



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

Appeal Number: IA/50285/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 9 May 2014**

**Determination**

**Promulgated**

**On 18<sup>th</sup> June 2014**

**Before**

**UPPER TRIBUNAL JUDGE GOLDSTEIN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**LINDA WILSON**

Respondent

**Representation:**

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

For the Respondent: No appearance

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Hindson, who, in a determination decided on the papers on 25 February 2014 and promulgated on 4 March 2014 allowed the appeal of the Respondent (hereinafter called the "claimant"), a citizen of Ghana born on 16 July 1971, against the decision of the Secretary of State dated 14 November 2013 to refuse to issue her with a residence card as a family member of an EEA national exercising treaty rights in the United Kingdom.
2. The claimant had provided a Ghanaian passport issued in London dated 4 May 2012, but there was no evidence as to how or when the claimant entered the United Kingdom. The claimant claimed to have married her Sponsor, Cedric Marius Landre, (who claimed to be a French national born on 19 January 1981) by proxy on 16 March 2012 and she applied for a residence card on 17 January 2013.

3. In his determination, the First-tier Judge noted that the claimant's application was refused because inter alia, she did not meet the requirements of Regulation 17 of the 2006 EEA Regulations that requires the Secretary of State to inter alia, issue a residence card to a person who is not an EEA national and is a family member of a qualified person or of an EEA national with a permanent right of residence under Regulation 15 on application and production of a valid passport and proof that the applicant is such a family member.
4. The Secretary of State in her Reasons for Refusal Letter dated 14 November 2013 noted that the claimant had provided a Ghanaian customary marriage certificate dated 18 June 2012 that showed her date of marriage as 16 March 2012 with the marriage having taken place in Ghana. It was apparent that the marriage took place by proxy.
5. Reference was made in the refusal letter to relevant case law guidance as it stood in relation to the validity of proxy marriages for immigration purposes at the time of the refusal letter. This included the ruling in CB (validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080 that held that the United Kingdom would recognise the validity of a proxy marriage for immigration purposes, provided that the proxy marriage was legal in that country and which further set out three pre-requisites of proxy marriage to be accepted as valid in the UK for immigration purposes namely: that the type of marriage must be recognised in the country in which it took place; the marriage must have been properly executed as to satisfy the requirements of the law of the country in which it took place; and, there must be nothing in the law of either party's country of domicile that restricted the freedom to enter into the marriage.
6. The refusal letter pointed out that for the purposes of Regulation 7 of the 2006 EEA Regulations, for the claimant to be considered as the spouse of an EEA national the Secretary of State would expect the claimant to provide a validly registered marriage certificate for the comprehensive reasons that she set out in the refusal letter and which led her to conclude that she could not be so satisfied.
7. Indeed the First-tier Judge summarised the Secretary of State's position in that regard as reflected in her refusal letter over paragraphs 6 to 11 of his determination as follows:
  - "6. In the instant case the Respondent notes that the Appellant has provided a Ghanaian passport as evidence of his own nationality but none that his spouse is of Ghanaian origin.
  7. In addition, the Respondent does not accept that the marriage is properly registered because the statutory declaration does not include where the parties to the marriage were living at the time of the marriage, nor does it state the marital status of the parties. The

statutory declaration is defective and therefore the couple are not validly married.

8. The statutory declaration states that the parties were represented by their respective fathers but no evidence of that relationship has been provided and the Respondent does not accept they are related as claimed. This invalidates the marriage.
  9. The Appellant has submitted a letter from the Ghanaian High Commission which purports to confirm that the marriage is properly registered. However, the reference number on the letter does not match the marriage certificate. The telephone number for the High Commission on this letter went unanswered and is not the number of the Ghanaian High Commission. The Respondent contends that the letter is not genuine.
  10. The Respondent has considered, in the alternative, the position of the couple as unmarried partners in a 'durable relationship'. The Appellant has provided no evidence of cohabitation and so the application was refused on this basis also.
  11. The case was not considered under Appendix FM and paragraph 276ADE of the Immigration Rules because the Appellant has not made a separate application."
8. The First-tier Judge concluded that (notwithstanding the reasons cited by the Secretary of State as to why, for example, the registration of the claimant's marriage had not been properly made and as to why she had concluded that the marriage was therefore not valid) that:
- "16. The fact remains however that the application to register the marriage was accepted by the Ghanaian authorities because they were prepared to register it and to issue a certificate to that effect. If the Ghanaian authorities were satisfied that there has been a valid marriage it is not for me to go behind that finding. The Respondent has provided no evidence that marriage by proxy is not permitted unless both parties are Ghanaian. The decision maker relies on expert evidence given to the Tribunal in the case of NA. This is evidence, no more. It is not authority."
9. I pause there, because as was rightly contended by the Secretary of State in her letter of refusal, when referring to NA (customary marriage and divorce - evidence) Ghana [2009] UKAIT 00009 it was held that in considering whether the Tribunal could be satisfied that a proxy marriage was contracted under Ghanaian customary law and was thus legal, that inter alia:
- "5. The most common form of marriage in Ghana is the customary marriage. It is a type of marriage contracted under the particular tradition and customary practices of a group of people... A valid customary marriage can only be validly contracted between two Ghanaian citizens and both parties must have capacity to marry. This

