



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/06256/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 18 June 2019

**Decision and Reasons
Promulgated**

On 16 July 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

FATOU DIENG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Swain, Freedom Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 10 September 2018 to refuse to issue a residence card confirming a right of residence as the family member of an EEA national exercising Treaty rights in the UK.
2. The application made by the appellant's solicitor on 11 May 2019 included a summary of the appellant's immigration history and explanations as to why certain documents, including a renewed French passport for her son and her own Senegalese passport, were not available. The application in its original form was for a residence card as the family member of an EEA national as the spouse but the representations also included, in the alternative, a request for the appellant's derived right of residence as the primary carer of a French citizen to be recognised.

3. The respondent refused the application solely with reference to regulation 7 of The Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations 2016”) because, although she had provided a marriage certificate from Senegal to indicate that a proxy marriage took place on 17 August 2017, she failed to provide any other evidence to confirm that the marriage was performed and properly registered so as to satisfy the requirements of the relevant laws in Senegal.
4. First-tier Tribunal Judge Gribble (“the judge”) dismissed the appeal in a decision dated 26 April 2019. She found the appellant, who she had spoken to in a previous appeal and found to be credible, was still a credible witness. She noted the evidence produced by the appellant and the oral evidence that she gave at the hearing explaining how she had attempted to verify the documents relating to her most recent marriage with the Senegalese Embassy.
5. When she came to her findings, which began at [29], the judge reminded herself correctly that the appellant was only required to prove her case on the balance of probabilities. She found the appellant to be a credible witness and noted that she previously found her to be “an entirely credible witness who provided reliable documents to the tribunal in 2017. I have no reason to doubt that position remains.” She went on to say “I have no hesitation in accepting what she said about her relationship, the marriage and her current situation” [29].
6. However when going on to consider whether there was evidence to show that a valid marriage took place by proxy according to Senegalese law the judge made the following findings:
 - “31. There can be little doubt that proxy marriages do occur in Senegal. The background evidence is clear about this as provided in the Senegal Family Code (AB page 51) and I have already noted I have no reason to doubt any of the documents provided to me by Mrs Dieng. The problem I have is that those documents say that such a marriage is valid only if the requirements of Articles 126 and 127 ‘have been previously respected’.
 32. In this case not only do I not have any evidence of what they are, I have no evidence that they have been respected. It may be they are trivial and relate to identification and/or residence; equally it may be that they are much more complex but it is for Mrs Dieng to show on balance that all of the requirements have been met. So whilst I accept her oral and written evidence about the wedding and marriage I cannot on balance be satisfied that whatever **additional** requirements set out in the code have been met. I stress that it may be that she meets these requirements but without a translated copy of what they are I cannot find that she meets the requirements as per **Awuku**.
 33. In terms of being in a durable relationship, I have no hesitation in finding that she and Mr Ndiaye are in a relationship and live together as evidenced by the documents and photographs they have provided; although it has not lasted for two years as the couple did not meet and become engaged until June/July 2017. However Regulation 2 and 18 do not give appeal rights against refusal of an application, which in any event has not been made.

...

35. In terms of the ground of appeal that she has a derivative right given [the child's] status, Mrs Dieng has not provided a valid passport to form the basis of such an application so it could not succeed in any event, failing on the first limb requirement. A decision following such an application (had it been made) is an EEA decision however Regulation 36(5) deals with derivative right applications and states that a person who claims to have such a right may not appeal under the Regulations unless they produce a valid national ID card issued by an EEA State or a valid passport and either a family permit or other documents showing that they meet the criteria.
36. My previous findings in respect of [the child] stand and as I have emphasised there is no issue at all with Mrs Dieng's credibility. But she has not produced a valid passport so she cannot succeed on the first limb and whilst she would seem to meet the other requirements, having a valid passport is a prerequisite for obtaining a residence card on this basis."

