



IAC-AH-SC-V1

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

Appeal Number: IA/00190/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7th November 2014**

**Determination Promulgated
On 14th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant

and

**DORA AMOH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Claimant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Miss A Darko of BWF Solicitors

DETERMINATION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Cockrill (the judge) promulgated on 9th July 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female citizen of Ghana born 27th August 1967 who in October 2013 applied for a residence card as the spouse of an EEA national, that being her husband King Douglas Antwi (the Sponsor).
4. The application was made on the basis that the Claimant and Sponsor had undergone a proxy marriage on 17th November 2012. This had taken place in Ghana. The Sponsor although a citizen of the Netherlands, is originally from Ghana. Both the Sponsor and Claimant remained in the United Kingdom but were represented at the proxy marriage by their family members.
5. The application was refused on 11th December 2013. The Secretary of State did not accept that the proxy marriage was valid and therefore did not accept that the Claimant was the spouse of an EEA citizen as required by regulation 7 of The Immigration (European Economic Area) Regulations 2006 (the 2006 regulations).
6. The Secretary of State went on to consider whether the Claimant and Sponsor were in a durable relationship, and whether the Claimant was therefore an extended family member pursuant to regulation 8(5) of the 2006 regulations. It was noted that no evidence had been submitted to prove that the Claimant and Sponsor resided together as a couple at the same address prior to the date of their customary marriage certificate, and had provided no evidence that they knew each other or had met prior to the date of that certificate being issued. The Secretary of State decided that insufficient evidence had been submitted to prove that the couple were in a durable relationship and therefore the application was also refused with reference to regulation 8(5) of the 2006 regulations.
7. In relation to Article 8, and the right to a family and private life, the Secretary of State noted that the Claimant had not made an application under either Appendix FM or paragraph 276ADE of the Immigration Rules and contended that if the Claimant wished Article 8 to be considered, then an application would have to be made, and as no application had been made Article 8 was not considered.
8. The Claimant appealed to the First-tier Tribunal against the decision that the proxy marriage was not a valid marriage. The Claimant did not appeal on any other ground.
9. The appeal was heard by the judge on 1st July 2014. The judge found that the proxy marriage was valid, and therefore the Claimant was the spouse of an EEA citizen and the appeal was allowed on that basis.
10. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had misapplied Kareem (Proxy marriages - EU law) [2014] UKUT 0024 (IAC). It was contended that the judge should have examined the validity of the marriage in accordance with the laws of the member state from which the union citizen obtains nationality. In this appeal that would have meant considering Dutch law. It was contended that the judge did not follow this approach, and had therefore erred in law.

11. Permission to appeal was granted by Judge of the First-tier Tribunal White and I set out below paragraphs 2 and 3 of the grant of permission;
 - “2. Having had regard to the grounds for permission to appeal and the determination, I am satisfied that in reaching his decision the judge arguably made an error of law (at paragraph 12) by failing to engage with whether the marriage was recognised under the law of the Sponsor’s own country (Netherlands) – see Kareem (Proxy marriages – EU law) [2014] UKUT 0024, and TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC).
 3. Accordingly I am satisfied that the grounds and determination disclose an arguable error of law.”
12. Following the grant of permission the Claimant lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the judge had correctly applied Kareem in paragraph 12 of the determination, and in paragraph 14 had found that the appellant had “done all she reasonably and properly could to produce material to show that her marriage would be properly recognised as a valid one in Holland.”
13. The rule 24 response also made reference to the Claimant seeking permission to cross appeal “as the Secretary of State has not discharged the burden of proof on the issue of durable relationship in her decision.”
14. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Error of Law

15. Mr Melvin relied upon the grounds contained within the application for permission to appeal and submitted that the judge had not taken into account the principles in Kareem and TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC). Mr Melvin submitted that because the judge had not properly considered whether a proxy marriage would be recognised in the Netherlands, the judge had erred in law and the decision must be set aside.
16. I then heard submissions from Miss Darko who relied upon the rule 24 response, and pointed out that in paragraph 14 the judge had stated that the Appellant had done all that she could to show that the marriage would be properly recognised as valid under Dutch law.
17. I was asked to note that in the supplementary bundle before the First-tier Tribunal, there was at L1 a letter from the Dutch Embassy in London dated 13th March 2014, and at L2 a letter from a Dutch lawyer dated 28th February 2014 which Miss Darko submitted showed that the marriage would be recognised under Dutch law.

