Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09288/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 August 2014	**On 5 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KWASE BOAKYE TWUMASI
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr N. Bramble, Specialist Appeals Team
For the Respondent: Mr J. Khalid, Counsel (Direct Access)

DETERMINATION AND REASONS

1. The Secretary of State ("SSHD") appeals to the Upper Tribunal ("UT") from the decision of the First-tier Tribunal (Judge R. Prior sitting at Hatton Cross on 7 May 2014) allowing the claimant's appeal against the decision by the

SSHD on 25 January 2014 to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights here. The First-tier Tribunal ("FTT") did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a Ghanaian national, and his sponsor is a French national. As evidence that he was married to the sponsor, the appellant relied on a marriage certificate dated 20 October 2011 showing that he had married the sponsor in Accra on 28 September 2011. A statutory declaration made on 5 August 2013 conveyed the information that it had been a customary marriage by proxy. Paragraph 8 of the declaration stated that it superseded a previous one dated 17 October 2011, "which inadvertently did not indicate the proxy marriage and the place of residence of the parties at the time of the celebration of the marriage".

3. The SSHD gave lengthy reasons for refusing the claimant's application. The burden was on him to prove that his asserted customary marriage was valid, and he had not discharged this burden. He had not shown that all the requirements for a valid customary marriage, including the payment of a dowry, which had been identified by the expert in **NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 0009** had been met, in particular the requirement that both parties to the marriage were of Ghanaian descent. He had also not shown that the marriage had been validly registered in accordance with Ghanaian law. The application for the registration of the marriage had to be accompanied by a statutory declaration which stated, among other things, the places of residence of the parties at the time of the marriage. This had not been done. There was also no proof that the signatories to the statutory declaration were related to the parties as claimed. The Ghana COI report of 11 May 2012 highlighted problems with forged and fraudulently obtained official documents, such as birth certificates. The signatures of husband and wife on the marriage certificate did not match those on the application form, passport or ID card.

4. The SSHD went on to consider in the alternative whether the claimant could be considered as unmarried partner under Regulation 8(5). To assess whether their relationship was durable, she would expect to see evidence of cohabitation for at least two years. No evidence had been provided that they had resided together as a couple prior to the issue of their marriage certificate, or even that they knew other or had met prior to the issue of the certificate.

The Decision of the First-tier Tribunal

5. The claimant only appealed against the decision to refuse to recognise him as a family member under Regulation 7, and he asked for his appeal to be determined on the papers. His case was that registration of the customary marriage was not mandatory, and it was not necessary that both parties to the marriage should be of Ghanaian descent:

> Further, the marriage certificate was issued by the Ghanaian authorities and certified by the Ghana High Commission in the United Kingdom which clearly shows that the marriage has been recognised in the country where it took place.

6. Judge Prior's reasoning in allowing the appeal under the Regulations 2006 was that the SSHD had sought to go behind the statutory declaration made on 5 August 2013 and the marriage certificate, "although, on the face, there is nothing to suggest they are not valid". In English law there was a presumption of validity. Whether or not the sponsor was of Ghanaian descent, the judge did not accept that the customary marriage, on the reasoning of the refusal letter, was not valid. Its validity was established by its registration and he was satisfied that it was registered.

The Application for Permission to Appeal

7. The SSHD applied for permission to appeal to the Upper Tribunal, arguing that the judge had erred in law in failing to establish whether the proxy marriage was recognised in France, the sponsor's country of nationality, when determining the issue of validity, citing **Kareem (proxy marriages – EU law) Nigeria [2014] UKUT 24**. The claimant had not discharged the burden of proving that the marriage was a type recognised in France, and so the appeal should have been dismissed on that basis. Moreover, proxy marriages are incompatible with the French Civil Code, Article 146-1, which states as follows (in translation):

> The marriage of a French person, even when contracted in a foreign country, requires his being present.

The Grant of Permission to Appeal

8. On 12 June 2014 Judge Nicholson granted the SSHD permission to appeal on the above grounds.

The Hearing in the Upper Tribunal

9. At the hearing before me, Mr Bramble developed the argument raised in the grounds of appeal, citing **TA and others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**, which was heard at Field House on 10 June 2014. Mr Khalid sought to rely on an unreported decision of Upper Tribunal Judge Macleman in the case of **Abina Serwaah** promulgated on 21 May 2014, which he said he had obtained from the UT website. The decision was to the contrary effect of **TA**. Mr Bramble objected to the introduction of this decision, on the ground that the practice direction relating to the citation of unreported decisions had not been complied with.

