



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

Appeal Number: IA/47376/2013

THE IMMIGRATION ACTS

Heard at Field House

On 16 May 2014

Oral determination given following the hearing

Determination

Promulgated

On 19th June 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMED ABDELMID ABDELGAWAD SHAWKH

Respondent

Representation:

For the Appellant (Secretary of State): Mr T Wilding, Home Office Presenting Officer

For the Respondent (Mr Shawkh): Mr F Gaskin, Counsel, instructed by Roli Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal but for ease of reference I shall refer to the parties as they were originally described.
2. The appellant is a citizen of Egypt who was born on 15 May 1985. He applied for a residence card as confirmation of a right of residence in this country on the basis of his marriage to Ms Irdos Edit, a Hungarian citizen said to be exercising her treaty rights in this country. In support of his application as evidence of his relationship to Ms Edit he provided an Islamic marriage certificate but it appears to have been his case that he had married this lady in a civil ceremony conducted by proxy in Egypt. His application was refused by the respondent on 1 November 2013 and the refusal letter is dated the same date.
3. The respondent did not accept that the appellant and Ms Edit were validly married and accordingly the appellant was not entitled to a residence card pursuant to Regulation 7. The respondent then considered whether or not the appellant might be entitled to a residence card under Regulation 8(5) on the basis that he was in a "durable relationship" with Ms Edit but considered that insufficient evidence had been provided to establish that this was the case.
4. The appellant appealed against this decision and his appeal was considered on the papers by First-tier Tribunal Judge Maxwell sitting at Richmond on 21 February 2014.
5. In a very short determination promulgated on 24 February 2014 Judge Maxwell allowed the appellant's appeal. He found for reasons set out within the determination that the appellant and Ms Edit were validly married placing reliance on guidance to proxy marriages conducted in Egypt which had previously been given by the respondent. He did not, however, have regard to the reported decision of this Tribunal in the case of *Kareem (Proxy marriages - EU law) Nigeria* [2014] UKUT 24 which had been reported a month earlier and gives definitive guidance with regard to proxy marriages and what needs to be established before a Tribunal can find that an applicant has contracted a valid proxy marriage. The judge did not make any finding as to whether or not the appellant and Ms Edit were in a durable relationship.
6. The respondent has appealed against this decision and permission to appeal was granted by First-tier Tribunal Judge Simpson on 14 March 2014. When setting out her reasons for granting permission to appeal Judge Simpson stated as follows:
 - "...2. The respondent argues that the judge's approach to the issue of proxy marriages involving EEA nationals erred in law in that he ought to have referred to the decision in *Kareem (Proxy marriages - EU law) Nigeria* [2014] UKUT 24, which was promulgated a month prior to the hearing.
 3. The grounds identify an arguable material error of law".

7. This appeal was then listed before me for hearing on 15 April 2014 but there was no appearance either by the appellant or anybody acting on his behalf. When the appellant's solicitors were contacted someone from that firm informed the Tribunal that his firm had not received any notification of the hearing. On examining the file it appeared that the communication which had been sent to the appellant on 18 March 2014 informing him that the respondent had been granted permission to appeal was returned as "unknown at this address". The solicitors formerly on the record who had now come off the record were contacted and subsequently in a letter dated 25 March 2014 and received by the Tribunal the following day the appellant's current solicitors notified the Tribunal that they were now instructed and that "we would be grateful if you could address all correspondence in that case to our office".
8. Because the notification of the hearing had been issued on 25 March 2014 it was possible that this had not been communicated to the appellant's current solicitors and in those circumstances I considered that in accordance with the overriding objective I could not deal justly with the appeal on that occasion but I did make directions which were sent to the parties before this hearing. Regrettably the directions were not sent out immediately following the hearing but they were sent by fax on 12 May 2014 and also formal notification of the date of this hearing had been sent on 25 April 2014. Clearly the appellant's solicitors were aware of the date of this hearing because a large bundle was received from them on 12 May 2014.
9. In the directions which I gave and which were sent to and received by the appellant's solicitors the parties were reminded of the direction previously given that they must prepare for the hearing on the basis that if a decision was made to set aside the First-tier Tribunal's determination any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision could be so considered at the hearing. The parties were also put on notice that in the event that the determination of the First-tier Tribunal was set aside the Tribunal may draw an adverse inference in the event that the appellant is not supported at the Tribunal by his partner and a direction was also made that in the event that it was intended by the appellant to adduce any further evidence at the adjourned hearing in the event that an error of law was found such evidence must first be set out in a witness statement and served on the respondent and filed with the Tribunal by no later than yesterday.

The Hearing

10. As I have already noted there was no attendance by the appellant but he was represented by Mr Gaskin of Counsel who attempted to persuade me that although he could not legitimately argue that there had not been an error of law by the First-tier Tribunal by his failure to have regard to the decision in *Kareem*, nonetheless it had not been shown that this error was material. In my judgment it cannot be doubted that this error was

material. The relevance of the decision in *Kareem* is that it is clear from what the Tribunal found in that case at paragraph 11 that in order to establish that there has been a valid proxy marriage between an applicant and an EU citizen exercising treaty rights in this country it must be established that that marriage is regarded as valid in the country of nationality of the EU national spouse. At paragraph 11 the Tribunal of *Kareem* concluded as follows:

“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”.

It is clear from the head note also at g. that there is a burden on any applicant to establish this. I set out this head note:

“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”.

11. In this case although there is an abundance of material provided in the further documents none of it appears to be relevant to the issue which has to be determined which is following the decision in *Kareem* whether the marriage said to have taken place would be regarded as valid in Hungary, which is the country of nationality of the EEA spouse upon whose rights this appellant is dependent. As this was the issue which had to be established, clearly Judge Maxwell’s failure to have regard to what in *Kareem* it was found was the crucial issue was a material error and I so find. Accordingly the decision will now have to be remade by this Tribunal.
12. Notwithstanding the direction which has been given that this Tribunal would be likely to draw an adverse interest from the failure of the appellant’s partner to attend there was as I have already indicated no attendance either by the appellant or by his partner. What is moreover crucial is that no evidence has been provided to establish that what was said to have been a proxy marriage conducted in Egypt would be regarded as a valid marriage in Hungary. In those circumstances there is simply no basis upon which this Tribunal can find that the appellant and Ms Edit are validly married. It follows that on this rehearing his appeal against the original decision of the respondent refusing his application for a residence permit under Regulation 7 must be dismissed.

13. I turn now briefly to consider whether or not he might be entitled to a residence card under Regulation 8 on the basis that the respondent ought to have exercised her discretion to issue him with a residence card because he was in a durable relationship with Ms Edit. This was not a matter which was considered by Judge Maxwell. I can deal with this very briefly. The respondent considered whether or not she could be satisfied on the evidence which had been put before her that this appellant was in a durable relationship with Ms Edit and concluded that she could not. The appellant has put no evidence before this Tribunal capable of persuading the Tribunal that he is in a durable relationship with Ms Edit and neither he nor Ms Edit have chosen to attend this Tribunal notwithstanding the direction which had been given. In these circumstances there is no basis upon which I could find that he is in a durable relationship with Ms Edit and I do not do so.

14. It follows that this appellant's appeal must be dismissed and I will so find.

Decision

I set aside the determination of First-tier Tribunal Judge Maxwell as containing a material error of law and I substitute the following decision:

The appellant's appeal is dismissed under the EEA Regulations.

Signed:

Date: 18 June 2014

Upper Tribunal Judge Craig