Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53415/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 July 2014	**On 29th July 2014**
Delivered Orally	

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DOUGLAS OWUSU

Respondent

Representation:

For the Appellant: Mr S Kandola, Home Office Presenting Officer
For the Respondent: Mr F Awuah, Solicitor of Danbar Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, hereinafter called the Secretary of State, against the decision of the First-tier Tribunal who in a determination promulgated on 29 April 2014 allowed on the papers the appeal of the Respondent (hereinafter called the claimant), a citizen of Ghana born on 2 February 1979 against the decision of the Secretary of State dated 2

December 2013 refusing to him the grant of a residence card as confirmation of right of residence as a family member of an EEA national, on the ground that he had failed to prove that he was in a durable relationship with an EEA national in accordance with Regulation 8(5) of the 2006 Immigration (European Economic Area) Regulations.

2. In fact the claimant had applied for a residence card as a confirmation of a right to reside in the United Kingdom as the spouse of a French national in relation to which Regulation 7(1)(a) is relevant in that it recognises that the spouse of a qualified person as defined in Regulation 6 shall be treated as a family member of that person.

3. The claimant's grounds of appeal before the First-tier Tribunal maintain that he had married his French national Sponsor by way of a Ghanaian customary marriage on 23 October 2012. He maintained that his wife was a qualified person exercising treaty rights in the United Kingdom currently working here.

4. The claimant contended that the Secretary of State was required to recognise the validity of the proxy marriage for immigration purposes "provided that proxy marriage is legal in that country" and that his proxy marriage was valid in Ghana and he asked the Secretary of State to accept its validity.

5. The claimant submitted that he considered he met all the necessary prerequisites for a proxy marriage to be accepted in the UK in that: the marriage was recognised in Ghana, the country in which the marriage took place; it was properly executed and satisfied the requirements of the laws of Ghana; and that there was "nothing in the law of either party's country of domicile that restricts the freedom to enter into the marriage".

6. In addition the claimant maintained he had fully discharged his obligation to prove that the marriage was valid in that he had provided the marriage certificate, a statutory declaration and a letter from the Ghana High Commission confirming that the relevant persons had signed the marriage registration documents.

7. The claimant did not choose to avail himself of the opportunity to have an oral hearing at which he and his claimed spouse could have given evidence in support of his appeal and therefore the First-tier Judge proceeded to determine the appeal on the papers before him.

8. In allowing the appeal (occasionally confusing the respective genders of the claimant and his Sponsor) the First-tier Judge relied on the guidance of the Tribunal in NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 0009 and concluded that he was satisfied in the light of that guidance, that the claimant was Ghanaian because he held a Ghanaian passport his entitlement to which had not been challenged by the

Respondent. The Sponsor had produced an identity card showing that she was a French national.

9. Further and in reliance on the guidance in McCabe v McCabe [1994] 1 FLR 410, the Judge could find "no evidence that both parties to a Ghanaian customary marriage must be Ghanaian".

10. The Judge continued at paragraphs 11 and 12 of his determination as follows:

> "11. I find that the marriage has been registered and a certificate of registration issued, although this step is no longer essential to its validity. I note that the witnesses who have signed the certificate are the Appellant's and the Sponsor's fathers. Their statutory declaration, taken before a Notary Public and duly notarised and legalised, states that the ceremony was attended by members of the families of both the Appellant and the Sponsor. Although the names of the Appellant and Sponsor appear on the certificate, I do not believe that they signed the certificate at the time of its issue, since they were not in Ghana; the proxies have signed to show they were there.
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> 12. It is for the Appellant to prove that the marriage is legally valid in Ghana before it can be recognised as such in the UK. I find that he has done so. I find that he is entitled to a Residence Card as the spouse of the Sponsor."

11. The grounds in support of the Secretary of State's successful application for permission to appeal that decision, pointed out inter alia, that in reaching his findings, the Judge failed to have regard to the reported decision and guidance of the Tribunal in Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC) in relation to which would be as well to note in particular that in head note (e) the Tribunal were clear that in considering cases of marriage by proxy conducted in a non-EEA state where the Sponsor was an EEA national

> *"the starting point will be to decide whether a marriage was contracted between the Appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality."*

12. Further, at head note (g) the Tribunal were equally clear inter alia

> *"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."*

13. This decision has since recently been reinforced by the Tribunal in TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC) in which the head note states 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."*

14. I note that in fact Mr Kandola, who appeared before me, also appeared for the Secretary of State in that case.

15. In her grounds the Secretary of State further inter alia pointed out, that in determining the validity of this claimed marriage the Judge should have firstly, but failed, to establish whether it was recognised in the Sponsor's EEA state, namely France. Indeed references were made to paragraph 16 of Kareem that inter alia

> *"a lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail."*

16. The grounds contended that in that regard and in terms of the present case, Article 146-1 of the French Civil Code clearly stated that proxy marriages were in fact incompatible with the code.

17. The Secretary of State thus submitted that as the claimant did not satisfy those requirements, it inevitably followed that he failed to satisfy the requirements of Regulation 7(1)(a) of the EEA 2006 Regulations and the First-tier Judge should thus have dismissed the appeal.

18. Thus the appeal came before me on 16 July 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.

19. Mr Kandola relied on the Secretary of State's grounds, pointing out that the guidance in Kareem had now been adopted in TA. He referred me to paragraph 6 of TA in which the following was stated:

> "6. The Secretary of State sought, and obtained, permission to appeal to the Upper Tribunal, it being said that the First-tier Tribunal had erred in law in failing to take into account and apply the recent reported decision of the Upper Tribunal of Kareem …; this being relevant because neither the first claimant, nor EKT [the Sponsor], had been present in Ghana at the time their marriage was contracted.
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> "7. It is not in dispute that the First-tier Tribunal ought to have, but failed to, consider the decision in Kareem, although the Judge was not helped in this regard by the failure of both parties to draw her attention to it."