18. Miss Darko explained that the reference in the rule 24 response to durable relationship, was because it was contended that the judge had erred in law in not making a finding regarding durable relationship. Miss Darko accepted that this point had not been raised as a Ground of Appeal before the First-tier Tribunal, and was not referred to in the skeleton argument produced to the First-tier Tribunal, and accepted that the Claimant in paragraph 10 of her witness statement and the Sponsor in paragraph 12 of his witness statement had both stated that they are not in a durable relationship.
19. I did not agree that the judge had erred in not making a finding regarding durable relationship, as in my view it was clear that this had never been raised as a Ground of Appeal. The issue before me related to the contention by the Secretary of State that the judge had erred in not considering whether the proxy marriage was valid under Dutch law.
20. I decided that the judge had materially erred in law and that the decision of the First-tier Tribunal must be set aside. My reasons for this conclusion are that legal guidance on this issue has been given by the Upper Tribunal in both Kareem and TA. Although TA was promulgated on 18th June 2014, I do not believe that it was published until 14th July 2014, and therefore was not before the First-tier Tribunal. This would explain why there was no reference in the determination to TA.
21. TA clarifies what the Upper Tribunal decided in Kareem. I set out below, the headnote in TA, and also paragraph 20;

Following the decision in Kareem (proxy marriages - EU law) [2014] UKUT 24, the determination of whether there is a marital relationship for the purposes of the Immigration (EEA) Regulations 2006 must always be examined in accordance with the laws of the Member State from which the Union citizen obtains nationality.

20. Given that which I set out above, it is difficult to see how the Upper Tribunal in Kareem could have been any clearer in its conclusion that when consideration is being given to whether an applicant has undertaken a valid marriage for the purposes of the 2006 Regulations, such consideration has to be assessed by reference to the laws of the legal system of the nationality of the relevant Union citizen. Mr Akohene's submissions to the contrary are entirely misconceived and are born out of a failure to read the determination in Kareem as a whole.
22. It was submitted on behalf of the Secretary of State, to the First-tier Tribunal, that the issue of whether the proxy marriage was valid, had to be assessed with reference to Dutch law. The judge rejected this proposition stating, inter alia, in paragraph 12;

"Quite properly and helpfully, my attention was drawn to the decision in Kareem and the stance of the Respondent was that I should really identify whether or not, under Dutch law, which is of course the relevant EEA national's qualifying person's law in this case, would say that the marriage was contracted according to Dutch law. I do not in fact accept that that is the right argument in the circumstances of this case."
23. In rejecting that submission the judge erred in law. I do not accept Miss Darko's argument that the error is not material because the judge in paragraph 14 made a

reference to the Claimant doing all that she could to produce material to show that her marriage would be properly recognised as valid in the Netherlands.

24. I accept that the Claimant had supplied a letter from the Dutch Embassy in London dated 13th March 2014, and a letter from a Dutch lawyer dated 28th February 2014, but the judge did not specifically refer to that evidence. There was no analysis of that evidence, and no adequate reason given as to why that evidence proved that the Appellant's proxy marriage would be recognised as valid in the Netherlands.
25. For the above reasons I set aside the decision of the First-tier Tribunal with no findings preserved.

