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**UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)**

**APPEAL NUMBER: IA/33326/2014**

**THE IMMIGRATION ACTS**

**Heard at: Field House on  
10 September 2105**

**Decision and Reasons Promulgated  
on 12 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MS AKOSUA D  
NO ANONYMITY DIRECTION MADE**

**Respondent**

**Representation**

**For the Appellant: Mr C Whitwell, Senior Home Office Presenting Officer**

**For the Respondent: Mr W Akaho, Solicitor, BWF Solicitors**

**DETERMINATION AND REASONS**

1. I shall refer to the appellant as the secretary of state and to the respondent as "the claimant."
2. The claimant is a national of Ghana, born on 7 July 1972. Her appeal against the decision of the secretary of state refusing her application for a residence card pursuant to the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"), was

allowed by First-tier Tribunal Judge Lal “under the immigration rules” (sic) in a determination promulgated on 11 November 2014.

3. On 1 July 2015, the Tribunal set aside the decision of the First-tier Tribunal Judge. It was accepted that the Judge erred in law in failing properly to apply the Upper Tribunal's decision in TA, explaining the decision in Kareem (Proxy Marriages - EU Law) [2014] UKUT 24. The determination of whether there is a marital relationship for the purpose of the 2006 Regulations must always be examined in accordance with the laws of the member state from which the Union citizens obtained nationality. No evidence had been produced as to the laws of France from which the Union citizen in this case obtained his nationality.
4. There were moreover no clearly identifiable reasons justifying the findings that the marriage was genuine and durable. The decision in that respect only amounted to two sentences. The record of proceedings did not set out the evidence in full and it was accordingly not possible to ascertain the full nature and extent of the evidence that the Judge relied on.
5. In the circumstances, I found that the decision of the First-tier Tribunal Judge involved the making of material errors of law.
6. Both parties accepted that the decision should accordingly be set aside and would have to be remade.
7. In remaking the decision I found that the claimant and her partner were not to be treated as being married for the purpose of the 2006 Regulations and that she accordingly had not established that she is a family member for the purposes of Regulation 7 of the 2006 Regulations.
8. With regard to Regulation 8, however, it was accepted on behalf of the respondent that the claimant would be entitled to adduce evidence and make full submissions as to whether their relationship is durable for the purpose of Regulation 8(5) of the 2006 Regulations. The appeal was accordingly adjourned.

#### **Hearing on 10 September 2015**

9. I have had regard to the bundles of documents relied on before the First-tier Tribunal as well as the supplementary bundle produced to the Upper Tribunal. The latter bundle contained the documentary evidence relied on by the claimant.
10. In assessing whether the relationship was durable, the secretary of state noted in refusing that claim that it is to be expected that the claimant demonstrates that she has been living together with her EEA national sponsor for at least two years. Equally, it is reasonable to expect that both intend to live permanently together and that any previous relationship or marriage each may have had has broken down.
11. The secretary of state contended that no evidence had been provided that they resided together as a couple at the same address prior to the date of their customary

marriage certificate. In addition, there was no evidence that they knew each other or had met prior to the date of their customary marriage. As a result there was insufficient evidence suggesting that they are in a durable relationship.

**The claimant's case**

12. The claimant attended the hearing and gave evidence. She had the benefit of a Twi interpreter. She adopted her witness statement at A1-A8 dated 20 October 2014. She was born on 7 July 1972 and is a Ghanaian national. She lives at 81 [ - ] London [ - ].
13. She came to the UK as a visitor in March 2003. Whilst here she met a Portuguese national. They eventually decided to get married. On 3 April 2004, whilst they were about to get married at the Lambeth Registry Office, she was arrested. She was detained and then released.
14. Her relationship broke down when her partner decided he had had enough of the UK and left for Portugal. She did not wish to leave and remained.
15. She lived at different addresses with friends who accommodated her.
16. In September 2007 she heard a programme relating to a pregnant woman who had collapsed and died. Her baby however was saved. There was an urgent request for a helper or carer for the baby. A telephone number was disclosed.
17. She got in touch with a Mr M who accompanied her to the hospital where his newborn baby had been placed in an incubator. Whilst he went to Ghana to bury his wife, she looked after his children in his absence. She attended hospital on a daily basis to see the newborn child.
18. When he returned from Ghana, she was told by nurses that the baby had become attached to her and that she should continue her visits. She lived with Mr M for a few months. When the baby was discharged, she came to London for the weekends. She had resided in Northampton prior to that.
19. She came to London over weekends. In due course after Mr M noted her commitment to the children, they started a relationship.
20. He moved into her home permanently at 353 [ - ]. They became close and had a sexual relationship. They eventually agreed to get married.
21. This they did on 30 April 2008 and entered into a customary marriage. Her subsequent application for a residence card was refused.
22. Mr M went to Ghana with his two boys and left her on her own with the baby. He never returned. She was left with no choice but to care for the baby herself. She received help from social services. She became Kwame's sole carer and bonded with him. She decided to adopt him as her own child and obtained a parental responsibility order.

