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

Cudjoe (Proxy marriages: burden of proof) [2016] UKUT 00180 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10 September 2015** | ……………………………… |

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**
**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**
Appellant

**and**

**SHIRLEY NANA AMA CUDJOE**
(ANONYMITY DIRECTION NOT MADE)
Respondent

**Representation:**
For the Respondent: Mr T Melvin, Senior Home Officer Presenting Officer
For the Claimant: Ms D Ofei-Kwatia, Counsel, instructed by Bedfords Solicitors

1. *It will be for an appellant to prove that their proxy marriage was in accordance with the laws of the country in which it took place, and that both parties were free to marry. The burden of proof may be discharged by production of a marriage certificate issued by a competent authority of the country in which the marriage took place, and reliance upon the statutory presumption of validity consequent to such production. The*

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*reliability of marriage certificates and issuance by a competent authority are matters for an appellant to prove.*

2. *The means of proving that a proxy marriage was contracted according to the laws of the country in which it took place is not limited to the production of a marriage certificate, as is recognised in Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC).*

3. *In cases where a divorce has taken place prior to the proxy marriage and there is an issue as to whether the parties were free to marry, it is for an appellant to show that the dissolution of the previous marriage was in accordance with the laws of the country in which it occurred.*

## DECISION AND REASONS

### Introduction

1. By a decision promulgated on 23 December 2014, Upper Tribunal Judge Rintoul found that the First-tier Tribunal had materially erred in law when allowing the appeal of the respondent (whom we shall call the claimant) against the decision of the Secretary of State (whom we shall call the respondent), dated 8 January 2014, refusing to issue her with a residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations) as confirmation of her right of residence in the United Kingdom as the spouse of a Dutch national exercising Treaty rights. Upper Tribunal Judge Rintoul's error of law decision is set out in full at Annex A.

2. In summary, it was found that First-tier Tribunal Judge Dineen erred by relying solely on an item of Dutch legislation entitled "Conflict of Law Rules for Marriages" to conclude that the claimant's proxy marriage to her husband in Ghana was valid for the purposes of Dutch law. This approach was contrary to the decisions in Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC) (Kareem) and TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC) (TA).

3. It is important to note that although the decision of the First-tier Tribunal was set aside, certain findings were expressly preserved: first, that the previous customary marriage of the claimant's Dutch husband, Mr Raymond Awuah, had been validly dissolved in 2012; second, that the proxy marriage contracted between the claimant and Mr Awuah in Ghana was valid according to the law of that country.

4. Thus, as was clearly stated in the error of law decision, the issue before us now is a narrow one: is the marriage in question valid for the purposes of Dutch law?

### History of directions issued by the Upper Tribunal

5. Contained within the error of law decision were clear directions relating to the provision of evidence on proxy marriages and their validity under

Dutch law. As regards the crucial issue of expert evidence, specific questions were to be addressed by "either party" wishing to submit such evidence.

6. The appeal then came back before the Upper Tribunal on 26 March 2015, whereupon further directions were given, including a provision for the Respondent to put any questions about the expert opinion on Dutch law relied on by the claimant to her solicitors, in order that the relevant expert could address them.

7. The claimant's solicitors produced a further expert report, served on 27 May 2015. Nothing by way of evidence or questions to the expert having emanated from the Respondent thus far, Upper Tribunal Judge Rintoul issued further directions to the parties on 20 July 2015. Direction 3a stated that:

> "Any material or expert evidence in response to the expert evidence adduced by the appellant must be served by the respondent on the appellant and on the Upper Tribunal at least 21 days before the hearing."

8. The directions also required skeleton arguments from both parties, addressing all relevant issues including the recent apparent occurrence of registration of the marriage with the Dutch Embassy in Accra.

**<u>The hearing before us</u>**

9. On the morning of the hearing, Mr Melvin, who has appeared for the Respondent throughout proceedings in the Upper Tribunal, provided us with a skeleton argument and various additional materials gleaned from the websites of the Dutch Embassy in Accra and the Netherland's Immigration and Naturalisation Service. The service of these documents was very late in the day, and there was no explanation from the Respondent for this. Nonetheless, we admitted the skeleton argument and additional evidence. What we have made of this evidence is discussed later on in our decision.

