



IAC-AH-CO-V1

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

Appeal Number: IA/16885/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 10 November 2014**

**Determination Promulgated
On 24 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KENNETH CHINEDU AKABOGU NWANKO

Respondent/Claimant

Representation:

For the Appellant: Mr Armstrong, Specialist Appeals Team

For the Respondent/Claimant: Mr Okoye, Legal Representative, House of Law

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.
2. The claimant is a national of Nigeria, whose date of birth is 11 March 1978. On 1 October 2012 House of Law applied on his behalf for a residence

card. The application was refused on 29 April 2013 due to the lack of substantive evidence concerning the validity of the relationship between him and his EEA national sponsor. The marriage certificate provided with the application was deemed to be insufficient. The document bore no resemblance to any previous marriage certificate that had been seen from Nigeria. Additionally, the certificate did not state whether the marriage was conducted under customary or civil law. Therefore it had been decided to refute the confirmation that he sought with reference to Regulation 7 of the Immigration (EEA) Regulations 2006.

3. In his grounds of appeal to the First-tier Tribunal, the claimant said he was ready to marry his spouse in the UK but the Secretary of State's policy of not allowing people to marry who did not have valid leave to remain in the UK prompted them to marry under the Customary Marriage of Nigeria, which also accepted marriage by proxy. The decision maker failed to consider that it had long been established in English law that if a proxy marriage was legal in the country where it took place, it was recognised in English law.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. The claimant's appeal came before Judge Callender Smith sitting at Taylor House on 30 July 2012. Both parties were legally represented. The judge received oral evidence from the claimant, who adopted a witness statement dated 28 April 2014. He married his sponsor in a traditional wedding ceremony conducted under the Customary Laws of Nigeria on 24 January 2011. His marriage certificate had been issued to him by the Nigerian courts and all the required legal formalities and customs in Nigeria had been followed. He and his wife were happy as a couple, and planned to have a baby soon. They would arrange a church wedding as soon as he received leave to remain in the United Kingdom. His wife gave "confirming evidence".
5. In his subsequent determination, Judge Callender Smith said the point in question in the appeal was a short one. The Secretary of State sought to challenge the marriage certificate - and the validity of the marriage - but at the appeal hearing the Presenting Officer had not sought to cross-examine either of the witnesses or to produce any evidence that the documentation was fraudulent or otherwise flawed. In the circumstances, he found the evidence offered by both the claimant and his wife cogent and credible. It established that on the balance of probabilities they had been through a valid customary marriage ceremony in Nigeria, and so the claimant was entitled to be issued with a residence card to confirm his right of residence in the United Kingdom as the husband of his wife.

The Grant of Permission to Appeal

6. The Secretary of State applied for permission to appeal, and on 1 October 2014 First-tier Tribunal Judge Landes granted permission to appeal for the following reasons:

There is arguably an implicit finding by the judge that the marriage was a proxy marriage (see [11] where he referred to the rights being performed on the couple's behalf). If the marriage was a proxy marriage, it was arguable that the judge should have considered the authority of **Kareem**. Failure to follow that authority is likely to be material to the outcome, but the judge does not refer to any evidence that the marriage is valid by the law of the EEA state which the sponsor was a national. It is right that the respondent's representative does not appear to have referred the judge to **Kareem**, but it is still arguable that the judge erred in law in failing to follow the approach set out in that case, if the marriage was a proxy marriage.

The Hearing in the Upper Tribunal

7. At the hearing before me, Mr Okoye relied on a skeleton argument in which he submitted that the decision of the First-tier Tribunal did not fall foul of **Kareem**. This was because there was no doubt that the marriage certificate had been issued by a competent authority, and so there was no justification for investigating whether the marriage had been contracted according to the national law of the EEA country of the sponsor. Alternatively, he relied on the fact that the claimant had been able to produce for the hearing before me a certified copy of a French marriage certificate. The certificate was issued in Marseille on 6 November 2014. Mr Okoye explained that the sponsor, who was a French national, had travelled to Marseille to obtain this document. He said that the certificate demonstrated that the French authorities recognised the customary marriage which had taken place between the claimant and the sponsor on 24 January 2011 in Nigeria.
8. Mr Armstrong relied on the grant of permission to appeal. The judge had failed to decide whether or not the marriage was a proxy marriage, and it was now an agreed fact that it was a proxy marriage. The judge had failed to apply and follow **Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC)** and **TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**. The French marriage certificate had only being produced on the day of the hearing, and it needed to be verified by the Secretary of State.

