IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49714/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4th November 2014	**On 17th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR HAYFORD OTENG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Okyere-Darko (Solicitor)
For the Respondent: Mr N Bramble (Senior Home Office Presenting Officer)

DETERMINATION ON ERROR OF LAW

1. It is convenient to refer to the parties as they were before the First-tier Tribunal. The appellant's appeal against a decision to refuse to issue him with a residence card was allowed by First-tier Tribunal Judge McDade ("the judge") in a determination promulgated on 4th July 2014.

2. In refusing the appellant's application, the Secretary of State found that the appellant had not shown that he fell within regulation 7 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") as there was insufficient evidence to show that he was

married to the Belgian citizen he relied upon. In particular, the Secretary of State was not satisfied that the proxy marriage between the appellant and his sponsor was registered in accordance with the Ghanaian Customary Marriage and Divorce Law enacted in 1985. The Secretary of State went on to assess the appellant's case that, if he could not bring himself within regulation 7, he could show that his relationship with his partner was a durable one, within the meaning of regulation 8(5) of the 2006 Regulations. In this context, the respondent concluded that there was insufficient evidence showing that the appellant and his sponsor resided together as a couple at the same address prior to the date of the customary marriage and so the claim that they were in a durable relationship was not made out.

3. The judge noted that he had heard oral evidence from the appellant and his wife but found that this "did not go to the heart of the matter". Having weighed the evidence, and having taken into account guidance given in Kareem [2014] UKUT 24, the judge concluded that the evidence did show a genuine customary marriage, conducted by proxy, in Ghana and allowed the appeal on this basis.

The Application for Permission to Appeal

4. The respondent applied for permission to appeal, contending that the judge had misdirected himself and had misinterpreted the Upper Tribunal's decision in Kareem. The judge was required to assess whether the marriage relied upon by the appellant was recognised in the law of his spouse's state, Belgium. The author of the grounds asserted that there was no evidence adduced by the appellant showing that the marriage was recognised in Belgium. The evidence before the judge did not show that the appellant met the requirements of regulation 7 of the 2006 Regulations.

5. Permission to appeal was granted on 3rd October 2014, the judge granting permission observing that there may have been a failure to consider whether the marriage was recognised in the law of Belgium.

The Rule 24 Response Made by the Appellant

6. On 23rd October 2014, a response was made by the appellant's solicitors. It was accepted that the judge had failed to make a finding regarding the validity of the marriage in Belgian law but, on the other hand, there was evidence before the judge on this point, contained in the bundle of documents before him. The appellant's solicitors noted that the judge made no finding on the durability of the appellant's relationship with his partner or in relation to the requirements of regulation 8(5) of the 2006 Regulations. Again, evidence was adduced on this aspect of the case and the appellant and his sponsor were cross-examined. The judge was required to determine whether the decision to refuse the residence card

breached the appellant's rights in community law and so he was required to assess the durable relationship claimed to exist.

Submissions on Error of Law

7. Mr Bramble, for the Secretary of State, said that the issue was a narrow one. Further guidance from the Upper Tribunal in TA and Others [2014] UKUT 316 qualified how Kareem should be applied. It was clear that the judge had to find whether the marriage was recognised in the law of Belgium. He failed to deal with this. The evidence in the appellant's bundle included a letter from the Belgian embassy (which appeared in translation at page L5) but this did not reveal the questions put to the embassy for answer. It appeared to be the case that Belgian law would recognise the customary marriage by proxy only subject to certain conditions. What was required was confirmation by the Belgian consulate in Ghana but there was no evidence before the judge showing any recognition on this basis. The net result was that the judge had clearly erred in law.

8. The appellant's Rule 24 response raised the durable relationship point but this would only be relevant if an error of law were found, in which case the determination showed that it would be best to send the decision back to the First-tier Tribunal, for proper fact-finding in relation to the marriage and the durable relationship.

9. Ms Okyere-Darko accepted that the judge had made no finding in relation to Belgian law. The evidence at L5 in the appellant's bundle was before him. She also accepted that the document from the Belgian embassy was not conclusive but it did shed light on the position. It was clear that Belgian law made provision for the recognition of proxy marriages. She handed up a copy of Article 30 of the Civil Code, referred to in the letter from the Belgian embassy. What was required was authentication by the Belgian consulate, to check that the marriage complied with Ghanaian law. On this basis, there was evidence before the judge that the marriage would be validated and recognised. At page B9 in the appellant's bundle was a letter from the Ghanaian high commissioner confirming that the marriage was properly registered in Ghana and so there was no impediment to validation or recognition by the Belgian authorities, although that particular step had not yet been taken. Ms Okyere-Darko also agreed that the judge had made no findings on the durable relationship between the appellant and his sponsor, even though evidence was put before him on this point. Both the appellant and his sponsor were cross-examined and submissions were made. It was, perhaps, the case that the judge thought that his determination in relation to regulation 7 was sufficient.

Conclusion on Error of Law

10. The decision contains material errors of law and must be set aside. Although prepared by a very experienced judge, the short determination (the operative part is barely one side long) contains no findings of fact in relation to recognition of the customary marriage, conducted by proxy, in Belgian law. It is clear from Kareem and also from TA and Others that findings are required in this context. The determination in TA was dated 14 June 2014, two weeks before the appeal was heard by the judge and three and a half weeks before the determination was promulgated. It may not have been in the public domain by the time the judge prepared the case. If so, he cannot be faulted for failing to take it into account.

11. The determination also contains no findings in relation to the durable relationship claimed to exist between the appellant and his sponsor. The Secretary of State dealt with this part of the case in her decision letter and evidence was given by the appellant and his sponsor at the hearing. Ms Okyere-Darko is probably right in suggesting that the judge felt no need to consider regulation 8(5) as he believed that his analysis of the marriage was sufficient. Sadly, this is simply not so.

12. The absence of evidence of the recognition of the marriage in Belgian law fatally undermines the judge's conclusion that the requirements of regulation 7 of the 2006 Regulations were met and he has not engaged with the alternative case put by the appellant and considered by the Secretary of State under regulation 8(5).

13. The decision of the First-tier Tribunal, containing material errors of law, is set aside. It will be remade on the first available date, at Taylor House. There will be a de novo hearing and all the issues are at large.

DECISION

The decision of the First-tier Tribunal is set aside and will be remade in the First-tier Tribunal, at Taylor House, on the first available date. A Twi interpreter will be required and, subject to any further case management at Taylor House, two hours will be sufficient.

Signed Date 1**4th November 2014**

Deputy Upper Tribunal Judge R C Campbell