10. The evidence we have considered in making our decision on the appeal is as follows:

    a) The bundle prepared by the Respondent for the appeal before the First-tier Tribunal;
    b) The bundle from the Appellant relied on before the First-tier Tribunal, indexed and paginated 1-109;
    c) The expert report, dated 25 May 2015, of Dr Ian Curry-Sumner, founder of Voorts Juridische Diensten, a legal services company based in Utrecht, the Netherlands;
    d) A letter from the Ghanaian High Commission in London, dated 2 July 2014;
    e) Documents from the Ghanaian authorities previously submitted by the Appellant in respect of her marriage to Mr Awuah and subsequently stamped by the Dutch Embassy in Accra;

f) The Internet materials provided by Mr Melvin and referred to in the previous paragraph.

11. We were provided with the originals of the relevant Ghanaian documents.

12. The claimant and her husband attended the hearing but were not called upon to give oral evidence.

*Ms Ofei-Kwatia's initial submissions*

13. In her succinct opening, Ms Ofei-Kwatia relied on the expert report and submitted that it was comprehensive and sufficient for us to conclude that the claimant's marriage was recognised under both Ghanaian and Dutch law.

**Relevant legal framework**

14. We remind ourselves that matters of foreign law are questions of fact for us to determine and that it is for the Appellant to prove the facts relied upon in support of her case. For the reasons identified in Kareem and TA, the issue here, as noted above, is whether the claimant's marriage is valid for the purpose of Dutch law. Paragraph [68] of Kareem states:

"We make the following general observations.

a) 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.

b) 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.

c) 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.

d) 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.

e) 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.

f) 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.

g) 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.

h) 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."

15. The headnote of TA reads:

"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."

16. At paragraph [20] of TA, Upper Tribunal Judge O'Connor held:

"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."

## Our findings

*The claimant's husband as a qualified person*

17. We take first a matter that has never been in dispute and find as a fact that Mr Awuah has been and is exercising his Treaty rights in the United Kingdom. He is employed by ISS, as evidenced in the Appellant's bundle, and is therefore a worker for the purposes of Regulation 6 of the Regulations.

*The validity of the marriage according to Ghanaian law*

18. We have no hesitation in finding that the claimant's marriage to Mr Awuah was valid according to Ghanaian law. That finding, and a finding that, contrary to the respondent's assertion, Mr Awuah was indeed free to marry as his previous marriage had in fact been validly dissolved in 2012, are part of the findings made by the First-tier Tribunal and are preserved. In any event, there is the letter from the Ghanaian High Commission in London, which states unequivocally that both the divorce and marriage were valid according to law. In absence of any cogent evidence to the contrary, it would not be appropriate to go behind the clear statement of the competent authority of the country in which the events took place.

19. Although Mr Melvin raised an issue in respect of the Ghanaian documents and the issue of the registration of the claimant's marriage with the Dutch Embassy in Accra, he expressly declined to submit that the documents were forgeries. He did however submit that the Ghanaian authorities had "distanced themselves" from the marriage certificate in particular by only attesting to the authenticity of the signatures of officials. When the preserved finding of First-tier Tribunal Judge Dineen relating to the validity of the marriage under Ghanaian law was pointed out to him, Mr Melvin accepted that if this was the case his submission on this point failed.

*The validity of the marriage according to Dutch law*

20. We turn now to the core issue in this appeal, namely the validity of the proxy marriage according to Dutch law. This necessarily entails dealing with the expert evidence in some detail.

21. In respect of Dr Curry-Sumner's suitability as an expert in the field of Dutch law, we simply refer to paragraph 10 of Mr Melvin's skeleton argument, in which he states that, "No issue is taken with Dr Curry-Sumner's expertise in the area in question." There is nothing in the evidence to cast any doubt on this concession, and we need say no more about the matter. The report before us is from a suitably qualified source.