Re-Making the Decision

26. I indicated that I did not, having considered the Senior President's Practice Statement 7.2, consider it appropriate to remit this appeal to the First-tier Tribunal to be determined afresh. Neither representative sought to persuade me otherwise.
27. Mr Melvin submitted that it would be appropriate for the decision to be remade by the Upper Tribunal without a further adjournment, taking into account the directions that had been made to the parties, that they should prepare for the Upper Tribunal hearing, on the basis that if the First-tier Tribunal determination was set aside, the Upper Tribunal could remake the decision at the hearing.
28. Miss Darko requested that the hearing be adjourned to enable the Claimant to submit further evidence in order to prove that her marriage would be recognised in the Netherlands. Miss Darko was unable to explain why no further evidence had been submitted to the Upper Tribunal, in accordance with the directions that had been issued before this hearing.
29. I decided that the directions were clear, and that it would be appropriate, fair, and in the interests of justice to proceed and dispose of this appeal without a further adjournment, taking into account that the application for a residence card had been made in excess of twelve months previously. There was no indication given of what further evidence might be submitted in order to prove the validity of the marriage, and in the circumstances, I found that the appeal should proceed without a further adjournment.
30. No further oral evidence was called. I had before me, all the documentary evidence that was before the First-tier Tribunal. This included the Secretary of State's bundle, the Claimant's initial bundle with Annexes A - D, and a supplementary bundle with Annexes E - L.
31. The issue before me, was the same issue that had been before the First-tier Tribunal, which was whether sufficient evidence had been submitted to prove that the proxy marriage would be recognised under Dutch law.

The Secretary of State's Submissions

32. Mr Melvin submitted that there was insufficient evidence to show that the marriage would be accepted under Dutch law. The letters from the Dutch Embassy, and the Dutch lawyer did not discharge the burden of proof.

The Claimant's Submissions

33. Miss Darko submitted that there was sufficient evidence to show that the marriage would be recognised in the Netherlands. I was asked to note that the Upper Tribunal in Kareem indicated in paragraph 25 that they were unsure whether they were considering the correct version of the Dutch Civil Code, but the letter from the Dutch Embassy at L1, confirmed that the correct Articles of the Dutch Civil Code were 10.31 to 10.34 which were in fact the Articles considered by the Upper Tribunal in Kareem. Miss Darko placed reliance upon Article 10.31(4) which states that a marriage is presumed to be valid if a marriage certificate has been issued by a competent authority, and submitted that in this appeal, evidence had been presented to show the marriage certificate had been issued by a competent authority, and therefore the marriage would be recognised.
34. I was referred to the letter dated 28th February 2014 from the Dutch lawyer, and in particular paragraph 3 in which it was stated in summary;

“A valid foreign proxy marriage is (probably) not against our public order, so the proxy part will not be a stay in the way for recognition. Almost all valid foreign marriages are recognised in the Netherlands as long as they are not bigamists.”

35. Miss Darko therefore submitted that the appeal should be allowed on the basis that the proxy marriage would be recognised as valid under Dutch law, and therefore the appellant has proved that she is the spouse of an EEA citizen and entitled to a residence card under regulation 7 of the 2006 regulations.

My Conclusions and Reasons

36. I remind myself that the burden of proof is on the Claimant, and the standard of proof is a balance of probability. I have considered all the documentary evidence placed before me even if I do not refer to a particular piece of evidence, and I have taken into account the submissions of both representatives.
37. I have followed the guidance given in the decisions Kareem, and TA. The letter from the Dutch Embassy makes it clear that the Upper Tribunal were considering the correct version of the Dutch Civil Code in Kareem and I set out below paragraphs 27 - 30 of Kareem;

“27. Article 10.31 is headed, *Recognition of foreign marriages*. It provides:
Article 10:31

- (1) A marriage that is contracted outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State is recognised in the Netherlands as a valid marriage.

...

- (3) For the purposes of paragraph 1 and 2, the word 'law' includes rules of private international law.
- (4) A marriage is presumed to be valid if a marriage certificate has been issued by a competent authority.

