

**Upper Tribunal
(Immigration and Asylum
Chamber)**
IA/23146/2013



Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

On 7th May 2014

Determination

Promulgated

On 22nd May 2014

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Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR OSAMUYI DICKSON OSAGHAE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Jack, Home Office Presenting Officer

For the Respondent: No attendance

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State, but for ease of reference I will refer to her as “the Respondent” and the Respondent as “the Appellant” as they were before the First-tier Tribunal.
2. The Appellant is a citizen of Nigeria born 21st January 1977. He applied for an EU Residence Card as the husband of Sonia Myriam Kerras (the Sponsor), a French national who, it is accepted by all parties, is exercising Treaty rights in the UK.

3. As evidence that the Appellant and his Sponsor are married, there was submitted to the Respondent a Ghanaian Customary Marriage certificate dated 15th November 2011 together with a Statutory Declaration dated 25th January 2013 stating that the marriage took place by proxy.
4. The Respondent noted that the Appellant was born in Nigeria and his Sponsor in Boulogne Billancour, France. Neither party, were known to be of Ghanaian descent; further the Respondent was not satisfied that the Registration of Marriage Certificate nor the Statutory Declaration were credible documents. The Respondent concluded therefore that they had not been lawfully issued as claimed and refused the Appellant's application for a Residence Card by a decision dated 1st June 2013.
5. The Appellant appealed that decision and the appeal came before First-tier Tribunal Judge Devittie, as a paper hearing at the Appellant's request. In a determination promulgated on 27th January 2014 he allowed the Appellant's appeal. The Judge made findings that he was satisfied about the documentary evidence submitted showing that the parties were validly married in compliance with Ghanaian law. Further he made a finding that the parties are a durable relationship.
6. Permission to appeal was granted by First-tier Tribunal Judge Ford on this basis,

"The Respondent seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Devittie dated 27 January 2014 whereby he allowed the Appellant's appeal against the Secretary of State's decision to refuse to issue a Residence card to the Appellant as the family member of an EEA national.

It is arguable that Judge Devittie may have materially erred in law in failing to follow the guidance given in the case of Kareem (Proxy marriage - EU law) 2014 UKUT 00024 (IAC) and failed to consider whether the Appellant had established that her marriage was valid under French law. The case was reported on 16 January 2014.

There is an arguable material error of law".

7. Thus the matter comes before me to determine whether the First-tier Tribunal Judge materially erred in law, and if so, whether the decision should be remade.

The Hearing Before Me

8. Mr Jack appeared on behalf of the Respondent. No one attended on behalf of the Appellant. The Appellant had however, written to the Appellate Authority a letter date stamped 1st May 2014, stating that he wanted his case to be heard in his absence because "everything I had to say has already been put before the Tribunal". I confirm that I gave full consideration to the written submissions forwarded by the Appellant.

9. Mr Jack essentially relied on the grounds seeking permission but added that the First-tier Tribunal Judge had erred in his assessment of the documentary evidence. He had incorrectly given too much weight to the validity of those documents. Likewise when assessing the evidence concerning the durability of the marriage the Judge had relied on a bare statement contained in a letter from the Sponsor.
10. He emphasised that in accordance with paragraph 18 of *Kareem*, it is clear that the First-tier Tribunal materially erred because, other considerations aside, there was no evidence placed before it that the marriage between the Appellant and his Sponsor was in accordance with the legal system in place in France. He asked that I find the determination of the First-tier Tribunal contains an error of law of such gravity that the decision must be set aside. He asks that I remake the decision and dismiss the Appellant's appeal.

Has the Judge Erred?

11. I am satisfied that the determination of the First-tier Tribunal discloses an error of law such that it needs to be set aside and the decision remade. The first issue which the Judge was tasked to deal with is clearly set out in the Respondent's reasons for refusal letter. When relying on a proxy marriage in Ghana, it is for the Appellant to demonstrate that the marriage is valid. The marriage certificate dated claims that the marriage took place in Ghana on A proxy marriage may be recognised as valid, provided that the marriage was valid in the country in which it took place, satisfying the requirements of the law.
12. The marriage was governed by the PNDC (Provisional National Defence Council) law 112, and the Customary Marriage and Divorce (Registration) Law 1985, as amended in 1991 to remove the mandatory requirement of registration of marriage.
13. Whilst registration is no longer mandatory, if the marriage is in fact registered, the registration must comply with section 3 of the Customary Marriage and Divorce (Registration) Law 1985. The burden of proving that was done rests with the Appellant. In the refusal decision, the Respondent points out that an application for registration must be accompanied by a statutory declaration stating certain mandatory matters set out in section 3, including that the conditions essential to validity have been complied with. The Respondent considered the statutory declaration invalid as it did not state the place of residence at the time of marriage for neither the Appellant nor the EEA Sponsor.
14. Added to this, the appellant submitted a Nigerian decree absolute document, but the marriage certificate itself contained irregularities since it did not mention 'divorce' in the conditions column and the 'by proxy' were added using a different pen.