22. Within the section of the report entitled "Assignment", Dr Curry-Sumner sets out the instructions from the claimant's solicitors, a comprehensive list of the relevant documents provided to him in advance of the report's production, and the specific questions posed by Upper Tribunal Judge Rintoul in his error of law decision. A statement of truth is also included, as is a declaration of his impartiality in the case and a lengthy curriculum vitae. To this extent there is compliance with the requirements of paragraph 10 of the Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal.

23. Mr Melvin submitted that weight should not be attached to Dr Curry-Sumner's report for, in summary, the following reasons:

    a) The sources cited by the expert in his report were in Dutch and had not been translated for the benefit of the Respondent or the Upper Tribunal and so the Upper Tribunal could not rely on what the expert said. It followed, that there was no evidence before us to show that the expert's assertions were correct.

    b) The fact that the author of the report was not at the hearing to give oral evidence was relevant. We assume that this submission went to the question of weight.

    c) The expert made references in his report to marriages contracted in Las Vegas, USA, and Pakistan (paragraph 2.4). These could not be relevant to the present case and so the weight attached to the report was thereby undermined.

24. We reject Mr Melvin’s first submission. Dr Curry-Sumner’s report is fully sourced, in footnote form, as to academic works, legislative provisions and case-law; the respondent has conceded that Dr Curry-Sumner is a suitably qualified expert; and, it is the function of an expert to provide their opinion on the issues in question. Particularly in the context of matters of foreign law, it is the expert opinion which constitutes the evidence to be assessed, not the primary source materials upon which that evidence is based. As is made clear in Kareem, simply examining legal materials from a particular country is unlikely to be of any assistance in deciding questions of fact in relation to foreign law. Further, no authority has been put to us supportive of the contention that the absence of translations effectively renders the report valueless.

25. We note that paragraph 10.9 of the First-tier Tribunal Practice Directions does not include a requirement for materials in a foreign language relied on to be translated. On Mr Melvin’s case, the expert, or in reality the claimant’s solicitors, would have had to provide translations of not only the relevant Dutch legislative provisions, but also extracts of all academic works and court judgments cited in the report. In our view, this would amount to a disproportionate burden. It is also contrary to the purpose of instructing an expert when disputes as to foreign law arise; the need for the expert is because a Tribunal in the United Kingdom cannot interpret foreign laws, even if translated, as Kareem makes abundantly clear.

26. Finally, there is the respondent’s conduct in this case. At no stage prior to the production of the skeleton argument on the morning of the hearing before us has the respondent taken the absence of translated source materials as a point against the expert report, a report which has been in her possession since May 2015. No questions for the expert relating to the source materials (or indeed any other matter) have ever been provided by the respondent, and of course she has not provided an expert report of her own. In light of this, even if translations had been produced, it is unlikely in the extreme that any further evidence would have emanated from the respondent. With all due respect to Mr Melvin, the reality is that all he could have done would be to make submissions on translated legal materials in relation to which he had no expertise.

27. In view of the above, the absence of translations of primary source materials does not materially detract from the weight we attach to Dr Curry-Sumner’s report.

28. We can deal briefly with two further criticisms made of the expert report. The fact that Dr Curry-Sumner did not give oral evidence has no material bearing on the weight we attach to his report. There has never been any indication from the respondent that she had any questions to put to him. The history of the respondent’s failure to engage with the expert evidence in this appeal rather suggests that there were no such questions. Mr Melvin did not allude to any matters he might have wished to raise with Dr Curry-Sumner.

29. The second point made is Dr Curry-Sumner’s citation of two judgments of the Dutch courts in his report: the first relating to a Pakistani Islamic

marriage (footnote 5 on page 5); the second concerning a marriage in Las Vegas in paragraph 2.4. These were clearly just examples of how the Dutch courts had applied the law when considering the validity of marriages contracted outside of the Netherlands, which may not have been permitted within the domestic jurisdiction. The examples were relevant and we fail to see how they could possibly undermine the substance of the report.