Reasons for Finding an Error of Law

9. The law always speaks, and so the failure by the Presenting Officer to rely on **Kareem** and **TA and Others** is not fatal to the error of law challenge.
10. Mr Okoye seeks to defend the judge's approach by reference to an interpretation of **Kareem** which was decisively rejected by Upper Tribunal Judge O'Connor in **TA and Others**. The headnote of **TA and Others** reads as follows:

*Following the decision in **Kareem (Proxy marriages - EU law) [2014] UKUT 24**, the determination of whether there is a marital relationship for the purposes of the Immigration (EEA) Regulations 2006 must always be*

examined in accordance with the laws of the member state from which the Union citizen obtains nationality.

11. Mr Okoye submits that **TA and Others** was wrongly decided. But it is a reported decision of the Upper Tribunal, and it is binding on me. Mr Okoye does not seek to explain why it was wrongly decided, and the ruling of Upper Tribunal Judge O'Connor reflects the following passage in **Kareem** at paragraph [18]:

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.

12. In conclusion, I find that the decision of the First-tier Tribunal was vitiated by a material error of law, such that it should be set aside and remade.

The Remaking of the Decision

13. The parties were directed to prepare for the hearing on the basis that, if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal, any further evidence the Upper Tribunal might need to consider if it decided to remake the decision, could be so considered at that hearing.
14. The late production of the French marriage document is potentially unfair to the Secretary of State. But having reflected on the matter I do not consider that it is in accordance with the overriding objective to give the Secretary of State the opportunity to verify the document. This is because the burden rests with the claimant to prove that his customary marriage by proxy to the sponsor is in accordance with the laws of France, and he does not discharge this burden through the production of the French marriage document. I reach this conclusion for two reasons.
15. Firstly, the proper way to prove that a customary marriage by proxy is recognised under French law is to produce the relevant extract from the French Civil Code and/or expert evidence from a suitably qualified expert in French law and/or a relevant decision by a French court.
16. Secondly, the route which the claimant has taken is manifestly unsatisfactory, as a vital piece of evidence is missing. What is missing is proof that the French authorities were made aware of the fact that the customary marriage was a proxy one. There is no reference in the French marriage certificate to the customary marriage having been conducted *by proxy*. Indeed, the implication of the document is that the sponsor falsely represented to the French authorities that she and her husband were present at the marriage. The last paragraph of the marriage certificate reads as follows (in translation):

[The claimant] and [the sponsor] have declared one after the other to marry each other traditionally and we have declared in the name of the law that they were united in marriage in the presence of their respective witnesses Jean-Claude and Sona David. Readings done, and invited to read the certificate, the spouses and the witnesses have signed with us...

17. When I explored this passage with Mr Okoye in the course of oral argument, I initially understood the certificate to represent that the claimant and the sponsor had attended in person at the Town Hall of the 15th and 16th District in Marseille, from which the certificate has been issued. But Mr Okoye said that the claimant had not accompanied his wife to Marseille, and what was being described was what had taken place at the customary marriage. But it is an agreed fact that the claimant and the sponsor were not united in marriage “in the presence of their respective witnesses”.
18. Accordingly, despite the production of this French marriage document, the claimant has not discharged the burden of proving that he has contracted a valid marriage by proxy to the sponsor under French law.
19. The question of whether the claimant might qualify for a residence card on the basis of a durable relationship was not raised in the refusal decision, and was not explored by the First-tier Tribunal.
20. No Article 8 claim was raised by way of appeal, and this issue was also not addressed by the First-tier Tribunal.
21. No evidence relating to either issue (durable relationship or Article 8) was tendered before me.
22. I find that any interference consequential upon the refusal decision is not such as to engage Article 8(1) because the claimant is not facing removal, and it is open to him to make a fresh application for a residence card relying on evidence of a durable relationship. As this avenue is open to him, the refusal decision is plainly proportionate, having regard to Section 117B of the 2002 Act. In particular, I have in mind the consideration that the maintenance of firm and effective immigration control is in the public interest.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant’s appeal against the decision by the Secretary of State to refuse to issue him with a residence card is dismissed.

Signed

Date **24 November 2014**

Deputy Upper Tribunal Judge Monson