IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26249/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2014	**On 15 December 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

DANIEL OPPONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Oji, Counsel instructed by Messrs VLS Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant, a citizen of Ghana born on 4 May 1985, against the decision of the First-tier Tribunal who, sitting at Richmond Magistrates' Court on 29 January 2014 and in a determination subsequently promulgated on 18 February 2014, dismissed the appeal of the Appellant against the decision of the Respondent dated 11 June 2013 to refuse the Appellant a residence card as confirmation of a right of residence as a family member of an EEA national because it was concluded that he had failed to produce a valid marriage certificate as

evidence that he was related as claimed to the EEA national and that in consequence he did not have a basis of stay in the United Kingdom under the Immigration (European Economic Area) Regulations 2006.

2. The Appellant had applied as a non-EEA national family member of Esther Afriyie Oppong, an EEA national claiming to be exercising treaty rights in the United Kingdom. In support of his application, he submitted his Ghanaian passport, his EEA Sponsor's Austrian National Identity Card, his Ghana customary marriage certificate and statutory declaration and evidence of his EEA Sponsor's employment. In order for the Appellant to qualify for a residence card, Regulation 17(1)(b) of the 2006 EEA Regulations required him to provide evidence that he was related as claimed to his EEA national Sponsor. Regulation 7 defined who was considered as a direct family member of an EEA national, such as spouse.

3. As evidence of this, the Appellant submitted a Ghanaian customary marriage certificate and stated that he was married to the Sponsor in Ghana on 12 July 2012 by proxy and that the marriage was registered with the District Registrar on 26 July 2012. Further a statutory declaration dated 26 July 2012 had been provided from the Appellant's father and his EEA Sponsor's father in regard to consent of marriage by proxy in his absence.

4. As the First-tier Tribunal Judge recorded in his determination (decided, at the Appellant's request, on the papers) the Respondent did not accept that there was any evidence to show that the Appellant had registered his marriage in accordance with the requirements of Ghanaian law, namely the Customary Marriage and Divorce (Registration) Law 1985 and as such it was not accepted that the marriage certificate produced had been lawfully issued and constituted evidence of the Appellant's relationship and consequently the Appellant had failed to meet the requirements of Regulation 7 of the 2006 EEA Regulations.

5. The Respondent further considered the Appellant's application on the basis of his being an unmarried partner of an EEA national under Regulation 8(5) as an extended family member, but it was not accepted that he was in a durable relationship with an EEA national. In that regard the Appellant had failed to provide sufficient documentation to show that he was in such a relationship.

6. The First-tier Tribunal Judge considered the decision of the Tribunal in NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 00009 which held inter alia, that the onus of proving either a customary marriage or dissolution rested on the party making the assertion and that under the Immigration Rules it was for the Appellant to prove that the marriage was valid.

7. In this regard the First-tier Tribunal Judge at paragraph 7 of his determination had this to say:

> "The only evidence before me in respect of the customary marriage of 12 July 2012 which was said to be registered on 26 July 2012 relates to the documents that the Appellant produced in his covering letter of 6 January 2014 entitled 'evidence in support of appeal'. The statutory declaration is dated 19 December 2013 and clearly is not the same statutory declaration of 26 July 2012 in which the Appellant's place of residence was not included in the declaration. The document signed by the Second Deputy Judicial Secretary is not a document showing registration of the marriage and neither is the certificate that the name of the notary public whose name appears on the statutory declaration of 19 December 2013 is a notary public of Ghana. The Second Deputy Judicial Secretary states in his certificate that he only attests to the signature of the notary public and not to the contents of the statutory declaration of 19 December 2013. The document from the Ministry of Foreign Affairs and Regional Integration merely confirms that the signature of the Second Deputy Judicial Secretary is a true and certified signature. Put simply, none of these documents constitute evidence that a valid customary marriage took place".

8. In consequence, the First-tier Tribunal Judge was not satisfied that there was credible evidence that the Appellant entered into a valid customary marriage by proxy in Ghana and that the marriage had been registered in Ghana as required by the laws of the country. He found in accordance with the decision in NA that the Appellant had failed to prove that he entered into a valid customary marriage in Ghana by proxy.

9. The Judge continued that since there was no evidence that the marriage had been registered, he found that the Respondent was

> "correct to reject the Appellant's application under Regulation 7 of the 2006 Regulations because of a lack of evidence that he is a family member of an EEA national, in this case a spouse".

10. The Judge further found that in terms of the requirements of Regulation 8(5) he was not satisfied that the Appellant was in a durable relationship with an EEA national as an extended family member.

11. The Appellant made an unsuccessful application for permission to appeal that decision when it was noted that the first grounds seeking permission contended that the First-tier Judge erred in law in that he proceeded on the basis that registration of customary marriages in Ghana was mandatory as opposed to optional. The First-tier Judge who refused such permission, considered that although such a contention was arguable, the application nonetheless failed in relation to which she gave the following reason:

> "The EEA national to whom the Appellant is purportedly married is Austrian. In the case of Kareem (Proxy marriages - EU law) [2014] UKUT 24 at paragraphs 16, 17 and 18 it is stated:
>
> > 'Spouses' rights of free movement and residence are derived from a marriage having been contracted and depend on it. 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, 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.'