30. Before moving on to the substance of the expert report, we need to say something more about the respondent’s engagement with this appeal following the error of law decision in December 2014. As mentioned previously, she has not provided any expert evidence of her own. This is despite having had ample time in which to do so, not only since the possibility of such evidence was flagged up by Upper Tribunal Judge Rintoul in his initial directions, but more importantly since she came into possession of an expert report back in May which clearly favours the claimant’s case. There has been no obligation on the respondent to commission a report in this appeal, but we regard it as a pity that she has seemingly declined to take any steps whatsoever to assist with the accumulation of the best evidence possible on an issue affecting not only the claimant but quite probably numerous other individuals in similar situations.

31. It does not follow that the absence of expert evidence from the respondent has the effect of increasing the weight to be attached to Dr Curry-Sumner’s report: it does not (see SI (expert evidence - Kurd - SM confirmed) Iraq CG [2008] UKAIT 00094). We have assessed the expert evidence on its own merits. Having said that, the respondent’s inaction on this issue means that there is no expert evidence from her to contradict or qualify that provided by Dr Curry-Sumner.

32. The only evidence produced by the respondent is of very little probative value. The materials are printouts from websites, albeit official Dutch government ones. They do not even allude to substantive legislative provisions of relevant Dutch law regarding the issue in this appeal. Indeed, as we shall discuss later, the information contained in the printouts is irrelevant to the question of whether the marriage is valid under Dutch law. In our view, these materials are of even less assistance than the legal materials considered and rejected by the Upper Tribunal in Kareem and TA.

33. In light of everything said above, we attach significant weight to the expert evidence of Dr Curry-Sumner. In this context, we address the relevant parts of his report.

34. Dr Curry-Sumner refers to the relevant aspects of the Dutch Civil Code by reference to its constituent Books (of which there are ten in total). The Book relating to Private International Law (and thus the issue of overseas marriages with which we are concerned) is Book 10. The key Articles of Book 10 are 31 to 34. For the avoidance of any confusion, we note that in Kareem the Upper Tribunal referred to the relevant provisions using the format of the Book number immediately followed by the particular article,

whereas Dr Curry-Sumner cites them in reverse order. This makes no difference to the substance of his conclusions.

35. The first conclusion provided by Dr Curry-Sumner is that the law applicable to the issue of whether the claimant's marriage is valid under Dutch law is contained in Articles 27-34 of Book 10 of the Dutch Civil Code, and not in the Hague Marriage Convention 1978 (paragraphs 2.1 to 2.2 of the report). The reason provided for this conclusion is that although under the Dutch Constitution international instruments will take precedence over domestic private law, Articles 5, 6 and 7 (with reference to Article 8) of the Convention exclude proxy marriages from its scope. We rely on this conclusion and find as a fact that this is the case.

36. The expert confirms that by virtue of Article 34, the provisions of the Dutch Civil Code only apply to marriages contracted after 1 January 1990. We find this to be so.

37. Dr Curry-Sumner then sets out his opinion on the core provision of Article 31(1) of Book 10. It is as well to quote the relevant passages contained in paragraph 2.4 of his report:

> "The main rule is that a marriage concluded outside of the Netherlands will be regarded as valid and thus recognised as a valid marriage if it is concluded in accordance with the law of the State where the marriage took place…Automatic recognition only occurs, however, on the premise of the satisfaction of two cumulative conditions, namely firstly that the marriage is valid according to the law of the place where the marriage took place, and secondly that no exception ground is at stake…Contrary to the requirements for entering into a marriage in the Netherlands before the civil registrar, foreign informal marriages and other forms of marriages not permitted in the Netherlands may be recognised if conducted properly abroad. This means that informal or religious marriages that are concluded validly abroad will be recognised as such in the Netherlands."

38. In view of the significant weight we attach to his report in general, for reasons elucidated previously, we find as a fact that the operation of Article 31(1) of Book 10 is as stated by Dr Curry-Sumner in the passage quoted above.

