Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02142/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th August 2014	**On 8th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR AHMED ELSAYED ABDELGALIL SHAHBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Al-Rashid (Counsel)
For the Respondent: Mr T Wilding (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M A Khan, promulgated on 5th June 2014, following a hearing at Hatton Cross on 16th May 2014. In the determination, the judge dismissed the appeal of Ahmed Elsayed Abdelgalil

Shahba. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Egypt, who was born on 1st January 1983. He appeals against the decision of the Respondent Secretary of State dated 19th December 2013, refusing his application for a residence card, on the basis of his marriage to a Czech national, namely, Mrs Martina Ferkova, under Regulation 7 and 8(5) of the Immigration (EEA) Regulations 2006.

The Appellant's Claim

3. The Appellant's claim is that he is married to his wife, Mrs Martina Ferkova, by way of a proxy marriage which was conducted in Egypt, as well as by way of a religious ceremony which was carried out in a mosque in Doncaster. He is validly married. The Respondent Secretary of State has misunderstood the marriage. The Respondent refers to the religious marriage at a mosque in Doncaster as a proxy marriage, whereas in fact, it is the marriage in Egypt which is the proxy marriage. The Respondent in her refusal letter has considered the former but has not considered the latter. Had the latter been considered, it was clear that the marriage was a valid marriage by virtue of the laws of Egypt such that the Appellant was entitled to be issued with a residence card on account of his marriage to a Czech national.

The Immigration Judge's Findings

4. The judge held that, whereas it was true that the Respondent had referred to the Doncaster marriage as a proxy marriage when in fact it was the marriage in Egypt that was a proxy marriage, the fact was that there was little evidence of the Appellant's wife having travelled to Egypt for the purposes of this marriage (paragraph 28). He held that it was for the Appellant to provide original documents. He had not done so. He had not discharged the burden of proof. The judge also considered whether the parties had a durable relationship for the purposes of EEA law and held that the documents provided, such as a Vodafone bill and the partner's employer's letter, did not establish a durable relationship as required by Regulation 8(5) of the EEA Regulations 2006. Therefore the parties could not succeed on this basis either (paragraph 30).

Grounds of Application

5. The grounds of application assert that the judge erred in law by concluding that the Appellant's marriage, conducted by proxy in Egypt, was not valid, because he failed to take into account material evidence. Furthermore, the judge had erred in not considering the evidence in relation to the parties' durable marriage.

6. On 25th June 2014, permission to appeal was granted.

7. On 2nd July 2014, a Rule 24 response was entered by the Respondent. This made two essential points. First, that the judge was entitled to question whether the evidence demonstrated whether a marriage by proxy had been conducted. However, this was, in any event, irrelevant given the recent Tribunal determination of **Kareem**, which required the Appellant to produce evidence that demonstrated that the marriage was lawful between himself and Mrs Martina Ferkova in the relevant EU member state, namely, in the Czech Republic. Second, the judge was entitled to find that there was insufficient evidence before him to demonstrate that there was a durable relationship between the parties.

Submissions

8. At the hearing before me on 18th August 2014, Mr Al-Rashid, appearing as Counsel on behalf of the Appellant, submitted that given the Upper Tribunal determination in **Kareem** in January 2014 this year, the proper course of action was to make a finding of an error of law and to remit this matter back to the First-tier Tribunal, such that evidence can be produced from the Czech Republic confirming their recognition of proxy marriages. He submitted that this was the proper course of action because this was a case where the Respondent Secretary of State had proceeded on an entirely wrong footing and this error had continued right the way through to the determination of the First-tier Tribunal.

9. The Respondent Secretary of State had treated the Doncaster marriage, which was a religious marriage, as a proxy marriage. It was not. It was the marriage in Egypt, where the Appellant's partner had gone, which was the proxy marriage. There was evidence that this marriage in Egypt was conducted according to Egyptian law. Now that we had the determination in **Kareem**, however, the proper course of action was to make a finding of an error of law and to remit this matter back to the First-tier Tribunal where evidence can be produced about the position under Czech law.