There was no such evidence before the FTJ as to the applicable Austrian law and therefore any appeal has no realistic prospect of success".

12. Subsequently, however, following the Appellant's application for Judicial Review Mrs Justice Lang by order dated 4 July 2014 decided that it was appropriate to grant permission "on procedural grounds". Her Ladyship continued:

> "The important case of Kareem v SSHD … confirming that the starting point was whether the marriage was contracted in accordance with the national law of the member state of the qualifying person, was only promulgated by the Upper Tribunal on 16 January 2014. Understandably it was not referred to at the FTT hearing on 29 January 2014 and is not part of the reasons for dismissing the appeal. But it was relied upon by the Upper Tribunal when refusing permission to appeal despite the fact that the Upper Tribunal found that the claimant's first ground of appeal (registration of customary marriages in Ghana not mandatory) was arguable. It seems to me that the claimant ought to be given an opportunity to address the issues which arise under Kareem both in evidence and law".

13. In consequence of that decision the Upper Tribunal in a decision dated 14 August 2014 granted the Appellant permission to appeal.

14. Thus the appeal came before me on 5 December 2014 when my first task was to determine whether the determination of the First-tier Judge contained an error or errors on a point of law that may have materially affected the outcome of the appeal.

15. Having heard the parties' submissions I was able to inform them that I was satisfied that the determination of the First-tier Tribunal Judge did not disclose errors of law material to the outcome of the appeal for reasons which I now set out below.

Assessment

16. I begin by acknowledging that the First-tier Judge failed to take account of the guidance in Kareem which indeed was a matter that led Lang LJ to grant permission "on procedural grounds" in that in consequence it was not part of the Judge's reasons for dismissing the Appellant's appeal.

17. This was a matter noted by Upper Tribunal Judge Coker when she had earlier refused renewed permission to appeal in a decision dated 8 April 2014, in which she too had recognised that although the grounds submitted were arguable the grant of permission was in her view

> "otiose because the appeal would fail in any event in the light of Kareem. Although the grounds to the UT submit that they were unaware of the case law even had they been aware there was no evidence to that effect and thus the appeal would fail in any event".

18. Indeed, UTJ Coker's observation properly reflected the fact that there was no evidence before the First-tier Tribunal Judge that the Austrian authorities would accept that the Appellant's customary proxy marriage was valid.

19. This reflects in particular paragraph 14 of Kareem where the following is stated:

> "Whilst considering the issue of evidence of marriage, we remind ourselves that the proof of the law of another country is by evidence, including proof of private international law of that other country. Such evidence will not only have to identify relevant legal provisions in the other country but identify how they apply in practice. A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail".

20. Such was further reflected at head note (g) of Kareem that inter alia:

> *"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".*

21. This decision was reinforced by the Tribunal in TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC) in which the head note stated as follows:

> *"Following the decision in Kareem (proxy marriages - EU law) [2014] UKUT 24, 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".*

22. It is apparent that the evidence before the First-tier Judge was that there was no evidence that this marriage was recognised in Austria and therefore the Judge's failure to consider Kareem is not in the above circumstances one that helps this Appellant.

23. I was informed by Ms Oji that there was now a letter from the Austrian authorities that was Kareem-compliant but as Mr Wilding rightly submitted, if that was the position advanced then, that evidence was not before the First-tier Judge. It was his further submission that the letter was not Kareem-compliant because it did not certify that the marriage in question was recognised by the Austrian authorities or as to how it was recognised (see my reference to head note (g) of Kareem above.

24. Mr Wilding submitted that "a party has to go to the EEA country in question to adduce evidence that they are married and ask that EEA state to accept that relationship".

25. Whilst it is regrettable that the First-tier Judge failed to take account of or was unaware of the guidance of the Upper Tribunal in Kareem, notwithstanding that its promulgation predated the First-tier Judge's decision, the fact remains that he could only decide the appeal on the basis of the evidence before him and in that regard the Appellant chose to have the matter determined on the papers.

26. Notably Ms Oji realistically accepted that "the necessary evidence was not before Judge Khan" and as I reminded her, a Judge cannot be regarded as having erred in law for failing to take into account evidence that was not before him. If there was now evidence that was considered by the Appellant to be Kareem-compliant then it was of course always open to him to make a fresh application on that basis.

Conclusion

27. I find that the First-tier Tribunal Judge properly identified and recorded the matters that he considered to be critical in his decision on the material issues raised before him in this appeal. The findings that he made were clearly open to him on the evidence and thus sustainable in law.

Decision

28. The making of the decision of the First-tier Tribunal involved the making of no error on a point of law and I order that it shall stand.

The appeal is dismissed.

No anonymity direction is made.

Signed Date 11 December 2014

Upper Tribunal Judge Goldstein