Upper Tribunal
(Immigration and Asylum Chamber)

TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 June 2014	………………………………

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS TA
MASTER KA
MISS ANAG
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr Kandola, Senior Presenting Officer
For the Respondent: Mr Akohene, Solicitor – Afrifa and Partners

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.

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DETERMINATION AND REASONS

Introduction

1. The appellant in these appeals is the Secretary of State for the Home Department. For the sake of convenience I shall refer herein to Ms TA, Master KA and Miss ANAG as 'the claimants'.

2. The First-tier Tribunal made an anonymity direction and neither party has requested that I discharge that direction. Therefore, unless and until a Tribunal or Court directs otherwise, the claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any members of their family. Failure to comply with this direction could lead to a contempt of court.

3. The claimants are citizens of Ghana. The first claimant is the mother of the second and third claimants, who are minors. On 14 September 2012 the claimants each applied for an EEA residence card as confirmation of their right to reside in the United Kingdom as non-EEA national family members of EKT, a Dutch national. The two minors are not the biological children of the EEA sponsor (EKT). The Secretary of State refused these applications in a single decision of 2 May 2013.

4. The claimants appealed the Secretary of State's decision to the First-tier Tribunal. First-tier Tribunal Judge Chowdhury heard the appeals on 3 March 2014 and allowed them *"under the 2006 Regulations"* [this being a reference to the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003)] in a determination promulgated on 22 April 2014.

5. Having considered the reported decision of the Tribunal in NA (Customary marriage and divorce evidence) Ghana [2009] UKAIT 00009 the judge concluded that the first claimant and EKT had undertaken a valid marriage for the purposes of regulation 7 of 2006 Regulations.

Error of Law

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 (Proxy marriages – EU law) [2014] UKUT 24; this being relevant because neither the first claimant, nor EKT, had been present in Ghana at the time their marriage was contracted.

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. Mr Akohene submits that this error was not material to the First-tier Tribunal's determination. Mr Kandola submits to the contrary.

8. It is prudent at this juncture to set out the terms of paragraph 68 of the decision in Kareem, upon which Mr Akohene seeks to found his submissions:

> "We make the following general observations:
>
> (i) A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.
>
> (ii) The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.
>
> (iii) A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.
>
> (iv) In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.
>
> (v) In such an appeal, 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.
>
> (vi) In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.
>
> (vii) 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. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight.
>
> (viii) These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships."

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].

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.

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.

13. Mr Akohene relies upon the terms of paragraph 68 of the decision in Kareem, but it is important to read the determination as a whole in order to properly understand what is being said in paragraph 68.

14. At paragraph 17 of Kareem the Tribunal concludes:-

> "…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 citizens obtains nationality and from which therefore that citizen derives free movement rights."

15. When this passage is read in isolation, it would appear to provide some support for Mr Akohene's submissions; however, when it is read in the context of the surrounding paragraphs a different picture emerges.

16. In paragraph 11 of its determination the Tribunal in Kareem recognise that the question of whether a person is married is a matter governed by the national laws of the individual Member States.

17. It continues in paragraph 13 as follows:

> “From this we infer that usually a marriage certificate issued by a competent authority will be sufficient evidence that a marriage has been contracted. Of course, a document which merely calls itself a marriage certificate does not have any legal status. A certificate will only have legal status if it is issued by an authority with legal power to create or confirm the facts it attests, that is, by an authority that has such competence. Where a marriage document has no legal status or where such status is unclear, other evidence may be used to establish that a marriage has been contracted. However, once again we find that these principles do not help us to determine whether a person is a spouse because it would depend on identifying the authority with legal power to create or confirm that a marriage has been contracted.”

18. Moving forward to paragraph 16, the Tribunal once again observe that :

> “…where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of the nationality and not the host Member State…”

19. The reasoning continues in paragraph 18:

> “Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions about that Union citizen’s marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to the fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system of which a marriage is said to have been contracted in such a way as to ensure that the Union citizen’s marital status is not at risk of being differently determined by different Member States. Given the intrinsic link between nationality of a Member State and free movement rights, we conclude that the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted.”

