Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11907/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20th June 2014	**On 26th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

TIM NII YAW (YAN) ARMAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Akohene, instructed by Afrifa & Partners London
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ghana whose date of birth is recorded as 2nd February 1969. The history to this appeal is set out in the Determination and Reasons following the earlier hearing in the Upper Tribunal on 25th April 2014. On that occasion the Appellant did not appear but Ms Everett

for the Secretary of State conceded that there was an error of law for the reasons which are set out in the determination following that earlier hearing and, for the avoidance of doubt, I made clear in any event that I agreed with what she had to say. However, on that last occasion we could not proceed because it was clear that the notice of hearing had not satisfactorily been served upon the Appellant or his representatives and so it would not have been fair to proceed. Today it is for me to re-make the decision of the First-tier Tribunal.

2. Mr Whitwell, for reasons which I need not go into, was not aware that the error of law had already been found in the determination of the First-tier Tribunal but in the event that did not matter because there was common ground that examination of the guidance in the case of **Kareem (proxy marriages – EU law) [2014] UKUT 00024** would very probably resolve the issue in the re-making because Mr Akohene conceded that if I found that the guidance in **Kareem** was to the effect that the appellant was required to prove on balance of probabilities not only that the marriage contended for was entered into lawfully in accordance with the laws of Ghana but also that on balance of probabilities it was a marriage that was recognised in accordance with the laws of France, he could not succeed because he was not in a position to prove his case, in relation to French law.

3. Mr Akohene's submission in short was that the guidance in **Kareem** is to the effect that only where there is doubt or uncertainty about the validity of the marriage in the third country, in this case Ghana, is it necessary to go on to consider whether the marriage is recognised in accordance with the laws of the EEA state of which the Sponsor is a member.

4. Mr Whitwell's position is to the contrary. His view is that where the parties to a marriage entered into in an EEA state is proved by sufficient evidence then that is the end of the matter but, where the marriage is entered into in accordance with the laws or said to be in accordance with the laws of a third country, that is to say a non-EEA country, then in addition to establishing that the marriage was validly contracted in that third country it must also be shown to be a marriage that is recognised in the state of the EEA member who is a party to that marriage.

5. Mr Akohene draws support from the guidance in the case of **CB (validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080** and also having taken me to various paragraphs in the case of **Kareem** to the final remarks from paragraph 67 onwards and in particular to 68(g) which reads:

> *"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...".*

Mr Akohene relies on the word "or", though not only on the case of **Kareem** does Mr Akohene rely. He also took me to Article 24 of EC2004/38 which relates to equal treatment. That reads:

> "(1) *Subject to such specific provisions as are expressly provided for in the treaty and secondary law, all Union citizens residing on the basis of this directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.*
>
> *(2) By way of derogation from paragraph (1) the host Member State shall not be obliged to confer entitlement to social assistance etc. etc."*

Mr Akohene relied on paragraph (1) of Article 24 and although I was also presented with Article 25 no reliance was placed on that.

6. I find that the submissions of Mr Whitwell are to be preferred. Firstly, at paragraph 5 of **Kareem,** read with the determination as a whole, it is clear that the guidance in **CB** was not to be seen as the end of the matter so far as the point which arises in this appeal is concerned. At paragraph 7 it reads:

> *"The Member States do not share a common definition of spouse, each state defining marital relationships for itself. For example, in several Member States a person cannot be a spouse if of the same sex as the partner whilst the laws of other Member States describe such a person as a spouse. Similarly, whilst many Member States refuse to describe any person in a polygamous relationship as a spouse other than the person first married, the laws of other Member States may recognise all partners as spouses in certain circumstances...".*

7. Then at paragraph 18 it reads:

> *"The same conclusion may readily be reached by a different route. 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 fundamental EU law principles. Therefore, we perceive EU law as*

requiring the identification of the legal system in 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."

8. I do not see Article 24 being offended by the requirement in the case of a marriage said to have taken place in a third country as treating persons outside of the requirements of Article 24. The equal treatment relates in my judgment to the equal treatment of, in this case, spouses. However the evidence required to establish that someone is a spouse can be different dependent upon whether the marriage is contracted within the EU or outside of it. In essence the requirement is the same ie that the marriage has to be shown to be recognised in the EEA state. In the case of a marriage contracted in an EEA state a certificate from the state will usually suffice, in the case of a marriage contracted outside the EEA, the certificate from that state will usually suffice to establish the marriage but not establish that the marriage is recognised in the relevant EEA state.

9. I take the view that the guidance in **Kareem** is clear and that the situation is this: where there is a marriage contracted outside of an EU state firstly the Tribunal or a court must satisfy itself that there was a marriage that was validly entered into in that country. If the marriage is not valid in that country then there is an end to it because there is no marriage to consider. If it is established that there is a marriage validly entered into in that country then there is a second hurdle of establishing whether that marriage is recognised in the EEA state of the EEA national and the reason why that must be so is already stated in the case of **Kareem**. Hypothetically, it may be that whereas under English law certain polygamous marriages would be recognised, the law of another EU state would in no circumstances recognise a polygamous marriage. What then would happen, if Mr Akohene were right is that the marriage would be recognised here, in the United Kingdom but not in the very country from which the EEA citizen hails.

10. In the circumstances, given the concession made by Mr Akohene that he cannot prove to the requisite standard that the marriage, even if valid in Ghana, would be recognised in accordance with the laws of France, the appeal in the re-making fails.

11. I invited the parties to tell me whether they wanted me to make any findings as to whether or not there was a valid marriage in accordance with the laws of Ghana. If so then it would have been necessary to stand the matter down for a while to give Mr Whitwell the opportunity to look at the papers but, in the event, Mr Akohene did not require such a finding and it seems to me that since the appeal fails in any event there is no prejudice to any of the parties if I do not make a finding at this stage. It may be that a future application will be made either on this basis or some

other, I simply do not know. Equally I was not addressed on whether there was any durable relationship for the purposes of regulation 8.

12. For the avoidance of doubt therefore there was an error of law in the determination of the First-tier Tribunal which was set aside in the determination following the hearing of 25 April 2014. In the re-making of the determination the appeal is dismissed.

Signed Date 25.06.2014

Deputy Upper Tribunal Judge Zucker