



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

Appeal Number: IA/30213/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 24 July 2014**

**Determination**

**Promulgated**

**On 31 July 2014**

**Before**

**THE HONOURABLE MR JUSTICE LEWIS  
UPPER TRIBUNAL JUDGE DAWSON**

**Between**

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

Appellant

**and**

**FRANCIS KUMI**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Ms C Litchfield, instructed by FB Legal Services

**DETERMINATION AND REASONS**

1. The Secretary of State appeals with permission the decision of First-tier Tribunal Judge Hunter who allowed the appeal by Mr Kumi against the decision refusing to issue a residence card for reasons given in his determination dated 30 April 2014.
2. We shall refer to Mr Kumi as the claimant. He made application for a residence card on 2 November 2012 as a family member of an EU national

exercising treaty rights, Esther Frimpong, a Dutch national. As evidence of their relationship, he produced documentation in support of the parties' customary marriage pursuant to rites which had been performed on 13 April 2012 in Accra. Neither party was present for the marriage; they were instead represented by their fathers.

3. The Secretary of State rejected the application because she was not satisfied that the marriage was conducted in accordance with the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. Judge Hunter who heard the appeal on 28 February 2014 concluded at [24] of his determination:

“The Ghanaian authorities in this case have issued a form entitled Register of Customary Marriages, following the documentation submitted by the relevant family members. I take the view that as the relevant authority in Ghana has accepted the validity of the marriage it is not for the Tribunal to go behind that evidence unless there are particularly cogent reasons for doing so. I therefore accept on the basis that the marriage register produced by the appellant that he entered into a valid marriage to Ms Frimpong under the customary law in Ghana.”

4. In reaching this conclusion the judge took into account of a reference in the grounds of appeal to an amendment to the 1985 law in 1991 (which was not provided at the hearing) and also the decision of the Tribunal in *NA* (Customary marriage and divorce - evidence) Ghana [2009] UKAIT 00009.
5. The grounds of appeal challenge that decision on the basis that the judge had materially erred in law by failing to take into account the findings in *Kareem* (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC) which had been promulgated prior to the delayed promulgation of Judge Hunter's determination on 30 April 2014. It is argued that the judge should have been aware of and considered the findings in *Kareem*. It is also argued that the judge had failed to consider if the proxy marriage conducted by the claimant was valid in Dutch law.
6. Ms Litchfield submitted that there had been no material error by Judge Hunter as even if he had applied *Kareem* he would have found that that marriage would have been lawful under the Dutch Civil Code in the light of the findings reached by the Tribunal in that case. Ms Isherwood disagreed with this interpretation of *Kareem*.
7. Our conclusions are as follows. *Kareem* was concerned with a proxy marriage between a Nigerian and a Dutch national neither of whom had attended their marriage on 26 November 2011 in Lagos State. In directing itself as to the correct approach to the definition of a spouse in EU law the Tribunal concluded at [11]:

“We conclude that in EU law the question of whether a person is in a marital relationship is governed by the national laws of the Member States. In other

words, whether a person is married is a matter that falls within the competence of the individual Member States.”

8. Further at [17]:

“Spouses’ rights of free movement and residence are derived from a marriage having been contracted and depend on it. In light of the connection between the rights of free movement and residence and the nationality laws of the Member States, we conclude 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 citizen obtains nationality and from which therefore that citizen derives free movement rights.”

9. The Tribunal went on to observe that it did not know whether, according to Dutch law, the marriage would be regarded as having been celebrated in Nigeria or the United Kingdom. It made it clear that there was no basis on which it could impose the approach adopted in the United Kingdom to this question.

10. The Tribunal turned to extracts from the Dutch Civil Code that had been placed before it and observed there was no indication whether the version was up-to-date. Furthermore the Tribunal observed that they had been given no assistance how the code should be interpreted or whether the appellant’s marriage ceremony would be regarded as a lawful marriage under that code. Specifically at [29] the Tribunal stated:

“The passages we cite are silent on whether a proxy or customary marriage would be recognised in the Netherlands or whether such a marriage would be incompatible with Dutch public order. We do recognise, however, that Article 1:66 permits marriage by representation in certain circumstances, which would suggest that marriage in the absence of one of the parties would not be contrary to Dutch public order. However, as we have indicated, we have not received evidence on these complex issues and have been given no help on how Dutch law might apply.”

11. It is abundantly clear from these extracts from *Kareem* that it cannot be relied on as support for Ms Litchfield’s submissions. The positive conclusion reached in *Kareem* was that the marriage was not valid under Nigerian law and although the Tribunal contemplated the possibility that if valid, the marriage might not be contrary to Dutch public law, it reached no conclusion on this aspect in the absence of proper and adequate evidence on the point. Furthermore, we do not regard it as appropriate to treat the description of the appellant’s evidence in *Kareem* about what Dutch law is as binding or a definitive statement of the law of the Netherlands in relation to foreign marriages. That issue was left unresolved by the Tribunal.

12. Accordingly we are persuaded that the judge erred by failing to take into account the approach set out in *Kareem*. Had he done so, he would have realised that the claimant could not be entitled to a residence card as a

family member solely because the marriage had complied with the requirements of Ghanaian law.

13. We told the parties that we would set aside the determination and that we would proceed to remake the decision. Ms Litchfield candidly acknowledged her difficulties in that she did not have expert evidence to address the issue of whether the marriage was valid under Dutch law. On taking instructions she decided to withdraw the appeal against the Secretary of State's decision. We gave our leave.
14. Accordingly the decision of First-tier Tribunal Judge Hunter is set aside for material error and we therefore allow the appeal by the Secretary of State in the Upper Tribunal. We do not remake the decision as the appeal has been withdrawn.

Signed

Date 29 July 2014



Upper Tribunal Judge Dawson