15. In his determination the First-tier Tribunal Judge makes a finding at paragraph 8 that he is satisfied that there is substantial compliance with the relevant statutory provision as the place of residence of the parties at the time of the marriage is expressly stated. In my judgment this is where the First-tier Tribunal has fallen into error. The marriage took place by proxy, it is said, on 15th November 2011. The marriage certificate records only 'UK' for residence. It does not identify the residence of the parties at the time of the marriage. The statutory declaration does not assist on this point because it is framed in terms of what happened after the marriage took place.
16. Further in paragraph 8 the Judge noted that that the entry in the condition column on the marriage certificate did not indicate, as it should have done, that the Appellant is divorced. In dealing with that point the Judge says this; I do not agree that this in any way undermines the validity or authenticity of the marriage certificate. It is hard to see where the Judge has formulated reasons for coming to that conclusion. The need to give adequate reasons enabling a party to the proceedings, why a judge has come to a particular conclusion has been set out by the Upper Tribunal in the decision of MK(duty to give reasons) Pakistan 2013UKUT))00641.
17. Likewise the Judge concluded in Paragraph 10 of his determination that there is a durable relationship between the sponsor and the appellant. I find that the judge erred in the weight he has placed on a letter apparently sent to the tribunal from the sponsor and dated 5th October 2013. The Judge simply reproduces the text of the letter in his determination and says;

"The tone and content of the above letter serve in my view to reinforce the conclusion that the marriage between the parties is genuine and valid".
18. The letter in question comprises a bare statement in an unattested document. It is hard to see why the judge placed any weight at all on it. Certainly the determination discloses a lack of reasons for so doing.
19. For the foregoing reasons I find the First-tier Tribunal's determination discloses an error of law such that it must be set aside and the decision remade.

Remaking the Decision

20. It I am satisfied I am in a position to remake the decision as I have before me all the evidence produced before the First-tier Tribunal together with the letter date stamped 1st May 2014 from the Appellant. I note in any event that throughout these proceedings neither the appellant nor his sponsor have ever sought to attend a hearing and give oral evidence.
21. I start my consideration by returning to the documents provided by the appellant in support of his proxy marriage. No explanation has been put

forward by the appellant dealing with the issue of validity raised by the respondent. There is no evidence explaining why the marriage certificate and statutory declaration do not properly record the Appellant's residence or why there is no entry concerning his divorced status. I cannot be satisfied therefore that the evidence points to the registration of marriage or statutory declaration submitted as being valid and lawfully issued.

22. The evidence of utility bills and payslips in the names of the sponsor and the appellant sent to the same address is limited and not sufficient to show that the relationship is genuine. I have already found that the letter produced in the name of the sponsor carries no weight. It would have been open to the parties had the appellant chosen to do so to have elected to have an oral hearing in which evidence of the genuineness of the relationship could have been given and tested in cross-examination. They chose not to do so.
23. Since this is was the only evidence submitted my findings above should be sufficient to dispose of this appeal. I do record however no evidence was placed before this Tribunal to establish that the proxy marriage which the appellant claimed to have contracted was valid according to the national law of the Appellant's Sponsor which in this case is France.
24. It is self evident that the First-tier Tribunal's determination contains no reference to any evidence identifying the relevant legal provisions in France. The written submissions which the Appellant provided for the hearing add nothing to this issue. The Appellant was made fully aware that what was in issue under *Kareem* was whether the proxy marriage was legally valid and recognised in France. He has not sought to address that issue at all, nor provide evidence to show that the Ghanaian proxy marriage which he says he and the Sponsor have contracted, is legally valid and recognised in France.
25. In these circumstances, I am satisfied that the First-tier Tribunal Judge has erred in law such that the decision must be set aside and remade. I am satisfied that the Appellant has failed to discharge the burden on him of proving that he is a family member of an EEA national exercising free movement rights within the Immigration (EEA) Regulations 2006 and that therefore he is not entitled to a Residence Card as the spouse of an EEA national exercising Treaty rights.

DECISION

26. The Appellant's appeal is dismissed.
27. Appeal dismissed.

No anonymity direction is made

Signature

Dated

Judge of the Upper Tribunal

I have dismissed the appeal and therefore there can be no fee award.

Signature

Dated