Reasons for Finding an Error of Law

10. The central issue in controversy is the interpretation of the headnote guidance given by the Vice-Presidential panel in **Kareem**, which repeats verbatim the guidance given by the panel at paragraph [68].

11. The interpretation favoured by UT Judge Macleman in a brief determination is that there is no need to consider whether a Ghanaian proxy marriage is recognised in the member state of the sponsor unless there is a difficulty over whether it is recognised in the state in which it was contracted ("the two stage approach").

12. In **TA** UT Judge O'Connor gave detailed reasons for reaching the contrary conclusion, which is that it is always necessary to undertake an examination of the validity of the disputed marriage in the context of the national legislation of the EEA sponsor's country of nationality. He accepted that paragraph [68] read in isolation appeared to provide support for the two stage approach (i.e. only to look at the national legislation of the EEA sponsor's country of nationality *if* there is a doubt over recognition in the country where the marriage took place) but he referred to earlier passages in **Kareem** which refuted such an approach. For instance, at paragraph [17] the panel held:

> In light of the connection between the rights of free movement and residence and the nationality laws of the Member States, we conclude that, *in a situation where the marital relationship is disputed* (my emphasis), 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.

13. I prefer the reasoning of Judge O'Connor, and in any event his decision has the imprimatur of being a reported decision of the UT, and thus it will have been approved by an editorial panel of the UT as representing good law.

14. The judge ought to have dismissed the appeal on the ground that the claimant had not discharged the burden of proving that he had a contracted a valid marriage under French law, following **Kareem**, even though this issue had not been raised in the refusal letter. For the law always speaks.

15. Although this was not a point taken by way of appeal to the UT, as it did not need to be, the reasoning of Judge Prior discloses another egregious error of law. While he was aware of **Kareem**, as he cites it, he appears to have misunderstood its import with regard to the question of how the Tribunal should go about the task of establishing that the marriage certificate relied upon has been issued by a competent authority.

16. In **Kareem** the panel conducted a rigorous analysis of the documents relied upon as showing that the proxy marriage had been validly registered in Nigeria, and found that there was non-compliance with statutory requirements, and no proof that the person who signed the certificate was a registrar: see paragraphs [41] and [42]. The panel

thereby concluded that the applicant had not discharged the burden of proving that the certificate had been issued by a competent authority. The panel did not presume that the marriage certificate was issued by a competent authority, and was thereby valid.

17. But this is Judge Prior's approach. He wrongly treats the registration of the marriage as engendering a presumption of validity. Moreover, he has not engaged with the irregularities identified in the refusal letter. The marriage certificate purports to have been signed by the bride and groom, but it was not signed by them as they were not in the country: so it is a false document in that it conveys the false message that bride and groom were present at the customary marriage ceremony, and subsequently signed the marriage register in person. In addition, the statutory declaration used to obtain the marriage certificate did not contain all the information required by law, as is partially acknowledged in the later statutory declaration of August 2013.

18. As pleaded in the refusal letter, it is a requirement of Law 112 that the application for registration of marriage shall be accompanied by a statutory declaration stating, inter alia, "(b) the places of residence of the parties at the time of the marriage". As this condition was not complied with, it would follow that the marriage was not validly registered, as the SHHD contends in the refusal letter.

19. At Paragraph [68] of **Kareem** the panel said inter alia:

> (ii) 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…

20. By the refusal letter the SSHD was challenging the proposition that the marriage certificate had been issued "according to the registration laws" of Ghana. So Judge Prior was wrong to proceed on the premise that the marriage had been registered according to the registration laws of Ghana, when that was precisely the issue which was in controversy and there was clear evidence of irregularities. This was not a case where the mere production of the marriage certificate was sufficient.

21. For the reasons given above, the decision of the FTT contains an error of law such that it should be set aside and remade.

Remaking

22. The appeal falls to be dismissed on the ground that the claimant had not discharged the burden of proving that he has a contracted a valid marriage under French law.

23. In addition, the appeal falls to be dismissed on the ground that the claimant has not discharged the burden of proving that he had contracted a valid marriage under Ghanaian law.

24. The judge did not deal with Regulation 8(5), and Mr Khalid submitted that the appeal should be remitted to the FTT for findings to be made on whether the claimant is an extended family member under Regulation 8(5). But this was not an issue upon which he appealed to the FTT, and so remittal is not appropriate. As Regulation 8(5) has not been an issue in this appeal, I make no finding on its potential applicability to the claimant.

Conclusion

25. The decision of the FTT contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed Date

Deputy Upper Tribunal Judge Monson