



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

Appeal Number: IA/02332/2014

THE IMMIGRATION ACTS

Heard at Field House

On 22 May 2014

Determination

Promulgated

On 3 June 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR ALBERT AWUKU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel

For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Secretary of State appeals with leave against the decision of First-tier Tribunal Judge Raikes allowing the appellant's appeal under Regulation 7 of the 2006 EEA Regulations, as the spouse and family member of an EEA national.

2. The appellant is a citizen of Ghana born on 10 October 1973. On 28 August 2013 an application was made on his behalf by his legal representatives for a residence card as a confirmation of a right to reside in the UK as the spouse of an EEA national who is exercising her free movement rights. The appellant provided a marriage certificate dated 13 August 2013 that showed his date of marriage as 4 February 2013, with the marriage having taken place in Ghana. The appellant provided the Home Office with a Ghanaian passport and an EEA national's German passport. As there were no entry or exit stamps from Ghana or the UK to demonstrate that he had attended his wedding ceremony, his marriage was considered to have taken place by proxy. The Secretary of State was not satisfied that the appellant's claimed marriage was registered in accordance with the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. Accordingly the Secretary of State could not accept the registration of marriage or statutory declaration submitted as being valid and lawfully issued and evidence of the appellant's relationship. His application was therefore refused with reference to Regulation 7 of the EEA Regulations 2006 (as amended)
3. As the appellant's marriage was deemed not to have been contracted in accordance with the law, the appellant's application was considered as an unmarried partner under Regulation 8(5) of the EEA Regulations 2006 (as amended). The respondent was not satisfied that the appellant had provided sufficient evidence to suggest that he was in a durable relationship.
4. The respondent stated that since the appellant had not made a valid application for Article 8 consideration, consideration was not given as to whether his removal from the UK would breach Article 8 of the ECHR. Additionally, it was pointed out that her decision not to issue a residence card/permanent residence card does not require the appellant to leave the UK if he can otherwise demonstrate that he has a right to reside under the Regulations.
5. The judge was satisfied that the appellant had produced evidence to show his marriage to his EU spouse as claimed. He produced a marriage certificate that shows the date of marriage in Ghana as 4 February 2013 by proxy and that the marriage was registered with the district registrar on 3 August 2013. This certificate indicated that neither party had been married prior to entering into this agreement.
6. The judge found that in addition the appellant produced a statutory declaration to support the marriage and application for registration. She noted that whilst the respondent had raised concerns about the relationship of those making the statutory declaration to the appellant and the EEA national, the related documents had not been disputed by the respondent. She noted that the registration of the customary marriage is optional, the parties voluntarily registered their marriage and she was satisfied that on the evidence the parties are Ghanaian nationals or have

direct familial links to Ghana as required. She was therefore satisfied that this type of marriage is recognised in the country in which it took place, that the appellant's proxy marriage to the sponsor has been properly executed such as to satisfy the requirements of the law of the country in which it took place, and there is nothing in the law of either party's country of domicile that restricts the freedom to enter into the marriage. She was therefore satisfied that the appellant is a family member of his EU sponsor.

7. She was satisfied that the appellant and his sponsor are family members and are related as claimed. She was also satisfied that the sponsor was exercising treaty rights in the UK.
8. The judge then considered the position in relation to the appellant's human rights under Article 8. She found that the appellant is the family member of his EU spouse. The consequences of removing the appellant from the UK will inevitably interfere with his private and family life. The interference is in accordance with the law. Such interference is necessary in a democratic society in order to enforce its immigration controls. The judge then relied on her findings of fact to find that as a family member of the EU national the removal of the appellant would be a disproportionate breach of their family's right to a family or private life under Article 8.
9. I note that the judge did not consider the durability of the relationship. This was not appealed by the appellant.
10. The respondent was granted permission on the respondent's argument that the judge had no regard to the case of **Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24**. There was clear merit in the argument that the judge should have considered whether the type of marriage was recognised in the EEA state of the sponsor, namely Germany, and did not do so that the judge erred in finding that there was a disproportionate interference with his Article 8 rights when her findings were inextricably linked to the EEA Regulations which the appellant could not meet.
11. Mr Nath relied on the respondent's grounds of appeal.
12. Counsel relied on head notes (b) and (d) of **Kareem**, in particular (b) which states:

"The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient."