28. The following article contains a restriction on this general rule:

Article 10:32

Irrespective of what is provided for in Article 10:31, a marriage that is contracted outside the Netherlands shall not be recognised in the Netherlands where such recognition obviously would be incompatible with Dutch public order.

29. The passages we cite are silent on whether a proxy or customary marriage would be recognised in the Netherlands or whether such a marriage would be incompatible with Dutch public order. We do recognise, however, that article 1:66 permits marriage by representation in certain circumstances, which would suggest that marriage in the absence of one of the parties would not be contrary to Dutch public order. However, as we have indicated, we have not received evidence on these complex issues and have been given no help on how Dutch law might apply."

38. The evidence submitted in this appeal is firstly the letter from the Dutch Embassy in London, which Miss Darko confirmed was a reply to BWF Solicitors in relation to a general question about the recognition of Ghanaian customary marriages by proxy under Dutch law, and was not specific to this appeal. The conclusion in the letter is as follows;

"The Dutch Embassy will only draw conclusions on the recognition of a marriage in the context of an application such as a Dutch passport application. It is therefore not possible to comment on the documentary evidence required."

39. I do not find that this letter supports the appellant's contention that her marriage would be recognised under Dutch law.

40. Turning then to the letter from the Dutch lawyer dated 28th February 2014, if this was intended to be put forward as expert evidence, then it does not comply with Practice Direction 10.9. This sets out (a) to (j) what an expert's report must contain. An expert's report must also be verified by a statement of truth which is not present in this case.

41. Again, Miss Darko confirmed that this letter was written in response to a general question about proxy Ghanaian marriages being recognised in the Netherlands, and therefore the letter is not specific to this appeal. It is stated in the third paragraph of the letter, *inter alia*;

"A valid foreign proxy marriage is (probably) not against our public order, so the proxy part will not be a stay in the way for recognition. Almost all foreign marriages are recognised in the Netherlands as long as they are not bigamist."

42. I set out below in full, the fourth paragraph of the letter;

"However, I expect that the municipality will not consider for granted proved the existence of the marriage. Therefore I assume that recognition in the Netherlands

should start with proving the marriage. If this marriage can be proven and if it is a formal marriage as you informed me, I don't expect problems with the recognition of this marriage in the Netherlands. Of course I can't give you guarantees. If you want to be sure, you should ask the municipality where the registration of the marriage should take place."

43. I had some difficulty in understanding the terms of that paragraph, in particular the first sentence. However I find that the author of the letter is answering a general question about Ghanaian proxy marriages, and is clearly making an assumption in the second sentence of the paragraph, and goes on to indicate that no guarantees could be given. It is not clear what documents were provided to the lawyer, it is relevant that in addition to the caveat, that the author of the letter cannot give any guarantees, the statement is made that a valid foreign proxy marriage is probably not against Dutch public order. In my view, this letter does not specifically address the issues in this appeal, and does not give a specific opinion on the validity of this Claimant's marriage under Dutch law. I do not find that cumulatively, the letters from the Dutch Embassy and the Dutch lawyer, prove that the marriage would be recognised under Dutch law and therefore the Claimant has not discharged the burden of proof.
44. As the only issue before me is whether the Claimant is the spouse of an EEA citizen, the appeal must be dismissed with reference to regulation 7 of the 2006 regulations.
45. As previously mentioned, the Claimant did not raise either Article 8 or the issue of a durable relationship as Grounds of Appeal before the First-tier Tribunal.
46. Although this decision means that the Claimant's appeal is dismissed as the burden of proof has not been discharged, it does not prevent the Claimant from making a further application for a residence card, if further evidence is available

Notice of Decision

The determination of the First-tier Tribunal contained an error of law was set aside.

I substitute a fresh decision.

The Claimant's appeal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There was been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

10th November 2014

**TO THE RESPONDENT
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

10th November 2014