10. For his part, Mr Wilding submitted that this could not be right. The reason was that the refusal letter was dated December 2013 when **Kareem** had not been decided by the Upper Tribunal, judgment being handed down there only on 15th January 2014. The Appellant was appealing against the refusal of a residence card by virtue of his alleged marriage to Mrs Martina Ferkova.

11. Even if the Appellant's case was that he was relying upon the proxy marriage in Egypt, the question was whether this was performed in accordance with Czech law, because it was Czech law that had to be considered, for the purposes of a valid marriage, that would withstand the scrutiny of European law. **Kareem** had made it clear that the issue could only be decided under the laws of the relevant EU state. The case of **TA and Others** had confirmed this approach.

12. There was no reason, if the Respondent's decision had been made in December 2013, why by the time of the appeal before Judge Khan in May 2014, evidence from the Czech Republic had not been produced, so as to comply with the requirements of **Kareem**.

13. Nor, had there been any request for an adjournment before the Tribunal of Judge M A Khan. The Appellant had chosen to run his appeal as he saw fit. **Kareem** had been ignored. The Appellant had not taken the chance of seeking to comply with **Kareem** and producing evidence from the Czech Republic.

14. As for the question whether there was a "durable relationship," the judge had considered this at paragraph 30 and had rejected this submission. The Appellant had given evidence but his wife had not given evidence, and it was unsurprising in the circumstances that the judge was not satisfied that there was a durable relationship.

15. In reply, Mr Al-Rashid submitted that there should be a finding of an error of law because the judge himself did not address the requirements of **Kareem**. **Kareem** was ignored by the judge. The Home Office Presenting Officer did not raise **Kareem**.

16. Second, the main complication in this appeal was that the EEA national, Mrs Martina Ferkova, was not prepared to give evidence. She was not at the hearing. She is not at the hearing today. She was presently with her children looking after them.

17. Third, the Czech Authorities have been contacted but are reluctant to provide evidence until and unless they have sight of the original marriage certificate. That marriage certificate is with the Respondent Secretary of State. Therefore, the Appellant has been disadvantaged by not being able to show that his marriage complies with the laws of a European country.

18. Finally, there should have been a positive finding under durable relationship for the Appellant because both his brother and sister-in-law gave evidence at the hearing.

No Error of Law

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision. My reasons are as follows. Whereas it is clearly desirable for a reference to have been made to **Kareem** in the determination, the question for this Tribunal is whether any error, such as it is, is a "material" error. I am not satisfied it is.

20. This is because the determination in **Kareem**, which was promulgated on 15th January 2014, was not referred to by either representative from either side, although it is difficult to see how they could have been unaware of it. Mr Al-Rashid, who has conducted this appeal as best as he could, submits that his clear instructions were not to refer to **Kareem**, because the Secretary of State had fundamentally misunderstood the facts that had been presented before her, thus enabling him to point to an error in the decision making process in any event. The judge did not refer to it.

21. However, had there been a reference to **Kareem**, it is clear that there could only have been one answer, and that was that the Appellant, who bears the burden of showing that his marriage with an EEA national complies with the laws of the Czech state,

was unable to point to the existence of such evidence. In the circumstances, therefore, the appeal could only have been dismissed.

22. As for the question of whether there was a "durable relationship" Mr Al-Rashid has very properly explained that the EEA national, Mrs Martina Ferkova, was reluctant to give evidence, was not present at the hearing before Judge M A Khan, and is not present here today.

23. Whatever evidence there was from the brother and sister-in-law, would not have been such as to enable the judge to conclude that the parties were in a durable relationship. If anything, the contrary was, in all probability, the case. This is just what the judge found.

Decision

24. There is no material error of law in the original judge's decision. The determination shall stand.

25. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th September 2014