39. Paragraph 2.5 of the report is concerned with the validity of the marriage under Ghanaian law, that being a prerequisite for recognition under Dutch law. Whilst Dr Curry-Sumner deals with the matter in some detail, this issue has already been decided in the claimant's favour by virtue of the preserved findings of First-tier Tribunal Judge Dineen, or, in the alternative, by our own conclusion on the evidence from the Ghanaian authorities. However, it is important to reiterate that the question of whether a marriage is valid according to Ghanaian law (or indeed the law of any other country) is one of fact for the Tribunal. This particular fact-finding exercise must take place in advance of a consideration of whether the marriage is valid under Dutch law. If a favourable finding is made in

relation to validity according to the law of the country in which the marriage took place, it will in the normal course of events follow that the marriage is recognised as valid according to Dutch law, given what we say about the absence of public policy objections, below.

40. In terms of how a claimant in any given case may be able to prove the validity of their marriage under Ghanaian law, there are various means, as discussed in Kareem, none of which are discounted by the expert evidence before us. These are not without their evidential difficulties, but in the context of the present appeal none of this concerns us, given the favourable findings already made on the issue.

41. Having viewed the evidence of Dr Curry-Sumner as a whole we find that under Article 31(4) of Book 10 of the Dutch Civil Code, there is a statutory presumption to the effect that where a marriage certificate issued by a competent authority is produced, the marriage shall be deemed to be valid until the contrary is established – see paragraph 2.5.2 of the report. According to an academic source cited in the same paragraph, the term "competent authority" should be interpreted as meaning that the authority in question is competent in the country in which the marriage took place. We emphasise that it is for the person adducing a marriage certificate in any given case to prove both its reliability and issuance by a competent authority.

42. Aside from the question of validity of the marriage under Ghanaian law, the second matter that must be shown for recognition of the marriage under Dutch law is that it is not regarded as being contrary to public policy: in other words that no exception ground exists. This issue is dealt with in the section of the report entitled, "Non-recognition and public policy". Dr Curry-Sumner explains that Article 32 of Book 10 provides for the withholding of recognition of foreign marriages on grounds of public policy. Importantly, and relying upon explanatory notes accompanying the introduction of the legislation in question, Dr Curry-Sumner is of the opinion that it would be "quite hypocritical" of the Dutch authorities to deny recognition of proxy marriages when the notes themselves acknowledge the possibility of such unions under Dutch law. He concludes by stating:

> "Accordingly, it would appear that the recognition of proxy marriages are not to be regarded as contrary to Dutch public policy."

43. As with other aspects of his report, we place significant weight upon this conclusion, and in the absence of any evidence from the respondent to found a contrary position, we rely on it and find as a fact that on the evidence before us there is no public policy objection in Dutch law to the recognition of proxy marriages conducted abroad.

44. A matter which consumed a considerable amount of time in this appeal is whether the claimant's marriage was registered with the Dutch authorities, and whether in turn this made a difference to its validity under Dutch law. Whilst in essence Ms Ofei-Kwatia's position was that it had no

bearing on the core question of validity, Mr Melvin appeared to us to be suggesting that it did. Indeed, the materials he provided went solely to the issue of registration.

45. At the hearing we indicated that this issue might have been something of a distraction from the core question of validity. The evidence provided by Mr Melvin said nothing at all about registration being a necessary requirement for the purposes of validity. At paragraph 2.4 of his report, Dr Curry-Sumner states that, "Registration of the marriage in the registers of the Personal Records Database is not a constitutive requirement for the validity of the marriage." The database referred to is the very one mentioned in the website materials relied on by Mr Melvin. In light of this we have no hesitation in finding that the issue of registration is a purely procedural matter relating to the requirements of residence in the Netherlands following an overseas marriage. It has no bearing on the validity of the marriage itself.

46. The final matter addressed by Dr Curry-Sumner in his report is that of Mr Awuah's divorce. It is said that under Dutch law, the recognition of divorces obtained outside of the European Union and in countries which have not ratified either the Hague Divorce Convention or the Luxembourg Divorce Convention is governed by Article 57 of Book 10: recognition occurs if the dissolution is obtained, as Dr Curry-Sumner puts it, "through a proper divorce procedure." We find that this is indeed the correct legal position. In the context of the expert's evidence, it is clear to us that the "proper divorce procedure" must mean one which is in accordance with the laws of the country in which it takes place.

