



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

Appeal Number: IA/05218/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 24 June 2014**

**Determination  
Promulgated**

**On 1<sup>st</sup> July 2014**

**Before**

**THE HONOURABLE MR JUSTICE HADDON-CAVE  
UPPER TRIBUNAL JUDGE CLIVE LANE**

**Between**

**MR OLUSOLA JAMES ADENIYI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Chibowu, Counsel instructed by M.J. Solomon & Partners Solicitors

For the Respondent: Mr Saunders, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against a decision of First-tier Tribunal Judge Tully promulgated on 8 April 2014 in which the Immigration Judge found that the appellant, Mr Adeniyi,

had discharged the burden of proof that he was the spouse of an EEA national who was exercising treaty rights as a worker and thus met the criteria to be granted an EEA residence card. The thrust of the decision was that Mr Adeniyi had proved to the satisfaction of the judge that a marriage which he had entered into by proxy on 22 March 2012 was legally recognised in Nigeria and validly registered in Nigeria on 28 March 2012.

### ***The decision in Kareem [2014] overlooked***

2. Permission to appeal that decision was granted to the respondent on the ground that the judge had arguably made an error of law in failing to consider the decision of **Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24** which held that evidence had to be provided by an appellant to show that the law of the EU partner's nationality (in this case French law) recognised proxy marriages. Had such evidence been brought forward, it would have shown that the French law, the relevant EU law in question, did not recognise such proxy marriages.
3. Like the First-tier Tribunal Judge who gave permission in this case, Judge Gibb, we have sympathy for the judge in this case because the **Kareem** case was not brought to her attention by either party. Equally we have some sympathy with Counsel for Mr Adeniyi, in this case Mr Chibowu, who like others, we suspect, read the head note to the **Kareem** case and concluded that "the production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient" in order to demonstrate that the applicant is the spouse of an EEA national qualifying for free movement.

### ***If O'Connor in TA, KA and ANAG (14 June 2014)***

4. We have the benefit, however, of a very clear and helpful decision of Upper Tribunal Judge O'Connor in **Secretary of State for the Home Department v TA, KA and ANAG** dated 14 June 2014 in which Judge O'Connor examined the decision in **Kareem** with great care, in circumstances similar to the present the First-tier Tribunal Judge failed to consider the decision in **Kareem**.
5. Judge O'Connor after setting out and analysing in particular paragraphs 68, 11, 13, 16 and 18 of the decision in **Kareem** concluded as follows:

"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 has been 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 borne out of a failure to read the determination in **Kareem** as a whole.”

6. We would, rather like Judge O’Connor, draw particular attention to the following passages in **Kareem**:

“11. We conclude that in EU law the question of whether a person is in a marital relationship is governed by the national laws of the member states. In other words, whether a person is married is a matter that falls within the competence of the individual member states.

17. ... The question of whether there is a marital relationship is to be examined in accordance with the laws of the member state from which the Union citizen obtains nationality and from which therefore that citizen derives free movement rights.

18. ... Given the intrinsic link between nationality of a member state and free movement rights, we conclude that the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted.”

7. Like Judge O’Connor, we are of the firm view that the decision in **Kareem** was an orthodox decision on Conflicts of Law grounds, namely that the question of the validity of a marriage pertaining to the right to free movement within the EU was one to be governed by the relevant nationality of the Union citizen from which such free movement was derived.

8. Mr Saunders for the Secretary of State submits in his appeal that this is an open and shut matter because it is quite clear that French law does not recognise proxy marriages. He relies on Article 146-1 of the French civil code which in translation provides as follows: “The marriage of a French person even where contracted in a foreign country requires his being present.”

9. Mr Saunders submits that Mr Adeniyi does not meet Regulation 7(1)(a) and the judge materially erred in his finding that Mr Adeniyi satisfied the EEA Regulations 2006. We agree and accordingly hold that the Secretary of State’s challenge by way of appeal to the decision of learned First-tier Tribunal Judge Tully should be allowed.

*Headnote in **Kareem** is misleading*

10. We note the general observations at the end of **Kareem**. It is unfortunate that those general observations seemed to have found their way into the head note in the reported decision. This appears to be the reason why undue reliance has been placed upon them by Mr Chibowu and Counsel in other cases. Such general observations do not form the ratio of the decision itself. As elucidated by Judge O’Conner, the headnote does not reflect the gravamen of the decision and is misleading. It should

be corrected. This case is a reminder of the special care which is necessary when preparing headnotes.

*The issue of Durability*

11. The only remaining question relates to the question of durability. In paragraph 23 of the Determination and Reasons Tribunal Judge Tully said as follows:

“The respondent goes on to address whether the appellant is in a durable relationship with an EEA national can be treated as extended family members (sic). I see no need to address this further in light of the findings above.”

12. As is normal practice parties are expected to appear at these appeals ready to argue all points. Mr Chibowu submits that whether or not the marriage was valid the said appeal should nevertheless be allowed because the appellant should be treated as an extended family member in a durable relationship with an EEA national.

13. He relies on a schedule of documents in the bundle in support of that submission. It is apparent, however, from the schedule of documents which lists 24 documents that few, if any, touch upon the question of durability. Documents 9 and 13 relate to some sort of joint life insurance proposal from Aviva.

14. It is apparent from the decision letter under challenge in the substantive appeal dated 4 January 2014 that careful consideration was given by the Home Office to the question of durability. In that letter the Home Office said as follows:

“To assess whether your relationship is durable we would expect you to demonstrate that you have been living with your EEA national spouse for at least two years. Equally, it is reasonable to expect that you both intend to live together permanently, that any previous relationship/marriage each of you may have had has broken down and that the parties are not related by birth. This department will not normally accept that there is a durable relationship where these criteria are not met, although each case is considered on its own merits. ...”

15. The letter explains that given the failure of the applicant to demonstrate that the marriage was legally contracted the Home Office had given careful consideration to the application of Regulation 8(5) and referred to the Aviva life insurance documents. The decision letter then continued as follows:

“You have provided no evidence that you resided together as a couple at the same address prior to the date of your customary marriage certificate. Moreover you have failed to provide any evidence of joint financial commitment. You have also provided no

evidence that you even knew each other or had met prior to the date of your customary marriage certificate being issued abroad.

As a result it is considered that you have provided insufficient evidence to suggest you are in a durable relationship. Due to the lack of evidence submitted this department cannot accept that you are in a durable relationship for the purpose of the EEA Regulations. Consequently you have failed to demonstrate that you are an extended family member as defined in Regulation 8 of the Regulations 2006. Your application is therefore refused under Regulation 8(5) of those Regulations.”

16. Doing his best for his client Mr Chibowu was unable to point to any further evidence or matters to gainsay the conclusion in the decision letter set out above or otherwise in support of the proposition that Mr Adeniyi was able to demonstrate a durable relationship. It is plainly apparent that he has no such evidence and is and was quite unable to discharge the burden of proof upon him on that Regulation 8(5) basis.

### *Conclusion*

17. In those circumstances, we have concluded that it is appropriate not only to allow the Secretary of State’s challenge to the decision in question but also to dismiss the substantive appeal by Mr Adeniyi to the original decision letter of 4 January 2014. So the order is:

- (1) Appeal of the Secretary of State allowed.
- (2) Mr Adeniyi’s substantive appeal against the decision of the Secretary of State dated 4 January 2014 is dismissed.

Signed

Date

Mr Justice Haddon-Cave