means that there should be no violation of any rule of tribal relationship. These rules differ from tribe to tribe.”

10. The First-tier Tribunal Judge continued:

“17. My conclusion that the authorities in Ghana were happy to register the marriage assumes of course that the marriage certificate is genuine. The Respondent does not go so far as to allege it is forged but implies that it should not be relied on. The decision maker points out that the signature of the wife on the marriage certificate does not match that on her passport. This is a marriage by proxy. The wife was not in Ghana at the time so could not possibly have signed the marriage certificate. The decision maker makes reference to a reference on the marriage certificate not matching that on the letter from the Ghanaian High Commission. The decision maker has provided no evidence that there should be such a match and, in any event, I can see no reference on the marriage certificate at all.

18. The decision maker says that the letter from the High Commission is not genuine because the phone number does not match the actual number of the High Commission and it was not answered when the decision maker called it. Again this is a bare assertion, not supported by any evidence. Information from the embassy website, from which this conclusion was made, has not been provided.”

11. In conclusion therefore, the First-tier Judge was satisfied the Ghanaian marriage certificate was genuine and that the claimant had established a valid marriage and that the appeal should be allowed.

12. The Secretary of State was granted permission to appeal that decision and it would be as well therefore to set out below the grounds in support of that successful application:

“Ground one: Making a material misdirection of law

The Reasons for Refusal Letter dated 14 November 2013 (‘the Refusal Letter’) disputes that the Appellant’s Ghanaian customary marriage certificate was lawfully issued and constitutes evidence of the Appellant’s relationship with an EEA national. Accordingly, the application was refused with reference to Regulation 7 of the Immigration (EEA) Regulations 2006;

On 16 January 2014 the determination in *Kareem (Proxy marriages – EU law)* [2014] UKUT 00024 (IAC) was promulgated which provides important guidance as to how the Tribunal should determine whether a marriage has been properly contracted;

At paragraph 68(d) of *Kareem* it is stated that –

*‘In appeals 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. This will require the Tribunal to determine whether a marriage was contracted’.*”

In this case there was doubt that the marriage certificate had been issued by a competent authority. Consequently, it was the task of the Immigration Judge to determine whether the marriage was contracted.

At paragraph 16 of Kareem it was found that -

*'...we start from the fact that the rights of free movement and residence stem directly from Union citizenship. According to the Treaties, a person having the nationality of a Member State is a Union citizen. It follows from these provisions that a Union citizen's rights of free movement and residence are intrinsically linked to that person's nationality of a Member State. Judgments of the CJEU indicate that where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of nationality and not the host Member State... This is because nationality remains within the competence of the individual Member States'.*

Accordingly, in determining whether the marriage was contracted, the Immigration Judge ought to have turned to the law of the Member State of nationality and not the host Member State. In this case the relevant Member State is France as the Appellant's claimed family member is a French national.

In the current case the determination does not make any reference to the law of France. It is submitted that in failing to consider the law of the Member State of nationality, the Immigration Judge has erred in the consideration of this case.

*Kareem* further notes that -

*'A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail'. [14]*

In this case no finding was made that any evidence of the relevant foreign law was provided by the Appellant. It is therefore submitted the Appellant did not satisfy the required burden of proof.

For these reasons it is considered that the Immigration Judge has made a material misdirection of law in failing to consider the approach set out in *Kareem*."

