



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

Appeal Number: IA/41570/2013

THE IMMIGRATION ACTS

Heard at Field House

On 10th October 2014

Determination

Promulgated

On 20th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**PERCY KOJO ANTWI-AGYEI
(NO ANONYMITY DIRECTION)**

Respondent

Representation:

For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer

For the Respondent: No representation

DETERMINATION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the determination of Judge of the First-tier Tribunal Elliman promulgated on 10th June 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.

3. The Claimant is a male citizen of Ghana born 23rd October 1978 who in January 2013 applied for a residence card as confirmation of a right to reside in the United Kingdom. The application was made on the basis that the Appellant was married to a French citizen, Audrey Cynthia Franck, to whom I shall refer as the Sponsor.
4. The application was refused on 12th July 2013. On that date the Secretary of State issued a Notice of Immigration Decision refusing the application with reference to regulations 7 and 8(5) of The Immigration (European Economic Area) Regulations 2006 (the 2006 regulations) and issued a reasons for refusal letter of the same date.
5. In giving reasons for refusal the Secretary of State did not accept that the proxy marriage undertaken by the Claimant and Sponsor in Ghana on 30th September 2012 was a valid marriage. Therefore the Claimant was not the family member of an EEA citizen as required by regulation 7 of the 2006 regulations as he was not the Sponsor's spouse.
6. The Secretary of State went on to consider Regulation 8(5) of the 2006 regulations, and whether the Claimant was an extended family member of the Sponsor, on the basis that he was in a durable relationship with an EEA national. The Secretary of State decided that this was not the case, as insufficient evidence had been provided to show that the parties were in a relationship, as they had not provided any supporting documentation such as joint bank accounts, utility bills, mortgage statements or tenancy agreements to show that they were residing together.
7. The Secretary of State did not consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). The Claimant appealed contending that the Secretary of State was wrong to conclude that a genuine and valid marriage had not taken place, and contending that the marriage was recognised under Ghanaian law, and therefore should be recognised under United Kingdom law. It was contended that the Claimant is therefore the Sponsor's spouse as required by regulation 7. It was also claimed that the refusal decision breached Article 8 of the 1950 Convention on the basis that the Claimant and Sponsor lived together and intend to live together as husband and wife in the United Kingdom.
8. The appeal was heard by Judge Elliman (the judge) on 23rd May 2014. The judge found that a valid marriage had taken place and therefore the Claimant satisfied regulation 7 of the 2006 regulations and the appeal was allowed on that basis. The judge did not consider Article 8, nor the issue of a durable relationship, which in fact had not been raised as a Ground of Appeal.
9. The Secretary of State applied for permission to appeal to the Upper Tribunal contending, in summary, that the judge had erred by failing to apply the principles in Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC).

10. Permission to appeal was granted by Judge of the First-tier Tribunal PJM Hollingworth, who found that an arguable error of law had arisen in relation to the extent of the issues to be determined in the context of the recognition of the validity of the marriage.
11. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

Error of Law

12. The appeal initially came before me on 1st September 2014. The Claimant appeared without legal representation. He said he had been let down by his solicitors and he had not seen the Secretary of State's application for permission, nor the grant of permission to appeal. Those documents were provided to him, and the Claimant thereafter applied for an adjournment to enable him to instruct a new solicitor. There was no objection on behalf of the Secretary of State.
13. The hearing was therefore adjourned in the interests of justice, until 10th October 2014 at 10am. Directions were made orally at the hearing and subsequently in writing, that the Claimant was to serve upon the Presenting Officers' Unit, the bundle of documents that he had already served upon the Upper Tribunal.
14. The appeal was next listed for hearing on 10th October 2014. The Claimant did not attend. I therefore considered Rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008 which provides that if a party fails to attend, the Tribunal may proceed with a hearing if satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing, and that it is in the interests of justice to proceed.
15. I was satisfied that proper notice of the hearing had been given, as the hearing date of 10th October 2014 at 10am had been fixed at the hearing on 1st September 2014 when the Claimant had been present.
16. In addition the Claimant had complied with the directions to serve documentation upon the Presenting Officers' Unit, and I was provided with a copy of the letter sent by the Claimant enclosing the documents, and which referred to the adjourned hearing date of 10th October 2014.
17. I observed that the Tribunal had in error, on 10th September 2014 sent out a notice of hearing to the Claimant at his previous address. However, on 15th September 2013 the Tribunal had sent directions to the Claimant at his correct address, and these directions confirmed the next hearing date to be 10th October 2014 at 10am at Field House.
18. Having satisfied myself that proper notice of the hearing had been given, I noted that there was no correspondence from the Claimant requesting an adjournment, and no explanation for his absence. I decided that it was in

the interests of justice to proceed with this hearing, taking into account that the Claimant's application had been refused as long ago as July 2013.