23. In March 2012 her Article 8 application was refused. Sadly, Kwame died of various ailments and was buried in June 2012 in the London Borough of Southwark. Her marriage to Kwame's father deteriorated as he had abandoned her. Ultimately the relationship broke down and was dissolved on 19 May 2013.
24. She had moved to her current address where she had lived with the child for four years before his death. On the anniversary of the child's death she held a gathering at her house 'to remember him'. Mr O was one of the sympathisers who were present on that occasion.
25. After the memorial event, Mr O called her to find out how she was coping. They became friends. He offered emotional and financial assistance. Eventually they fell in love. He visited her on most weekends. Their relationship started on her birthday on 7 July 2013.
26. She and Mr O visit the child's grave on a monthly basis.
27. They became inseparable and he moved into her home in the first week of August 2013. His BT bill was sent to that address. Eventually he began to discuss marriage with her.
28. On 18 October 2013, which was [Mr O's] birthday, friends came to celebrate. He proposed to her in their presence and she agreed. She calls her husband by his nickname. They agreed to get married "customarily". He went to Ghana to inform their relatives about their intentions. He went there at the end of October 2013. On 4 November 2013, they got married "customarily".
29. Mr O returned to London on 10 November 2013. There was a celebration at home with a few friends.
30. She disputes the contention that she gave false information for obtaining a visa. She had fled from female circumcision which she had earlier stated.
31. She refers to the refusal of her application on the basis that there was not sufficient evidence provided that she was residing with Mr M. It had been contended that she was not able to rely on that relationship as she was not residing with him. She contended that that was wrong, that she was at the time the mother of his child whom she adopted.
32. In the current application, she stated that her husband comes from France, although they are both of Ghanaian parentage. Her husband went personally to Ghana to perform the ceremony. If he did not love her he would not have taken the trouble to buy a ticket to Ghana to see her relatives.
33. She refers to various documents produced including photographs of the ceremony as well as those regarding 'family life'. She pointed to various documents including utility bills, bank statements and the like to which I shall later refer.

34. Her husband works as a cleaner, earning about £1,000 a month. He has been working with Asda since 2012.
35. She loves her husband. They plan to enjoy their companionship, intimacy and spend the rest of their lives together as a family unit. They live together as a married couple.
36. In her oral evidence in chief she said that they came to court today by taxi. They started living together when they were married on 4 November 2013. They lived together prior to that for about two months at 81 [ - ]. That was the property where she resided before her husband moved in. She still lives with him at that same address.
37. She was cross examined.
38. She said that there is no tenancy agreement relating to 81 [ - ]. This was property given by the Southwark council.
39. She was asked whether the council knows that her husband lives with her. She was given a letter by the council. The letter relied on was from the electoral registration officer to "the occupier" at 81 [ - ] dated July 2015.
40. There is no other tenant or occupier at the property: only they live there. She married in November 2013 and said she lived with her husband for about two months before that. She said he came in about July 2013.
41. She was asked why she stated that he came two months before November. She said she did not check this properly. She does not remember the dates properly.
42. She was taken to paragraph 22 of her witness statement where she stated that he moved into her home during the first week in August 2013. She said her child died on 19 May 2012. She met her husband a year later, at the anniversary celebration of his death on 19 May 2013.
43. She divorced Kwame's father on 19 May 2013.
44. She accepts that she was married within three months of meeting her husband. He is 61 years old and she is 43. He has a child from a previous marriage. She has not seen the child. His name is Kwasi. He has not been to stay with them in the UK. Her husband had not told her that Kwasi was living in the UK. When she met him her husband told her he had a child.
45. She was referred to paragraph 6 of her husband's statement. Where he stated that he has a child, Kevin O, who lives with his mother. She said his name is Kevin. He got the name 'Kwasi' from her husband. He did use the name Kwasi as well. The name relates to the date he was born.
46. She does not know when Kwasi and his mother came to the UK.

