



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

Appeal Number: IA/05227/2014

THE IMMIGRATION ACTS

Heard at Field House

On 23 July 2014

Determination

Promulgated

On 30 September 2014

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KINGSLEY AGYEMANG
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Whitwell

For the Respondent: No appearance

DETERMINATION AND REASONS

1. Mr Agyemang is a citizen of Ghana born in 1979. He appealed against a decision of the Secretary of State made on 11 January 2014 to refuse to issue a residence card as confirmation of a right to reside in the UK as the family member (spouse) of an EEA national (Portuguese) under the Immigration (European Economic Area) Regulations 2006 (Regulation 7).

2. Although in the proceedings before me the Secretary of State is the Appellant, for the sake of convenience I will refer to the parties as they were before the First-tier Tribunal, thus, Mr Agyemang is the Appellant and the Secretary of State is the Respondent.
3. The basis of the Appellant's claim is that he was entitled to a residence card as the spouse of an EEA national (Portuguese) who is exercising Treaty rights in the UK. The Respondent was not satisfied that the Appellant was able to meet the requirements of the Regulations in that the Appellant had failed to show that he is the family member of an EEA national. The Respondent did not accept that the Appellant's customary marriage by proxy to the Sponsor was valid under either Ghanaian or UK law.
4. He appealed. The matter was dealt with at his request 'on papers', thus, without a hearing. In a determination promulgated on 8 May 2014 Judge of the First-tier Tribunal Lagunju allowed the appeal. She considered that the issue was whether the marriage was valid in Ghana. If so, in her view, it was valid in the UK.
5. She considered that under Ghanaian law there was no requirement for a customary marriage to be registered for it to be valid. If there was no requirement to register a marriage for it to be valid, then the need to provide a statutory declaration which contains specific information, fell away: *'... neither a marriage certificate (obtained on registration of the marriage) nor a statutory declaration (used for the purpose of obtaining a marriage certificate) is required before a customary marriage is considered valid and lawful'* [10].
6. The Tribunal went on (at [12]) to note that despite there being no legal requirement to provide one, the Appellant had provided a statutory declaration. Also, a *'notarised document from the Legal and Consular Foreign Affairs and Regional Integration Office and a further document from the High Court of Justice attesting that the stamp and signatures of the notary public on the statutory declaration are genuine'*. She found *'in the absence of any evidence to the contrary, that these documents are recognised and acceptable by the Ghanaian authorities'*.
7. She concluded (at [16])

'In light of my findings above, I am satisfied that the Appellant has proved to the requisite standard that his customary marriage conducted in Ghana by proxy is a valid marriage. Accordingly the Appellant has shown that he is the family member of an EEA national, thus he meets the requirements of the regulations. In light of this I need not consider Regulation 8(5).'
8. The Respondent sought permission to appeal which was granted on 11 June 2014 a judge stating:

' ...

2. *The grounds of appeal argue that the Judge failed to consider the case of **Kareem (Proxy marriage - EU law) Nigeria [2014] UKUT 24**. Consequently, the Judge failed to consider whether the proxy marriage was recognised in the EEA Sponsor's home state of Portugal and fell into error.*
3. *It is arguable that the Judge did not correctly apply prevailing case law with regard to eligibility for a Residence Card as a spouse for EEA free movement purposes. The Judge did not refer to **Kareem** and arguably fell into error by not considering the status of proxy marriage of this nature in Portugal.'*
9. At the error of law hearing before me there was no appearance or response by or on behalf of the Appellant. Being satisfied that notice of hearing had been sent to both the Appellant and his representatives on 18 June 2014, I proceeded in absence.
10. In brief submissions Mr Whitwell simply sought to rely on the grounds seeking permission. The First-tier Judge had failed to have regard to **Kareem**. In determining the validity of the marriage the judge should have first established whether this type of customary marriage by proxy was recognised in the EEA state of the Sponsor, namely, Portugal. As no evidence was advanced by the Appellant to support the recognition of the marriage in Portugal the Appellant had failed to discharge the burden of proof. The appeal should have been dismissed on that basis.
11. I agreed with that submission. In **Kareem** at [11] the Tribunal recognised that the question of whether a person is married is a matter governed by the national laws of the individual Member States.
12. Moving forward to paragraph 16, the Tribunal once again observe that:

'...where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of nationality and not the host Member State...'
13. The reasoning continues in paragraph 18:

'Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than

to another (where it might not be). Such difficulties would be contrary to the fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system of which a marriage is said to have been contracted in such a way as to ensure that the Union citizen's marital status is not at risk of being differently determined by different Member States. 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.'

14. That such was the position was made clear in **TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**. The head note reads:

*'Following the decision in **Kareem** ... 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.'*

15. Whilst **TA** was promulgated in June 2014, **Kareem** was promulgated in January 2014 thus before the First-tier Judge considered the appeal. In failing to have regard to the relevant law the determination showed material error. I set it aside.
16. In the absence of any appearance or representations by or on behalf of the Appellant I saw no reason why I should not proceed immediately to remake the decision. Mr Whitwell simply stated that in the absence of any evidence as to the relevant Portuguese law in respect of such a marriage the appeal had to fail.
17. I agreed. There was no evidence whatsoever about the situation of customary marriage by proxy under Portuguese law. Having no evidence before me that the law of Portugal recognises the Appellant's marriage as a valid marriage, and the burden of proving the fact that it is a valid marriage is on the Appellant, I find that the Appellant and the Sponsor are not to be treated as being married for the purpose of the 2006 Regulations and, therefore, the Appellant cannot establish that he is a family member for the purposes of Regulation 7 of these Regulations.
18. That, though, is not the end of the matter. Regulation 8 of the 2006 Regulations regulates those persons who can be considered to be 'extended family members' of EEA nationals. Pursuant to Regulation 8(5):

'A person satisfies the conditions in this paragraph if the person is the partner of an EEA national and can prove to the decision maker that he is in a durable relationship with the EEA national'.

19. 'Durable relationship' is not defined in the Regulations, and whether a person is in a durable relationship is a matter to be determined on a case by case basis.
20. The First-tier Tribunal having allowed the appeal under Regulation 7 declined to consider Regulation 8.
21. Having dismissed the appeal on rehearing under Regulation 7 I must consider Regulation 8.
22. The refusal letter noted that the Appellant had provided no evidence that he and the Sponsor resided together as a couple at the same address prior to the date of the customary marriage certificate and that he had provided no evidence to show if they reside together currently. Additionally, he had provided no evidence that they even knew each other or had met prior to the date of the customary marriage certificate being issued abroad. As a result it was considered that he had provided insufficient evidence to show that he was in a durable relationship.
23. Again there is no evidence at all in support of this matter before me. I notice, indeed, that it was not even raised in the original Grounds of Appeal. I find, thus, that the Appellant fails to establish that he is in a durable relationship pursuant to Regulation 8. The appeal fails on this issue as well as under Regulation 7.

Decision

The decision of the First-tier Tribunal showed material error of law. It is set aside and remade as follows: the appeal is dismissed.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Conway