



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/13620/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham Sheldon Court  
On 23 December 2014**

**Decision Promulgated  
On 19 January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**RANSFORD KWASI GYEKYE**

Respondent

**Representation:**

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer

For the Respondent: Ms E Rutherford, instructed by Law Clinic (Birmingham)

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge McGinty that was promulgated on 5 June 2014.
2. Judge McGinty allowed Mr Gyekye's appeal against the EEA decision of 6 March 2014 refusing to issue residence documentation to him on the basis that he had not established that he was related to a qualified person. The Secretary of State's grounds of appeal are that the judge failed to follow the guidance contained in Karim (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC).

3. At the start of the hearing Ms Rutherford conceded that the decision was legally flawed because Judge McGinty had failed to follow Karim and had also failed to explain why it did not apply to the case he was determining.
4. Ms Rutherford was aware (as was Mr Smart) that I had authored the decision in Karim. I made it clear that even though I had been involved in that case, I was open to hear any arguments that it was wrong or did not apply in this case. Ms Rutherford confirmed that she did not have any such arguments.
5. I decided that Judge McGinty's decision contains an error on a point of law and that it has to be set aside. The error is that although the judge found that the appellant had established that he was legally married according to Gambian law, his marriage by proxy being recognised in that jurisdiction, and notwithstanding the fact that the marriage would be recognised according to the law of England and Wales, the judge failed to establish that the marriage was recognised for EU law purposes. As made clear in Karim, as the appellant was seeking to rely on EU law to secure his right of residence in the UK, it was incumbent on him to establish that he had contracted a marriage in that context, which required evidence to show that his marriage was contracted according to the laws of the Netherlands, being the country of nationality of his claimed spouse. By failing to deal with this issue, the judge erred in law.
6. I decided that it was appropriate to remake the decision in the Upper Tribunal despite Ms Rutherford's suggestion that the matter be remitted. I did so bearing in mind the overriding objective and relevant guidance. The Upper Tribunal notified the parties that the appeal might proceed immediately if an error on a point of law was found and that the parties should ensure that any evidence on which they intended to rely should be submitted two weeks in advance. Mr Gyekye had not submitted any additional evidence despite these directions and there was no explanation for such failure.
7. Given the guidance in Karim, the failure of the appellant to provide evidence to show that his marriage is recognised according to Dutch law means that he has failed to establish that he can benefit from the right of residence he might otherwise have been able to derive. His appeal against the EEA decision of 6 March 2014 must be dismissed on this ground.
8. Ms Rutherford sought to rely on the appellant being in a durable relationship with his Dutch partner. I pointed out that this had not been pleaded before the First-tier Tribunal. Even though the Secretary of State had considered whether the appellant might derive a right of residence as an extended family member as a person in a durable relationship, this was not raised in the original grounds of appeal or before Judge McGinty. This was not a situation where the judge overlooked a ground of appeal that had been previously canvassed.

9. In addition, there was no evidence that the appellant was in a durable relationship.
10. Bearing in mind the history of this appeal, it was not in anyone's interest to allow the grounds of appeal to be amended or to adjourn for further evidence. In reaching this conclusion I have borne in mind that it is open to the appellant to make a fresh application to the Secretary of State, this being an EEA matter.
11. In light of these considerations, I find that the appellant cannot rely on a ground of appeal relating to durable relationship.
12. Bringing these findings together, I conclude that the appeal against the EEA decision of 6 March 2014 fails.

## **Decision**

The decision of First-tier Tribunal Judge McGinty contains an error on a point of law and is set aside.

I remake the decision to dismiss the appeal against the EEA decision of 6 March 2014.

Signed

Date **23 December 2014**

Deputy Judge of the Upper Tribunal