47. Her husband does not have siblings. They have died. She does not know how many they had, nor their names. They died before they met.
48. She said that her husband's siblings had children. Her husband has nephews and nieces. He has not told her that they are in the UK. They are in Ghana. None has visited him in the UK. No friend of her husband from Ghana has stayed over.
49. She was referred to her husband's statement, where he stated that he would like to take her on holiday. She said he has not said where he would take her. They have not had a holiday in the UK.
50. She was asked what they do with the time they have together. They go to church on Sundays. He works six days a week from about 4am until 3pm each day. They do not eat out. They have been to a cinema together.
51. It was put to her that the fact that she cannot say much about him meant that they only cohabit and nothing more. She denied that. They are married. They go to formal social parties such as when someone is having a baby function.
52. The last such social party they went to was on Sunday this week. That was at the church. She has been with her husband to a "funeral" on the Sunday. She explained that this was a memorial service which was a thanksgiving at the church in Milton Keynes.
53. She was referred to paragraph 29 of her statement in which she stated that she did not provide sufficient evidence that she was residing with Mr M. She was asked why she did not marry him in the UK. That was because he had family in Ghana.
54. It was put to her that she could have a legal marriage with her husband, Mr O, in the UK. At the moment they are living together and do not want to marry civilly. This is not her first engagement with an EEA national. She was previously engaged to a Portuguese national.
55. She was asked why she did not marry that national on another day. That was because he said he was fed up. She did not want to go with him to Portugal. She did love him. She had not wanted to marry him 'for documents'.
56. She said that her husband's child's mother would not allow him to come to them. She has not seen the child's mother and has not met her.
57. When asked about 'last Sunday', she said they went to Milton Keynes. She repeated that this was a formal memorial ceremony. There was food. This was a gathering. The celebration of a child's birthday also took place, however they went for the memorial service.
58. There was no re-examination.
59. Mr O attended the hearing and gave evidence. He gave his address as 81 [ - ]. He adopted his witness statement, signed and dated on 20 October 2014. He said there

was one mistake at paragraph 17. He should have stated that he would be celebrating his 61<sup>st</sup> birthday in October 2014. He had however stated on 20 October 2014, the date he signed his statement, that he would be celebrating his 60<sup>th</sup> birthday.

60. He was born in Ghana on 18 October 1954. His parents are deceased. He left Ghana for France in 1981. He was educated in France. He married DO on 25 April 1998 in France. They had problems. This persisted and in 2009 he decided to come to the UK "for respite." He also wanted to learn English.
61. He rented a studio flat in Milton Keynes. He obtained a job at Tesco Warehouse as well as "a driving delivery job." He divorced DO in January 2013. He has a child, Kevin O, with her, who stays with his mother.
62. On 19 May 2013 he attended a remembrance day for a child who died a year earlier. He noticed that the claimant had not recovered from the death of the child. He took her telephone number and called her after that. He went to visit her over weekends and assisted her in coping. He also helped her financially. Eventually, he developed love and affection for her.
63. They attended birthday parties and funerals together. She also took him to her child's grave. They continue to go once a month.
64. The relationship commenced on 7 July 2013 and developed. After a month, some time in the first week of August 2013, he moved in with her. On his birthday party on 18 October 2013 he proposed to her at a gathering at the "home house." She accepted his proposal. She told him she could not travel as she did not have leave to remain. He then decided to go to Ghana to enable him to get acquainted with her relatives and perform the customary rites and to finalise their marriage.
65. On 4 November 2013 the marriage was performed in Accra. He returned to the UK on 10 November 2013. On 30 November they celebrated with friends at 81 [ - ]. They went to church on 1 December 2013 for thanksgiving for their marriage.
66. He loves his wife dearly. He was "alarmed" that her application was refused. He had submitted his ID card, payslips, utility bills and other documents.
67. He contends that he and the claimant are in a durable relationship and have been living together since August 2013. Although he is French, he wants to continue living with the claimant as his wife in the UK. He now sees the UK as his home. He pays the bills and is responsible for rent and other expenses.
68. He wants to be able to travel with the claimant wherever he goes. He is not happy travelling alone.
69. He is now 61. His wife's application has been of major concern to him, causing him anxiety. He has lived with his wife since August 2013 to date.