47. In summary, drawing together what is said in Dr Curry-Sumner's report, we find that the following propositions as to Dutch law are made out:

a) A proxy marriage contracted outside of the Netherlands will in the normal course of events be recognised as valid according to Dutch law provided that it was so contracted in accordance with the laws of the country in which it took place, and that the parties were free to marry.

b) Proxy marriages are not regarded as being contrary to Dutch public policy.

c) It is for an applicant to prove that their proxy marriage was in accordance with the laws of the country in which it took place, and that both parties were free to marry.

d) The burden of proof may be discharged by production of a marriage certificate issued by a competent authority of the country in which the marriage took place, and reliance upon the statutory presumption of validity consequent to such production. The reliability of marriage certificates and issuance by a competent authority are matters for an applicant to prove

e) The means of proving that a proxy marriage was contracted according to the laws of the country in which it took place is not limited to the production of a marriage certificate, (as is recognised in Kareem).

f) In cases where a divorce has taken place prior to the proxy marriage and there is an issue as to whether the parties were free to marry, it is for the claimant to show that the dissolution of the previous marriage was in accordance with the laws of the country in which it occurred

48. In respect of the last of these propositions, as with the issue of the validity of the marriage in Ghana, the issue of the divorce has already been resolved in the claimant's favour by the First-tier Tribunal in a finding preserved by Upper Tribunal Judge Rintoul.

49. The ultimate conclusion of Dr Curry-Sumner is unambiguous: on the basis of the information provided to him, the marriage between the claimant and Mr Awuah is valid according to Dutch law. Having regard once again to the weight attached to the report as a whole, the preserved findings of fact, the location of the burden of proof and its applicable standard, we are more than satisfied that when the six propositions set out above are applied to this case, the claimant's proxy marriage is recognised as valid according to Dutch law.

**Conclusions in this appeal**

50. We have found that the claimant's marriage to Mr Awuah was and remains valid according to Dutch law. We have found that Mr Awuah was free to marry the claimant. As she was and remains the spouse of an EEA national, she is therefore a family member of an EEA national who has been at all material times a qualified person, and thus, she was and is entitled to the issuance of a residence card under Regulation 17(1) of the Regulations.

**Decision**

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

**The decision of the First-tier Tribunal is set aside.**

**We re-make the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2006.**

Signed Date: 29 November 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

**Annex A: the error of law decision**

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

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3 December 2014** | ……………………………… |

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SHIRLEY NANA AMA CUDJOE**
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Respondent: Mr Melvin, Presenting Officer
For the Claimant: Ms D Ofei-Kwatia, Counsel, instructed by Bedfords Solicitors

**DECISION AND REASONS**

1. The respondent appeals with permission against the determination of First-tier Tribunal Judge Dineen promulgated on 15 September 2014 in

which he allowed the claimant's appeal against the decision of the respondent to refuse to issue the claimant with a residence card as confirmation of her right of residence in the United Kingdom as the spouse of a Dutch national exercising treaty rights.

2. The claimant's case is that she is lawfully married to Raymond Ofosu Awuah, a Dutch citizen who is working in the United Kingdom. They were married by proxy in Ghana, his previous marriage having been previously dissolved. The respondent's case is that the claimant's husband was not free to marry her as he had already been married, the date of divorce being 24 September 2013, substantially after the date of marriage which was 15 March 2013, and thus the marriage was not valid. It is not accepted either that the couple were in a durable relationship.

3. On appeal, Judge Dineen found that:-

(i) the customary marriage between Mr Awuah and his previous wife was validly dissolved on 14 November 2012, albeit not registered until 24 September 2013;

(ii) on the basis of the marriage and the materials before him, including a marriage certificate and a letter from the Ghanaian High Commission in London, that the marriage had been validly entered into according to the laws of Ghana; and

(iii) having had regard to the decision in **Kareem [2014] UKUT 00024** and the Dutch legislation presented to him that the marriage was valid according to the law of the Netherlands;

(iv) having given the respondent time until 7 September 2014 to produce evidence to show that the marriage had not been recognised in Holland, this had not been provided.