20. Given that which I set out above, it is difficult to see how the Upper Tribunal in Kareem could have been any clearer in its conclusion that when consideration is being given to whether an applicant has undertaken a valid marriage for the purposes of the 2006 Regulations, such consideration has to be assessed by reference to the laws of the legal system of the nationality of the relevant Union citizen. Mr Akohene’s submissions to the contrary are entirely misconceived and are born out of a failure to read the determination in Kareem as a whole.

21. Turning back to the instant case, the Union citizen sponsor (EKT) is national of the Netherlands. The First-tier Tribunal failed to engage in any consideration of the applicable legal provisions in EKT’s homeland and,

consequently, in my conclusion its determination is flawed by an error on a point of law that requires me to set it aside.

Re-making of decision under appeal

22. As to the re-making of the decision under appeal, I have no evidence before me that Dutch law recognises the first claimant's marriage as a valid marriage, and the burden of proving the fact that it is a valid marriage is on the claimant. It is relevant to observe that the Tribunal in Kareem itself gave consideration to the relevant legal provisions of the Dutch Civil Code and concluded, on the evidence before it, that it was not satisfied that the Netherlands was one of the countries that recognised the validity of proxy marriages. Thus, I find that the first claimant and EKT are not to be treated as being married for the purposes of the 2006 Regulations and, therefore, that the first claimant cannot establish that she is a family member for the purposes of regulation 7 of those Regulations.

23. That, though, is not the end of the matter. Regulation 8 of the 2006 Regulations regulates those persons who can be considered to be 'extended family members' of EEA nationals. Pursuant to regulation 8(5):

> "A person satisfies the conditions in this paragraph if the person is the partner of an EEA national and can prove to the decision maker that he is in a durable relationship with the EEA national."

24. "Durable relationship" is not defined in the Regulations, and whether a person is in a durable relationship is a matter to be determined on a case-by-case basis. In the instant case Mr Kandola submits that the first claimant and EKT are not in a durable relationship. Mr Akohene submits to the contrary. On this occasion I accept that Mr Akohene is correct.

25. The First-tier Tribunal concluded that the relationship between the first claimant and EKT was genuine and subsisting and that they have undertaken a marriage ceremony - albeit it is now clear that it is not recognised as a valid marriage in the Netherlands. These findings remain unchallenged and, when taken together with the evidence I have before me, lead me to conclude that the first claimant and EKT are in a durable relationship for the purposes of regulation 8(5) of the 2006 Regulations. The first claimant is, therefore, an extended family member for the purposes of the 2006 Regulations.

26. Regulation 17(4) of 2006 EEA Regulations provides discretion to the Secretary of State to issue a residence card to an 'extended family member'. In the first claimant's case the Secretary of State has not yet considered the exercise of such discretion. It is not open to me to consider the exercise of discretion for myself, absent the Secretary of State first doing so: see FD (EEA discretion – basis of appeal) Algeria [2007] UKAIT 49.[1] In such circumstances I am constrained to allow the

[1] Ihemedu (OFMs – meaning) [2011] UKUT 00340 (IAC)

first claimant's appeal on the basis that the respondent's decision was not in accordance with the law.

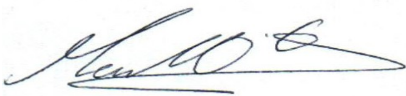
27. As to the second and third claimants' appeals, it is not submitted that these can succeed independently of their mother's appeal. They are not the children of the EEA national sponsor (EKT) and must rely upon their mother obtaining an EEA residence card in order to found a claim themselves under the 2006 Regulations. Consequently, the Secretary of State's failings in relation to the first claimant's case infect her decisions made in relation to the second and third claimants.

Decision

The First-tier Tribunal's determination contains an error on a point of law and is set aside.

The decision I substitute is to allow the claimants' appeals to the extent that each of their applications for an EEA residence card remains outstanding before the Secretary of State.

Signed:



Upper Tribunal Judge O'Connor
Date: 14 June 2014