70. He was asked how he spends his time with her. He works Monday-Saturday. He goes to church with her on Sundays. He last went to church on the Sunday past to Milton Keynes to attend a memorial service<sup>1</sup>.
71. In cross examination he said he is sure that it was the first week of August 2013 that he moved in with her.
72. He came to the UK in 2009. His child from his former relationship with DO lives with his mother in the UK. They came here in 2009. This was because the child plays football for [ - ] under 20s.
73. He married DO at the Court in France who accepted their marriage.
74. Kevin is also called Kwasi. He explained that '.....when you are born on a Sunday in Ghana you are called Kwasi'. He sees his son when he plays football on Sundays.
75. He still has a relationship with him. He buys things for him. He goes to see him because of the football and sees him play every two months or so. He has not discussed with his wife where she would want to go on holiday with him. They have not had a holiday in the UK. They go to the local Camberwell church on Sundays.
76. There was no re-examination.

### **Submissions**

77. Mr Whitwell referred to the reasons for refusal where it was stated that the claimant had provided insufficient evidence relating to the claim that theirs is a durable relationship. He submitted that living together and going to church does not amount to a durable relationship. There was little by way of any 'socialisation' apart from the attending of church.
78. He submitted that there was a vagueness as to when they began cohabiting together. He suggested that it may have been in July, September or August 2013. Mr Whitwell accepted that this may however not be the most significant matter.
79. There was no documentary evidence respecting their tenancy. Further, the claimant stated that she did not want to get married civilly, which may show that this is not a durable relationship.
80. Mr Whitwell submitted that the evidence must be assessed in its proper context. This is a claimant who came on a visit visa and has overstayed. She then became engaged and attempted to marry a Portuguese national. This was stopped. They decided not

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<sup>1</sup> When she gave her evidence, the claimant's husband remained out of court. He came into court immediately after she completed her evidence and began to give his evidence. I am accordingly satisfied that Mr O had no opportunity to speak to the claimant or his solicitor about her evidence.



to go further with that relationship. This suggests that that had not been a love marriage. Accordingly, the current relationship needs to “be scrutinised carefully.”

81. With regard to the additional evidence, he accepted that there is a degree of consistency between them.
82. On behalf of the claimant, Mr Akaho submitted that there was only one issue, namely whether theirs is a durable relationship. That is not defined by the directive or under the 2006 Regulations. He referred to YB (EEA Reg 17 (4) – proper approach) Ivory Coast [2008] UKAIT 00062 where the Tribunal stated at [29] that it is clear that the policy instructions themselves recognise 'at least in places' that meeting the requirements of comparable immigration rules is not necessarily determinative. Paragraph 2 of the European case work instructions emphasises that each case must be assessed on an individual basis, but an example of where it might be appropriate to issue a residence card would be if a family member was very elderly or incapacitated.
83. The Tribunal there stated that in the light of their analysis, it was also clear that the IDIs at 5.5.2 stipulates that officers “should satisfy themselves fully that the person meets the leave to enter requirements of an unmarried partner as set out in part 8 of the immigration rules (other than those relating to entry clearance)”. There was no definition given by the Directive or the regulations of the term “durable relationship.” The policy instructions are helpful in indicating the general approach but should not be taken as necessarily correct in every particular.
84. He also submitted that a durable relationship does not necessarily entail cohabitation – Dauhoo (EEA Regulations – Reg 8 [2012] UKUT 79 at [21]. Durable relationships are not defined by the regulations and is not measured by a fixed period of two years.
85. He submitted that theirs is a durable relationship. They have lived together for two years. Both said August 2013 was the date they began to live together.
86. They have married in accordance with Ghanaian customary law. They believe that there is no need to repeat it here in the UK. They remain committed.
87. With regard to the claimant's history as an overstayer, he submitted that after her Portuguese national partner left the UK, she did not decide to follow him. This was an individual decision. It does not follow that the current relationship is not genuine. This must be assessed on its own terms.
88. The evidence that they gave in relation to his son, Kevin (Kwasi) was consistent and so was the evidence relating to their association with each other during the week, the work pattern as well as the attendance of church.
89. He submitted that there is 'more than sufficient evidence' based on the documentation to confirm their assertions of cohabitation at the relevant address. He submitted that the appeal should accordingly be allowed.