Counsel also relied on head note (d) and (d). (d) says that where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. (e) says in such an appeal,

the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.

13. Counsel submitted that **Kareem** is very much misunderstood. What it is saying is that if there is no doubt about the marriage certificate, as the judge found in this case, then, the appellant can meet the requirements of Regulation 7. He submitted that the respondent has not challenged the competency of the authorities in Ghana to issue the marriage certificate. This was a paper case. **Kareem** did not form part of the respondent's reasons for refusing the appellant's application. The judge decided the application on the basis of the documentary evidence before her and her findings cannot be impugned.
14. Counsel submitted that the judge considered Article 8 as an alternative. English law recognises proxy marriages. The judge's Article 8 findings do not rely on **Kareem** or the nationality of the appellant's spouse. Accordingly the judge's Article 8 findings disclosed no error of law.
15. I find that the judge made an error of law. The respondent refused the appellant's application on 28 November 2013. **Kareem** did not form part of the respondent's refusal because it was heard on 30 October 2013 and was promulgated on 16 January 2014. The judge determined the appellant's appeal on 4 March 2014. She did not make reference to **Kareem** even though it was a reported decision and she should have been aware of it. It was not brought to her attention because the appellant had requested that the appeal be determined on the papers.
16. Nevertheless, **Kareem** is very helpful in deciding a marriage by proxy where one of the parties is an EEA national and I rely on it.
17. At paragraph 11 of **Kareem** the Upper Tribunal held as follows:

"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."
18. At paragraph 13 the Upper Tribunal states that the CJEU has established that a member state can expect persons claiming to be family members to establish that they meet the requirements of EU law (cf **Jia (C-1-05) [2007] Imm AR 439**, para 37ff). It goes on to say that Article 10(2)(b) of the Citizens Directive (2004/38/EC) indicates that non-EEA nationals can establish that they are family members by the production of a document attesting to the existence of a family relationship.
19. At paragraph 13 the Tribunal goes on to say:

"From this we infer that usually a marriage certificate issued by a competent authority will be sufficient evidence that a marriage has

been contracted. Of course, a document which merely calls itself a marriage certificate does not have any legal status. A certificate will only have legal status if it is issued by an authority with legal power to create or confirm the facts it attests, that is, by an authority that has such competence. Where a marriage document has no legal status or where such status is unclear, other evidence may be used to establish that a marriage has been contracted. However, once again we find that these principles do not help us determine whether a person is a spouse because it will depend on identifying the authority with legal power to create or confirm that a marriage has been contracted."

20. Counsel relied on this paragraph to say that because the Ghanaian authorities have issued a document stating that the marriage certificate was issued by the Ghanaian authority which had competence to issue it, the marriage certificate was a valid document which confirmed that the marriage contracted by the appellant and his EEA spouse was valid. I find that if that alone were the case, the appellant would have satisfied the requirement of being a family member of an EEA national. However, we come to paragraphs 17 and 18 of **Kareem** which say as follows:

"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.

18. The same conclusion may readily be reached by a different route. Within EU law, it is essential that member states facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host member state to decide whether a Union citizen has contracted a marriage. Different member states would be able to reach different conclusions about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one member state (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system in 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.”

21. I interpret these passages to mean that it is for the German authorities to determine whether the appellant’s marriage to the EU spouse by proxy is valid and recognised by Germany. At paragraph 14 of **Kareem** the Upper Tribunal held:

“A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail.”

22. I find that no evidence was adduced by the appellant to show that his marriage by proxy to a German national is recognised by the German authorities. Accordingly, the appellant has failed to discharge the burden of proof on him and the judge’s decision cannot stand.
23. I remake the decision and dismiss the appellant’s appeal under Regulation 7 of the 2006 EEA Regulations.
24. I find Counsel’s argument that the judge’s consideration of the appellant’s Article 8 appeal as freestanding from the EEA Regulations to be a fallacious argument. The judge’s finding was clear that the appellant was a family member of an EEA national. As the appellant had not produced any evidence to support his claim that his marriage was recognised by the German authorities as being valid, the judge’s Article 8 decision cannot also stand.
25. The judge’s decision allowing the appellant’s appeals under the 2006 EEA Regulations and under Article 8 of the ECHR cannot stand. I remake the decision and dismiss the appellant’s appeals on both grounds.

Signed

Date

Upper Tribunal Judge Eshun