20. Mr Kandola submitted that such a situation was in common with the present case, in that the Judge had simply failed to take account of the guidance in Kareem and, on the evidence before him, had he done so he would have had no alternative but to dismiss the appeal.

21. He further pointed out that the evidence showed in any event that the French Civil Code did not recognise proxy marriages. Matters of foreign law were matters of fact.

22. Mr Awuah, whilst accepting that the First-tier Judge had failed to consider the guidance in Kareem, maintained that in any event it was not material to the outcome of the appeal. He pointed out that the decision in Kareem was not referred to in the Secretary of State's Letter of Refusal.

23. The Secretary of State had not challenged the fact that the proxy marriage was solemnised by a competent authority in Ghana and further that at paragraph 11 of the First-tier Judge's determination (see above) the Judge made that clear. He was satisfied by reference to the decisions of the afore-named.

24. Further, the Judge was satisfied that the appeal should be allowed having made reference to and followed the guidance in NA and in McCabe in relation to which he referred to paragraphs 9 and 10 of the determination.

25. Mr Kandola in response pointed out that these were the same arguments raised in TA and rejected. In this regard he referred me to paragraphs 9 to 12 of that decision in which the following was stated:

> "9. Mr Akohene submits that it is clear that there is a two-stage process in the determination of whether a marriage can be considered to be valid for the purposes of the 2006 Regulations. Where a marriage certificate has been issued by a competent authority, this would usually be enough to demonstrate the validity of the marriage under the 2006 Regulations [paragraph 68(b) of Kareem]. In the instant case it is accepted that the competent authority in Ghana issued the marriage certificate and, consequently, the first claimant has demonstrated that she is married for the purposes of the 2006 EEA Regulations. It is not necessary to move on to the second stage of the consideration, which is relevant only where there is doubt about whether a marriage has been lawfully contracted [paragraph 68(d) of Kareem]. Where there is doubt as to whether a marriage has been lawfully contracted, for example because there is doubt about whether the marriage certificate has been issued by a competent authority, the starting point is to decide whether the marriage has been contracted in accordance with the national law of the EEA country of the Sponsor's nationality [paragraphs 68(d) and 68(e) of Kareem, when read together].
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> 10. This submission, it is said, is supported by the terms of paragraph 68(g) of Kareem, which contains the conjunctive 'and/or'. Accordingly, it is said, if there is clear evidence from the country in which the marriage took place that the marriage was lawfully contracted, an applicant need demonstrate no more.
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> 11. In response Mr Kandola submits that the determination in Kareem makes clear that a consideration of whether a person's marriage is valid always has to be undertaken in the context of the national

legislation of the EEA Sponsor's country of nationality; in this case the Netherlands.

12. I have no hesitation in agreeing with Mr Kandola's submission."

Assessment

26. Despite Mr Awuah's valiant efforts on the claimant's behalf, I have had no difficulty in concluding that the determination of the First-tier Judge disclosed errors of law that materially affected the outcome of the appeal.

27. Whilst it was perfectly understandable as to why the Secretary of State's Letter of Refusal made no reference to the position in Kareem (above) because its promulgation on 16 January 2014 postdated her letter, the same regrettably cannot be said for the First-tier Judge who determined the present appeal some three months after its promulgation.

28. Judges interpret existing legal principles. They reveal the law. They do not do so prospectively. Therefore, if for example the First-tier Judge misunderstood those legal principles then notwithstanding that a leading case on the issue postdated the determination it would still amount to a material error of law.

29. However, in this case the relevant Tribunal guidance did not postdate the Judge's determination.

30. Further, whilst I recognise that cases emanating whether from the former Immigration Appeal Tribunal or from the Upper Tribunal are not binding upon the First-tier Tribunal, significant weight should nonetheless be attached to the Tribunal's important guidance.

31. In such circumstances I consider it to have been highly regrettable that the First-tier Judge should have failed to heed the guidance of the Upper Tribunal in Kareem. As the former Immigration Appeal Tribunal (IAT) made clear in the past, it was always unfortunate where an Immigration Judge appeared to operate in a vacuum as if reported decisions of the Tribunal did not exist for guidance and consideration.

32. For the reasons that I have identified and indeed those comprehensively reasoned within the grounds in support of the Secretary of State's successful application for permission to appeal, I am wholly satisfied that the First-tier Judge materially erred in law and that in consequence his decision should be set aside.

33. Quite apart from the matters that I have identified above, there would appear for example to have been no or no satisfactory evidence before him that the Sponsor was exercising treaty rights.

34. I further note that the refusal letter was clear that the claimant's application had also been considered in the alternative under Regulation 8(5) which refers to durable partners (unmarried partners) of EEA nationals who apply for residence cards to regularise their stay in the United Kingdom.

35. As the Secretary of State pointed out, a claim from somebody who had stated that they were a durable partner would be considered in terms of evidence submitted to show that the couple were in a durable relationship. In that regard the First-tier Judge failed to consider this aspect in the refusal because he concluded that the couple were lawfully married and the Secretary of State's refusal was in the alternative and a consideration in compliance with this Regulation would not have applied if the claimant had demonstrated that his marriage took place in accordance with the law.

36. It is as well for the sake of completeness that I point out, that in terms of whether the couple's relationship was durable, there appears to have been no evidence that the couple had been living together for at least two years. It is right to say that most helpfully Mr Awuah accepted that this was the case.

Decision

37. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

38. I set aside the decision.

39. I remake the decision in the appeal by dismissing it.

Signed Date 28 July 2014

Upper Tribunal Judge Goldstein