### Assessment

90. I found the evidence of the appellant and her husband to be credible. There have not been any significant contradictions or discrepancies in their evidence.
91. I have had particular regard Mr Whitwell's submission that regard must be had to the context in which the appellant made her current application. That is indeed a very relevant consideration. I have taken into account the fact that the appellant was an overstayer who entered into a relationship with a Portuguese national. Her earlier application for a residence card failed, resulting in her sponsor returning to Portugal. However, she did not follow him there.
92. I have also had regard to the context in which she met Mr O. This was at a memorial service regarding the child whom she had adopted and who sadly passed away a year earlier. It was on that occasion that Mr O noted how sad the appellant was and that resulted in telephone contact between them.
93. Mr O was able to provide some comfort and solace for her, including assisting her financially at the time. In due course I accept that they did fall in love and that a proposal of marriage was accepted.
94. This resulted in a customary marriage. Although that marriage might be valid in accordance with Ghanaian customary law, there was no evidence placed before the respondent or the Tribunal that France was a country which recognises the validity of proxy marriages of this kind. Accordingly, the claimant and her partner could not be treated as being married for the purpose of the 2006 Regulations and she thus could not establish under Regulation 7 that she is a family member.
95. It was evident from the evidence given by the claimant and Mr O that they are aware of the day to day circumstances of each other's lives. Mr O set out his working pattern which the appellant independently confirmed during her oral evidence. None of that evidence had been available in either of their witness statements.
96. Moreover, although as submitted by Mr Whitwell, there is not much of an external social life, both said that their social life and social activity revolved around the church. They regularly attend on a Sunday. Moreover, they gave consistent evidence relating to their recent trip to Milton Keynes in order to attend a church ceremony there which was a memorial service for a deceased person.
97. There is no dispute that they have been living together at the premises situated at 81 [ - ]. Although they have not produced any tenancy agreement, the claimant stated that this was a house provided to her when she had care of the child of Mr M. That child was in hospital for nine months. Mr M proposed to the claimant and moved into her home. They did in fact get married customarily in April 2008. Her application for a residence card was refused.
98. Mr M went to Ghana with his two boys and left her alone with the baby. He never returned. She then decided to adopt the child as her own and even obtained a court

order for parental responsibility. The child suffered from cerebral palsy and died on 19 May 2012. The relationship with the child's father broke down and was dissolved in May 2013.