19. I heard submissions from Mr Parkinson who relied upon grounds contained within the application for permission to appeal, submitting that the judge had not considered the Kareem principles which was an error of law.
20. I decided that the judge had materially erred for the reasons given in the application for permission. Kareem was published January 2014, and therefore should have been referred to by the judge in the decision which was promulgated on 10th June 2014. Kareem indicated that 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. The Sponsor in this appeal is French, and the judge did not consider whether French law would regard a proxy marriage as valid. Because of that error the decision of the First-tier Tribunal was set aside.

Re-Making the Decision

21. Mr Parkinson submitted that the appeal must be dismissed as there was no evidence before the Upper Tribunal to prove that French law would recognise a proxy marriage.
22. In my view the legal position is set out in Kareem, and I set out below, in part, paragraph 17 of that decision;

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.

23. The position was confirmed in TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC) the head note of which states;

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.

24. I also set out below paragraph 20 of TA;

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.

25. The Sponsor in this appeal is French. No evidence has been submitted to prove that the proxy marriage, where neither party attended the ceremony in Ghana, would be recognised under French law. Therefore the burden of proof, the standard of which is a balance of probability, which is upon the Claimant, has not been discharged. The Claimant has not provided evidence to prove that a valid marriage has been carried out. Therefore the Claimant has not proved that he is the spouse of a French citizen, he has therefore not proved that he is a family member as defined by regulation 7 of the 2006 regulations.
26. The issue of a durable relationship was not raised as a Ground of Appeal before the First-tier Tribunal but as it was contended that the parties are in a relationship I will consider this.
27. Again, I find that the burden of proof has not been discharged by the Claimant. The Secretary of State in the refusal letter, pointed to the lack of documentary evidence to prove that the parties were in a relationship which could be described as durable, and pointed out the lack of documentary evidence that they lived together. This issue has not been addressed by the Claimant. No further documentary evidence to prove a durable relationship has been submitted. The Claimant has submitted further witness statements made by himself and the Sponsor. These are contained at pages 1-4 of the bundle submitted to the Upper Tribunal. They are not dated. The parties state that they have been living together since August 2012. Other than their assertions, there has been no satisfactory evidence submitted to prove this. Neither the Claimant nor his spouse attended the Upper Tribunal hearing to give evidence, there were no other witnesses called to give any evidence, either oral or written.
28. In consideration of Article 8 I firstly consider Appendix FM in relation to family life. I do not find that the requirements of Appendix FM are satisfied. A formal application has not been made under Appendix FM. The Claimant has not submitted evidence of English language ability, nor any evidence that the financial requirements can be satisfied. I do not find that the Claimant can rely upon EX.1 as he has not proved that he is the Sponsor's spouse and he has not proved that he and the Sponsor have been living together in a relationship akin to marriage for at least two years before the application was made. Indeed, the evidence in the witness statements would indicate that this was not the case.
29. I therefore conclude that the appeal cannot succeed under Appendix FM.
30. I have considered paragraph 276ADE in relation to private life. The Claimant has not lived in the United Kingdom for at least twenty years. I do not find that the Claimant can satisfy paragraph 276(vi) as he has not proved that there would be very significant obstacles to his integration into Ghana if he had to leave the United Kingdom. I therefore conclude that the appeal cannot succeed with reference to paragraph 276ADE.

31. I do not find that it is necessary to consider Article 8 outside the Immigration Rules. However if Article 8 was to be considered outside the rules, I would follow the Razgar five stage approach. I am not satisfied that the Claimant has proved that he has family life that would engage Article 8. He has a private life in the United Kingdom. It is unclear exactly how long he has been in this country. It is not a case where comprehensive evidence of his private life has been produced. However the threshold of engagement is not especially high.
32. Substantial weight has to be given to the maintenance of effective immigration control which is in the public interest. The fact that the Claimant cannot satisfy the 2006 regulations carries substantial weight. There is no removal decision in force and it is open to the Claimant to make a further application for a residence card if he deems this appropriate, and if he has further evidence to prove that he is either a family member or extended family member of an EEA citizen. The decision to refuse a residence card is in accordance with the law, and is proportionate and does not breach Article 8.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The Claimant's appeal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date: 13th October 2014

Deputy Upper Tribunal Judge M A Hall

FEE AWARD

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date: 13th October 2014

Deputy Upper Tribunal Judge M A Hall