



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal  
Number:  
IA/08614/2014**

**IA/08618/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 July 2014 at On 16 July 2014  
Determination  
promulgated**

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**Secretary of State for the Home Department**

**Appellant**

**and**

**(1) Yaw Sekyere  
(2) Bernard Kofi Osei  
(Anonymity directions not made)**

**Respondents**

**Representation**

**For the Appellant: Mr. G. Saunders, Home Office Presenting Officer.**

**For the Respondents: Ms. C. Litchfield of Counsel instructed by Ronik Solicitors.**

**DETERMINATION AND REASONS: ERROR OF LAW**

1. These are linked appeals against the decisions of First-tier Tribunal Judge Gordon promulgated on 16 April 2014, allowing Mr Sekyere's and Mr Osei's appeals against the Secretary of State's

decisions dated 29 January 2014 to refuse to issue residence cards under the Immigration (European Economic Area) Regulations 2006.

2. Although before me the Secretary of State is the appellant and Mr Sekyere and Mr Osei the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Sekyere and Mr Osei as the Appellants and the Secretary of State as the Respondent.

### **Background**

3. The Appellants are nationals of Ghana born on 3 August 1964 and 25 August 1995 respectively. They are father and son. On 3 October 2013 applications for a residence card as confirmation of a right to reside in the United Kingdom were made on behalf of each of them. The applications were based on a Ghanaian customary marriage by proxy between the First Appellant and Ms Yaa Konadu, a Dutch national, said to have taken place in Ghana, in the absence of the parties to the marriage, on 20 June 2013.

4. The Appellants' applications were refused for reasons set out in a 'reasons for refusal' ('RFRL') letter dated 29 January 2014, and Notices of Immigration Decision were issued on the same date (although one wrongly gives the year as 2013). The Respondent was not satisfied that Ms Konadu was exercising 'Treaty rights'. Further the Respondent was not "*satisfied that [the] claimed proxy marriage [had] been properly executed*", and was not otherwise satisfied that the First Appellant was in a 'durable relationship' with Ms Konadu.

5. I pause to note that at the date of the First-tier Tribunal Judge's consideration of the appeals the Respondent's RFRL was not on file: see determination at paragraph 2. Mr Saunders provided me with a copy of the RFRL today, which I have placed on file.

6. The Appellants appealed to the IAC. They requested that their appeals be dealt with 'on the papers'. The First-tier Tribunal Judge allowed the Appellants' appeals without a hearing for reasons set out in her determination.

7. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Hollingworth on 23 May 2014.

## **Consideration**

8. The First-tier Tribunal Judge allowed the Appellants' appeal on the basis that she was satisfied that the First Appellant's marriage was valid. In this context I note that the Judge did not have the Respondent's case as set out in the RFRL, and so did not address it. In essence the First-tier Tribunal Judge accepted the marriage certificate at face value: see determination at paragraph 3.

9. Similarly, the Judge did not have the benefit of the Respondent's reasoning in respect of the issue of the exercise of Treaty rights by Ms Konadu, and accordingly, in contrast to the contents of the RFRL observed that there was no contention on the part of the Respondent of any failed attempt to contact the employer, before accepting the Appellants' case in this regard: see paragraph 4.

10. Be that as it may, the Respondent's grounds of appeal seek to challenge the decisions of the First-tier Tribunal with particular reference to the decision in **Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC)** - promulgated on 16 January 2014, and therefore before the First-tier Tribunal's consideration of this appeal. It is pleaded that the Judge erred in not having regard to **Kareem**. The Respondent also raised a challenge to the Judge's conclusion in respect of the exercise of Treaty rights.

11. I accept the substance of the Respondent's challenge in respect of the failure of the Judge to have regard to **Kareem**. Whilst it may well be that the Respondent did not raise either the case of **Kareem**, or the substance of the matters determined thereunder in the RFRL (which in any event was not before the First-tier Tribunal Judge), it was incumbent upon the Judge to have regard to the applicable law. By failing to have regard to **Kareem** she failed to do so. As this went to the core of the issues before her, it was a material error. The First-tier Tribunal Judge misdirected herself by not having regard to the relevant case law, pursuant to which she should have considered as a starting point the question of whether a marriage was contracted between the First Appellant and Ms Konadu according to the national law of the Netherlands.

12. I note for the record that Ms Litchfield sought to resist the suggestion that it was incumbent upon the Judge to consider whether a marriage had been contracted according to the law of the Netherlands, arguing that such a consideration was only necessary if there was some issue over the validity of the marriage certificate -

which the Judge had found to be valid. I do not accept that that is a proper reading of **Kareem**. I am reinforced in this by the decision in **TA and others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**: see in particular paragraph 20. Ms Litchfield's argument is essentially the argument raised in **TA** (see paragraphs 9 and 10), but resoundingly rejected (paragraphs 12 - 20).

13. In the circumstances I find that the decision of the First-tier Tribunal Judge was flawed for material error of law and I set it aside.

14. The decision in the appeal accordingly needs to be remade.

15. Although no relevant material has been filed in respect of the validity of the First Appellant's marriage under Dutch law, Ms Litchfield indicated that those instructing her had commissioned evidence from a Dutch lawyer with whom they had been in contact, and evidence in support of the Appellants' cases was expected.

16. In contrast to the election to have the appeal determined 'on the papers' before the First-tier Tribunal, both Appellants and Ms Konadu attended the hearing today. I note that in the event that the evidence commissioned by the Appellants does not demonstrate recognition in the Netherlands of Ghanaian customary marriages by proxy, there will be a necessity to explore the issue of 'durable relationship'.

17. Further, although the First-tier Tribunal Judge made a favourable finding in respect of the exercise of Treaty rights, she did so without the benefit of considering the Respondent's case as set out in the RFRL and without any oral evidence being heard.

18. In all of the circumstances, and with the agreement of the parties, it is my judgement, that this appeal should now be remade before the First-tier Tribunal, before any First-tier Tribunal Judge other than Judge Gordon, at an oral hearing. In my judgement such a hearing is to be with all issues at large: in the particular circumstances outlined above it would be an artificial exercise to preserve the favourable findings in respect of the exercise of Treaty rights.

19. It is unnecessary to issue any specific Directions; standard Directions will suffice. The Appellants' representatives are aware

that it is incumbent upon the Appellants to file and serve any further evidence upon which they wish to rely, including in particular evidence addressing the recognition of the First Appellant's marriage by the Dutch authorities, at least seven days prior to the resumed hearing.

### **Decision**

20. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

21. The decision in the appeal is to be remade by the First-tier Tribunal at a hearing before any First-tier Tribunal Judge except First tier Tribunal Judge Gordon, with all issues at large.

**Deputy Judge of the Upper Tribunal I. A. Lewis 15 July 2014**