99. In the meantime the claimant had moved to her current address in [ - ] where she lived with Kwame for four years prior to his death. I accept that on the anniversary of the child's death there was a gathering at her house which resulted in her meeting her current partner, Mr O.
100. I accept from the evidence which has not been challenged that they have been living together at the same address for over two years as at the date of the hearing.
101. They have also married in accordance with Ghanaian customary law. Although evidence relating to their cohabitation has not been disputed, I have also had regard to the documentary evidence produced which confirms their assertions in this regard.
102. The claimant has produced gas bills between October and December 2013 which shows her address as 81 [ - ]. There are also EDF Energy bills during November 2013. At D10-D14 there is a Home Serve policy sent to the claimant at that address on 30 November 2013. Further, there is a letter from the London Borough of Southwark dated 14 June 2012 sent to the claimant at the address in which she is granted the exclusive right of burial at the Camberwell New Cemetery (14 June 2012).
103. There is moreover a landlord's gas safety letter sent to the appellant in March 2015.
104. I have also had regard to a joint Barclays statement evidencing that the claimant and Mr O operate a joint account - G2. This is for the period January to April 2015. There is also an account summary in respect of the joint account produced for the period October 2013 to October 2014.
105. With regards to the documentation relating to the sponsor alone, I have had regard to his payslips as well as his P60. His Barclays bank statement for the period 13 September until 10 October 2014 shows his address at 81 [ - ]. There are also joint Barclays bank statements for the period November 2013 until the end of January 2013 (see 30-33).
106. There are joint bank statements produced for the period 14 January to 11 April 2014; 14 January - 11 April 2014; 12 July - 10 October 2014 and 13 September - 10 October 2014.
107. There are a number of Barclays bank account statements in respect of the sponsor alone at the address for the period 13 December 2013 - 10 January 2014; 13 May 2014 - 12 June 2014; 13 November 2013 - 12 December 2013.
108. There is a Thames Water bill sent to the sponsor at the address for the period 1 April 2014 to 31 March 2015 in which the additional account holder is stated to be the claimant.

109. There is a BT bill sent to Mr O on 24 October 2013 at that address. There is also an NHS letter sent to Mr O at that address, issued on 9 October 2014, which is a confirmation of GP registration at the South London Primary Care Support Services in London [ - ]. There is a letter produced from the London Borough of Southwark addressed to Mr O in which his polling station in the election for the European parliamentary members scheduled for 22 May 2014.
110. I have also considered Mr Whitwell's submission that the relationship is not "genuine" on the basis that there is little by way of socialisation apart from attending church. However, I do not find that there is any merit in that contention. As already indicated, their relationship has demonstrated a commitment and there is an endurance to the relationship which satisfies the relationship for the purpose of the 2006 Regulations.
111. There is no requirement that they have an active and varied social life. Their social contacts, friends and acquaintances reside in the church, both locally and at Milton Keynes where they attended a memorial service a few days prior to the hearing.
112. I have also had regard to the photographs produced relating to the funeral rites of Kwame M (E1-E9) as well as the customary marriage photographs at E10-E15.
113. Regulation 8(5) provides that a person satisfies the conditions applicable to "extended family members" of the EEA National if she is the partner of an EEA National and can prove to the decision maker that she is in a durable relationship with him.
114. There is no definition in the 2006 Regulations as to "a durable relationship." Whether or not the appellant is in a durable relationship is a matter to be considered on the basis of the evidence as a whole.
115. Having regard to all the circumstances, I find that the parties have cohabited under the same roof for at least two years and that this constitutes more than mere cohabitation. They are living together in a committed relationship which has endured and which is permanent.
116. I am accordingly satisfied from the evidence as a whole that the claimant and Mr O are in a durable relationship for the purpose of Regulation 8(5) of the 2006 Regulations.
117. I have also had regard to Regulation 17(4) of the 2006 Regulations which provides that the secretary of state "may" issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA National on application if the relevant EEA National in relation to the extended family member is a qualified person (which I find Mr O is); and in all the circumstances it appears to the secretary of state appropriate to issue the residence card.
118. Accordingly, Regulation 17(4) provides a discretion to the secretary of state relating to the issue of a residence card in these circumstances.

119. In the claimant's case, the respondent has not considered the exercise of such discretion, having dismissed her application.
120. In the circumstances, the secretary of state is in the first instance required to consider the exercise of discretion before the Tribunal is itself entitled to consider the exercise of discretion itself: FD (EEA Discretion – Basis of Appeal) Algeria [2007] UKAIT 49.

**Notice of Decision**

Having set aside the decision of the first-tier Tribunal, the decision I substitute is to allow the claimant's appeal to the extent that her application for an EEA Residence card remains outstanding before the secretary of state.

No anonymity direction is made.

Signed

Date 9 October 2015

Judge C R Mailer  
Deputy Upper Tribunal Judge