4. The respondent sought permission to appeal on the grounds that Judge Dineen had, in reaching his decision, based his decision on documentation previously disregarded by the Upper Tribunal and considered that it did not show that the Netherlands recognised the validity of proxy marriages.

5. On 21 October 2014, First-tier Tribunal Judge Cruthers granted permission, noting that it was arguable that the judge erred in accepting that the proxy marriage would be recognised under Dutch law.

6. The issue in this case is a narrow one: is the marriage in question valid for the purposes of Dutch law? That is a relevant issue for two reasons: first if a Dutch national's marriage is not valid for the purposes of his own domestic law it is difficult to see how he is being treated differently or in a discriminating manner by a Member State which does not also recognise his marriage. Second, the issue of capacity to enter into a marriage is (for the purposes of English law) governed by the law of the individual's domicile. As was noted in Wilkinson v Kitzinger [2006] EWHC 2022 at paragraph 15:

> By the rules of private international law, whereas the form of marriage (subject to certain minor and immaterial exceptions) is governed by the local

law of the place of celebration (see **Berthiaume – v- Dastous** [1930] AC 79 and Rule 67 of Dicey & Morris, The Conflict of Laws (13 ed) Vol 2 651 at para 17R-001), the capacity of the parties to marry is generally governed by the law of each party's ante-nuptial domicile: see **Padolecchia –v- Padolecchia**[1968] P 314 at 338 and Rule 68 in Dicey & Morris 671 at para 17R – 054. Occasionally, the courts will judge the matter of capacity by reference to the intended matrimonial home (**Lawrence v Lawrence** (1985) FLR 1097 at 1105D-1106C) or by reference to the jurisdiction with which the marriage is adjudged to have its most substantial connection (**Vervaeke –v- Smith** [1983] AC145 per Lord Simon of Glaisdale at 166D). In this case as already indicated, the parties are both domiciled in England and Wales and, following their marriage, returned to live here. It is thus clear, that, on any ordinary application of the rules of private international law, their capacity to marry is governed by the law of England.

7. Capacity goes beyond mental capacity and factors such as age; the degrees of consanguinity permissible in marriage vary from country to country, some prohibiting marriage between first cousins, others not. It is not arguable, nor has it been expressly submitted that this is a case in which Mr Awuah's capacity should be adjudged by anything other than Dutch Law

8. In **Kareem** the Tribunal held:-

> "g. 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."

9. I accept that the questions of foreign law are questions of fact. I accept also that the decision in **Kareem** is not that Dutch law does not recognise proxy marriages; it is only that on the basis of the evidence before it it could not be satisfied that that is so. Further that is exactly the position in **TA and Others**.

10. I consider that Judge Dineen did err in having regard only to the copy of the Dutch act provided and in the absence of material tending to suggest how the law is enforced. Accordingly, therefore, I am satisfied that the decision did involve the making of an error of law and I set it aside.

**Directions**

(1) The decision of Judge Dineen is set aside only insofar as it relates to the finding that the claimant's marriage to her husband was valid for the purpose of Dutch law. The other findings are preserved.

(2) The claimant is to serve on the Tribunal and on the respondent, 21 days before the hearing, such evidence upon which she seeks to rely, showing that the applicant's marriage is valid according to Dutch law.

(3) The respondent is to serve on the Tribunal and on the claimant, seven days before the hearing, any response thereto and any further evidence which she wishes to rely showing that the marriage would not be valid according to Dutch law.

(4) Any expert evidence upon which either party wishes to rely must address:

    (a) whether there are in Dutch law any specific prohibitions on a Dutch citizen entering into a proxy marriage if that marriage took place outside the Netherlands and in a country where proxy marriages are permitted;

    (b) whether a proxy marriage would be seen as invalid from its inception; or, whether it is a marriage which in specific circumstances could be set aside as being contrary to Dutch public order; if so, on what grounds could that be done, whether the marriage would therefore be seen valid until it was struck down and who would have the right to petition for the marriage to be struck down – would it be simply the parties to the marriage or is there a role for the state.

Signed                                                  Date

Upper Tribunal Judge Rintoul