe also argued that the respondent would not have issued a "Certificate of Application" (confirmation of the EEA application) had all the documents not been submitted. I fail to see any merit in that submission. Given that the application was made as an unmarried partner, the issue of the validity of a proxy marriage was not an issue so it mattered not whether it was submitted or not. In any event, I have already explained above why I do not accept that all the documents were sent to the respondent.

21. I do not read the respondent's Rule 24 response as Ms Ogundipe did. The observation that *"the First-tier Tribunal took account of the fact that the appellant had provided the documents in relation to the proxy marriage with the appeal hearing bundle"* is simply a statement of fact and in any event even it implied the respondent had not seen the documents previously, that is what I have found. There was no error of law in the judge so finding.

22. The next part of the complaint turns on the judge's view of the documents. In fact, what he stated at paragraph 9 was not that he did not find the documents to be authentic but that the respondent had not had an opportunity to consider that for herself. It was argued for the appellant that the respondent had not raised any issue with the authenticity of these documents but if she did not have them before her, it is difficult to see how she could have done so. The emphasis placed on this comment is unwarranted.

23. At paragraph 10 the judge states that *"it would not be competent for me to consider the merits of this appeal on the basis that the parties are in a proxy marriage"*. Given that the application was on the basis that there had been no marriage and that the appellant was seeking a residence card as an unmarried partner, that is a view he was entitled to take. Had the appellant wished to change the basis of her application, it was open to her to make the appropriate application to the respondent with all the relevant documentary evidence. Indeed, that course of action is still open to her.

24. What the judge adds in paragraph 10 is essentially an "aside". He sets out his observations on the documents, pointing out valid concerns which the appellant may wish to engage with in any further application she chooses to make but his decision was *not* based on these observations. Indeed, he had just made it plain that he was not prepared to determine the issue of the legality of marriage. I find that his comments have been taken out of context, given far more emphasis than they merit and have no bearing at all on the issue which he did base his decision – the durability of the relationship.

25. The grounds have little to say about his conclusions on that matter. It is only maintained that he should have given weight to the certificate of proxy marriage and should have viewed that as a commitment to the relationship. Whilst that may have lent some weight to the evidence had there been anything substantial to show cohabitation, regrettably as the judge found, there was a paucity of evidence to support the claimed relationship. The respondent had been provided with bank statements which covered just a four-month period. The evidence before the judge was not a lot better. For the sponsor, there is just a single payslip for September 2015, one for May 2017, a letter of employment from September 2015 which provides no address, one P60 for April 2017 and bank

statements for April – July 2017, April 2016 October 2015 and December 2015. For the appellant, there are two P60s dated April 2017, bank statements from mid June - mid August 2015, one week in September 2015 and a letter from Barclaycard from April 2017. There are four undated photographs, three of which were taken on the same day. There are no supporting statements from friends. There is no evidence that they were both in Nigeria in 2014 when they claimed to have met. Given that the appellant claims to have lived at that address even during her student days, and to have spent over two years there with her partner, the judge was entitled to take the view that more evidence of cohabitation was required. The appellant has sought to adduce a statement from her mother to support the claim of cohabitation. No explanation is provided for why that evidence could not have been placed before the judge or why her mother could not attend the hearing. Only the mother is named as tenant on the tenancy agreement. There were no witnesses to the signatures on that document. There is no evidence from landlord that permission given for further tenants to live there or of who those tenants are. Further, when the appellant completed her application form and was asked to list relatives in the UK, she only referred to her partner and not to her mother (on p. 84 of 91).

26. The grounds complain that the judge should have found that the proxy marriage certificate was evidence of a committed relationship but a certificate of itself does not demonstrate a durable relationship. It certainly cannot show that a relationship is subsisting. The judge noted inconsistencies in the evidence and noted the limited documentary evidence of cohabitation. Taking account of all the circumstances and what he rightly described as *"a paucity of evidence",* he was entitled to find that the appellant had failed to establish a durable relationship. Given that finding, Ms Ogundipe is wrong to maintain that no adverse findings were made on the relationship.

27. In conclusion, therefore, I find that the judge did not make any errors of law which necessitate the setting aside of his decision. As mentioned earlier, it is open to the appellant to make a fresh application on the basis of her marriage should she wish to do so, to gather together meaningful documentary evidence in support of it and to resolve any obvious deficiencies in the documentary evidence submitted to the Tribunal.

28. **Decision**

29. The First-tier Tribunal did not make any errors of law. The decision to dismiss the appeal is upheld.

30. **Anonymity**

31. I was not asked to make an anonymity order and in any event see no reason to do so.

Signed

Upper Tribunal Judge

Date: 5 January 2018