13. Thus the appeal came before me on 9 May 2014 when my first task was to decide whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.
14. Regrettably it was apparent to me at the outset of the hearing that there was no appearance on the part of the claimant and/or by her claimed spouse/partner. There was no explanation for the claimant's absence and no request for an adjournment. I was satisfied that notice of hearing had been served upon the claimant's last known address and I therefore

acceded to Ms Isherwood's request to proceed with the hearing of the appeal in the absence of the claimant in accordance with the provisions of Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as I was indeed of the view that it was in the interests of justice in those circumstances to proceed with the hearing.

15. In that regard I further noted that at paragraph 1 of the directions to the parties that accompanied the notice of hearing dated 17 April 2014, it was made clear that any response the claimant to the appeal wished to make under Rule 24 of the 2008 Tribunal Procedure Rules had to be sent or delivered to the Tribunal so that it was received no later than fourteen days after the claimant was sent notice of hearing and the fact that permission to appeal had been granted.
16. I noted with further concern that no such Rule 24 response had been made. There was therefore no indication either prior to or at the time of the hearing before me as to whether inter alia, the claimant opposed the appeal on the grounds upon which the Secretary of State relied. Further there was no written request for an extension of time in order to seek to provide such a response in accordance with the provisions of Rule 24(4).
17. Ms Isherwood informed me that she relied on the grounds upon which permission to appeal was granted to which she added that there was no evidence as to whether the Sponsor was previously a Ghanaian citizen or any direct descendant of a Ghanaian citizen in accordance with the guidance at paragraph 5 of NA (above).
18. She asked me in the circumstances to set aside the First-tier Tribunal's decision for error of law not least because for the reasons stated in the grounds, the determination of the First-tier Judge was, she submitted, wholly and inadequately reasoned and that I should then proceed to make a fresh decision on the evidence before me to dismiss the appeal.

### **Assessment**

19. I have had no difficulty in concluding that the determination of the First-tier Judge discloses errors of law such as may have materially affected the outcome of the appeal.
20. Whilst it was perfectly understandable as to why the Secretary of State's Refusal Letter made no reference to the decision in Kareem (above) because its promulgation on 16 January 2014 postdated her letter, the same regrettably cannot be said for the First-tier Judge who determined the appeal almost six weeks after its promulgation.
21. Judges interpret existing legal principles. They reveal the law. They do not do so prospectively. Therefore, if for example the First-tier Judge misunderstands those legal principles, then notwithstanding the legal case on the issue postdates the determination, it will still amount to a material

error of law and so I find in the present case, not least for the comprehensive reasons identified within ground 1 in support of the Secretary of State's successful application for permission to appeal.

22. Further, whilst I recognise that cases emanating whether from the former Immigration Appeal Tribunal or from the present Upper Tribunal are not binding upon the First-tier Tribunal, significant weight should nonetheless be attached to the Tribunal's important guidance. In such circumstances, I consider it to have been highly regrettable that the First-tier Judge should have been so dismissive of the guidance of the Tribunal in NA and failed to heed the guidance of the Upper Tribunal in the recent reported decision in Kareem. As the former Immigration Appeal Tribunal (IAT) made clear in the past, it was always unfortunate when an Immigration Judge appeared to operate in a vacuum as if reported decisions of the Tribunal did not exist for guidance and consideration.
23. I would observe that paragraph 5 of the Secretary of State's grounds indeed reflected paragraph (d) of the head note to that case and for the sake of completeness it would be as well off to set out below in full, paragraphs (d) to (g) of that head note:
- "(d) In appeals 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. This will require the Tribunal to determine whether a marriage was contracted.
  - (e) In such an appeal, the starting point will be to decide whether the 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.
  - (f) In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.
  - (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."
24. This was a case where the Secretary of State had expressed serious doubt, indeed had concluded, that the claimant's marriage certificate had not been issued by the Ghanaian authorities as claimed. Indeed the Secretary of State had pointed out in support of that contention as follows:

### **“Ghanaian High Commission Letter**

As supplementary evidence that your marriage has been registered in accordance with Ghanaian law, you have submitted a letter from the Ghanaian High Commission in London dated 27<sup>th</sup> December 2012 and signed by Bernard K.B. Quantson. This letter states that the marriage was registered in accordance with Ghanaian Law. Each letter from the Ghanaian High Commission has its own reference number, unique to that marriage certificate and participants of the marriage. It is noted that the reference number on the letter you have provided does not match the marriage certificate that you have provided.

