Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00783/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 26 August 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

FELIX KOFI KONTOH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Aminu instructed by Afrifa & Partners, solicitors
For the Respondent: Mr T Melvin, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Ghana, appeals with permission against the dismissal by First-tier Tribunal Judge Bircher of his appeal against the respondent's decision to refuse him a residence card as the family member of an EEA citizen under the Immigration (European Economic Area) Regulations 2006 (as amended).

2. The appellant asserts that he entered into a Ghanaian customary marriage, by proxy, with a German citizen of Ghanaian descent who is exercising Treaty rights in the United Kingdom and that he should therefore be treated as her spouse, for the purposes of the Regulations. Neither of the parties was in Ghana when the marriage was entered into.

3. The appellant did not attend the First-tier Tribunal hearing or arrange representation. The respondent was also unrepresented. The First-tier Tribunal judge was obliged to determine the appeal on the materials before him. At paragraph 14 of the determination, he accepted that the appellant had voluntarily registered his marriage Provisional National Defence CLB Law 112 Customary Marriage and Divorce (Registration) Law 1985, as amended by the 1991 Amendment Act. However, the First-tier Tribunal judge was not satisfied that all of the relevant requirements of the Ghanaian statutes had been complied with (statutory declarations from the parties' parents had not yet been provided).

4. He then considered whether the appellant could bring himself within regulation 8(5) which applies to unmarried partners, but was not satisfied as to the evidence of durability of the relationship.

5. Finally, he considered Appendix FM and paragraph 276ADE of the Immigration Rules HC 395 (as amended), and Article 8 ECHR outside the Rules. She concluded that the appellant could not bring himself within the Rules and that this was not a case where the respondent should exercise discretion outside the Rules on private and family life grounds. The appeal was dismissed.

6. The appellant appealed. His grounds of appeal in the first application dealt only with the question of the validity of the customary marriage in Ghana, applying *CB (validity of marriage: proxy marriage) Brazil* [2008] UKAIT 00080, and contended that the marriage should be recognised as valid in United Kingdom law. He argued that the *Kareem* guidance was wrong since as a matter of private international law, the *lex loci celebrationis* should be determinative of the validity of the marriage.

7. He argued that there was no authority that parties domiciled in the United Kingdom could not conduct a marriage by proxy, and referred to the decision of the High Court in *Pazpena de Vire v Pazpena de Vire* [2000] All ER 2010, a case which concerned a proxy marriage conducted in Uruguay while the parties were both in Germany, followed by lengthy cohabitation. He also relied on *McCabe v McCabe* [1994] 1 FLR 410, [1994] 1 FCR 257 which dealt with the essentials of an Akan customary marriage in Ghana and establishes that it is lawful for both parties to be absent if family support can be demonstrated.

8. There was no challenge to the Article 8 findings (within or without the Rules) or to the conclusion that he had not established that his partnership was durable under regulation 8(5). Permission to appeal was refused.

9. The appellant renewed his application for permission to appeal to the Upper Tribunal. The grounds for his second application also focused on the Ghanaian

requirements for a valid customary marriage by proxy, and again, there was no challenge to the regulation 8(5) or Article 8 findings in the First-tier Tribunal determination.

10. The second application grounds do not engage with the Upper Tribunal's guidance in *Kareem* at all, nor do they repeat the private international law arguments contained in the first application. However, Upper Tribunal Judge Storey granted permission to appeal on the basis that the decision in *Kareem* arguably did not address the private international law rules to which all EU states are party.

11. By a rule 24 Reply, the respondent contended that there was no error of law in the determination and that *Kareem* was authority for showing that all proxy or customary marriages must be shown to be valid in the country of the EEA citizen whose free movement rights were in issue.

12. That was the basis on which the appeal came before me today.

The *Kareem* guidance

13. The guidance in *Kareem* so far as relevant to this appeal was that:

> *"d. In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.*
> *e. In such an appeal, the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.*
> *f. In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.*
> *g. It should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of the EEA country and/or the country where the marriage took place, the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight.*
> *h. These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships."*

14. Shortly after this determination was promulgated, the Upper Tribunal reaffirmed the importance of evidence about recognition in the EEA citizen's country of a customary marriage by proxy in Ghana. The case concerned a customary marriage between a Ghanaian citizen and a citizen of the Netherlands. The guidance therein is summarised in the judicial headnote thus:

> "*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.*"

Submissions

15. For the respondent, Mr Melvin relied on his grounds of appeal and did not add to them by way of oral submissions.

16. In his submissions for the appellant, Mr Aminu put his case in three ways: first, that the marriage in Ghana was valid and *Kareem* wrong; second, that the appellant was entitled to leave to remain in the United Kingdom on Article 8 grounds; and third, as set out in the grant, that *Kareem* is wrong because it takes no account of private international law on the recognition of marriages.

Discussion

17. None of the appellant's arguments can succeed. As regards the private international law point, that turns on the domicile of each party. The appellant is a Ghanaian citizen; his spouse is of Ghanaian descent, but there is nothing in the material before us which suggests that in adopting German nationality, she retained her Ghanaian domicile. Absent any evidence to the contrary, adoption of the citizenship of a third country in which you are living indicates that you have a new domicile of choice, in this case in Germany.

18. The parties contracted their marriage by proxy, neither of them being in Ghana when it was celebrated. As the *Kareem* cases indicate, it is therefore crucial that the appellant can prove that Germany recognises marriages contracted in this manner, since that is where the wife was domiciled at the date of marriage. The suggestion in the first grounds that these parties are domiciled in the United Kingdom is not supported by any evidence and, given that both of them are citizens of other countries, the evidence does not oust the presumptions as to the appellant's domicile of origin in Ghana and the wife's domicile of choice in Germany. The United Kingdom is not required to recognise customary marriages unless the parties can show that they were validly contracted under the applicable laws, and the appellant has not shown that to be the case in relation to his marriage.

19. The First-tier Tribunal Judge did not err in law in applying *Kareem (proxy marriage – EU law)* [2014] UKUT 00024 (IAC) and concluding that the appellant did not fall to be treated as a family member under the Regulations. The appellant had not and still has not supplied any evidence as whether German law recognises customary marriages by proxy contracted in Ghana. The judge was entitled to applied the *Kareem* guidance, indeed it would have been an error of law had he not done so. The marriage element of the appeal was therefore bound to fail.

20. The grounds in the second application also did not challenge the Article 8 and regulation 8(5) elements of the determination. Although Mr Aminu sought to raise

these issues again at the hearing, they were not challenged in the grounds of appeal and no Rule 24 Reply was filed putting them in issue. I have examined the judge's findings on these points and can find no error of law in his approach.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Date

Signed

Upper Tribunal Judge Gleeson