Decision and reasons

7. The appellant appealed on three grounds. The first being that the judge failed to adequately tackle the evidence that was before her. The second ground related to an argument regarding procedural unfairness in that the judge did not point out at the hearing that she would find that Articles 126 and 127 of the Senegal Family Code were of such crucial importance. The third related to her findings regarding derived rights of residence.
8. After discussion at the hearing it seemed quite clear that second ground could not succeed given that Mr Swain accepted there was no evidence relating to Articles 126 and 127 before the judge in any event. The only argument that was likely to succeed was that the judge failed to assess the evidence before her and thereby failed to give adequate reasons. In relation to the first ground I am satisfied that there was evidence which the judge failed to consider. The judge failed to conduct any assessment as to whether the documents that were before her showed, at least to the balance of probabilities, that a valid marriage took place by proxy. Whilst it would have been helpful for the judge to have copies of Articles 126 and 127 of the Senegalese Family Code, that was not the only aspect of the evidence which required evaluation. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error of law.
9. I take into account the fact that the appellant was found to be an entirely credible witness who produced reliable evidence in the past. There is no suggestion that the documents are false or unreliable. The appellant produced several documents relating to the marriage. The exact nature of some of those documents is a little unclear. The first document outlines the details of the marriage and provides extracts from the Senegalese Family Code referring to the fact that details of the family would be logged as evidence and would deem to be properly registered if they were inserted into the family logbook. It is unclear whether the document translated at [pg.55-60] is in fact a translated copy of the family book but nevertheless it was a document confirming the details of the marriage and it appeared to be signed by the local registrar.

10. There was another document described in the translation as a full copy of the marriage entry. That document outlined the details of the marriage, confirmed that a dowry had been paid and gave the details of witnesses. Again, the document appears to show registration of the marriage with the relevant registrar. Another document at [pg.79] of the appellant's bundle with a translation at [pg.77] stated that it was a registered marriage certificate. Again this was signed by the local civil registrar and is dated 21 September 2018. That document confirmed that the marriage was contracted by custom on 17 April 2018 and the marriage was registered on 21 September 2018. On the face of it this document appears to show that a marriage contracted by proxy (a customary marriage) was registered with the local registrar.
11. Whilst some of the finer details of Senegalese family law are not quite explained by the evidence, I bear in mind that the appellant does not need to prove her case with certainty. I am satisfied that the evidence before the First-tier Tribunal was sufficient to show that it was at least more likely than not that a proxy marriage was properly registered with the relevant authorities according to Senegalese law, especially given the judge accepted that the appellant is an entirely credible witness and there was evidence to show that proxy marriages are permitted in that country. For these reasons, I am satisfied that there is enough evidence to show, at least to the balance of probabilities, that the appellant contracted a valid marriage with an EU national which was recognised by Senegalese law. She is a 'family member' under regulation 7 of the EEA Regulations 2016.
12. In my assessment the judge wrongly concluded that the appellant could not succeed under regulation 8 because she did not have a right of appeal as an 'extended family member'. Once the appeal was instituted against an appealable 'EEA decision' the ground contained in paragraph 1 of Schedule 2 of the EEA Regulations 2016 is sufficiently wide to include consideration of any number of relevant matters relating to rights under European law and could only be restricted by the scope of section 85(5) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002). The judge erred in failing to consider whether it was necessary to seek the respondent's consent to determine whether the appellant was an 'extended family member' as a 'new matter': also see *Oksuzoglu (EEA appeal - "new matter")* [2018] UKUT 00385.
13. Even if I am wrong in finding that the evidence relating to the proxy marriage in Senegal is sufficient to show that the appellant is a 'family member' for the purpose of regulation 7, in remaking the decision, Mr Tufan gave consent for the issue of the durable relationship under regulation 8 to be considered as a 'new matter'. The consequence of the judge's clear finding at [33], that the appellant is in a durable relationship with an EEA national, is that the appeal should, in the alternative, be allowed with reference to regulation 8 of the EEA Regulations 2016.
14. The third point argued in the grounds becomes immaterial. Whilst it is at least arguable that the appellant also has rights under European law to remain on the basis of her relationship with a European national child it is


not necessary to determine the matter in light of the findings I have already made in relation to regulations 7 and 8 of the EEA Regulations 2016.

15. I conclude that the First-tier Tribunal decision involved the making of errors of law. The decision is set aside and remade. The respondent's decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on EU law grounds

Signed 
Upper Tribunal Judge Canavan

Date 11 July 2019