When the Home Office telephoned the Ghanaian High Commission on 13 December 2013 using the phone number provided on the letter 0208 342 7558/7559 there was no answer. When this number was cross checked with the Ghanaian High Commission in London website it was found that this number did not exist. For that reason we do not accept that this is a genuine letter issued from the Ghanaian High Commission in London.

On the basis of the above, the Secretary of State cannot be satisfied that your claimed proxy marriage has been properly executed as to satisfy the requirements of the law of the country in which it took place. Your application is refused with reference to Regulation 7 of the EEA Regulations 2006 as amended.”

25. I find that contrary to the First-tier Judge’s conclusion that this was no more than a “bare assertion” on the part of the Secretary of State, that this was in fact compelling evidence as reflected in the efforts made by the Secretary of State to determine whether the letter from the Ghanaian High Commission was genuine.
26. I further find that the First-tier Judge appears to have failed to appreciate that, not least mindful of the guidance in Kareem to which I have above referred, that it was for the claimant to demonstrate the reliability of the documentation upon which she relied.
27. Indeed, in Tanveer Ahmed\* [2002] UKAIT 439, a starred decision of the Immigration Appeal Tribunal, it was held inter alia, there was no obligation on the Secretary of State to make detailed enquiries about documents produced by applicants and it was not for the Secretary of State to authenticate the Appellant’s documents. It was for the Appellant to show that the documents produced by him/her were reliable in the overall context to the requisite standard of proof.
28. It is apparent that in granting permission to appeal, First-tier Tribunal Judge Hollingworth in effect concluded, that there was inadequate reasoning as to the findings of the First-tier Judge as regards the validity of the claimant's marriage that in consequence disclosed an arguable error of law within the First-tier Judge’s determination. For the reasons that I have identified above I would wholly agree.



29. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982, the First-tier Judge's reasoning does not in the circumstances satisfactorily disclose the thought processes of the First-tier Judge in reaching his decision. Indeed the Judge's reasoning not least overlooking relevant case law guidance was on the face of the evidence before him perverse and inadequate and therefore unsustainable.
30. As held inter alia in Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC) although a decision might contain an error of law where the requirements to give adequate reasons were not met, the Upper Tribunal would not normally set aside the decision of the First-tier Tribunal where there had been no misdirection of law and the fact-finding process could not be criticised unless, the conclusions the Judge drew from the primary data was not reasonably open to him or her. For the reasons that I have above identified it is apparent to me that the Judge's reasoning was inadequate and that in consequence of that inadequacy the conclusion that he drew from the evidence was not reasonably open to him.
31. Ms Isherwood urged me in the circumstances and for the reasons that I have above identified, to make a fresh decision and to dismiss this appeal and for the above reasons I do so. Quite apart from the matters that I have identified above that the First-tier Judge simply overlooked, there was for example, no evidence before the First-tier Judge that the Sponsor was as claimed a French national and/or that he was exercising treaty rights. There was no evidence that the Sponsor had formerly been or still was a Ghanaian citizen or that he was descended from Ghanaian citizens. There was indeed little if any evidence that met the guidance as set out comprehensively by the Upper Tribunal in Kareem.
32. As I have made clear above, the enquiries by the Secretary of State as to the reliability of a letter from the Ghanaian High Commission can hardly be described as amounting to a bare assertion. Those enquiries represent compelling evidence and so I find that the letter from the Ghanaian High Commission stating that the marriage was registered in accordance with Ghanaian law cannot be regarded as reliable.
33. I also cannot ignore the fact that despite the importance of the claimant's appeal she in the first instance and before the First-tier Tribunal failed to take the opportunity to give oral evidence in support of her appeal before that Tribunal nor was there any attendance on the part of the Sponsor for that purpose.
34. My concern in that regard has been reinforced by the fact that the claimant has failed to attend the hearing of the appeal before the Upper Tribunal in order to resist the Secretary of State's contention that the decision in her appeal should be set aside and reversed.

## **Decision**

35. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
36. I set aside the decision.
37. I re-make the decision in the appeal by dismissing it.

Signed

Date 17 June 2014

Upper Tribunal Judge Goldstein