



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

Appeal Number: IA/07729/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Sheldon Court
On 19th February 2015**

**Determination Promulgated
On 25th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR SAIT B J CEESAY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Rutherford (Counsel)
For the Respondent: Mr D Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Hawden-Beal, promulgated on 26th June 2014, following a hearing at Birmingham Sheldon Court on 9th June 2014. In the determination, the judge allowed the appeal of Sait B J Ceesay. The Respondent 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 Gambia, who was born on 12th June 1971. He is the spouse of Mrs Fatou Comma Danso, a German national. The Appellant applied for a residence card as confirmation of his right to reside in the UK on the basis of being a family member of an EEA national exercising treaty rights in the UK. The Secretary of State rejected this application on the basis that the Appellant's wife was not a qualified person, and that the Appellant was not a member of an EEA national exercising treaty rights, or that they were related as claimed, and it was not accepted that they were in a durable relationship with each other either (see paragraph 3 of the determination).

The Judge's Findings

3. The judge heard evidence that the Appellant and his German national wife had a relationship back home in Gambia from 1991 until 2001. They were both unmarried at the time. She, however, then married a German national and moved to Germany to be with him. The Appellant and Mrs Danso then had minimal contact because her husband controlled her communications. They re-established contact in 2008. This was after the Appellant came to the UK to study because it was cheaper to call Germany from the UK than it was from Gambia. They rekindled their relationship in April 2009. They maintained contact by telephone. When Mrs Danso returned to Germany after her first visit, it caused problems within her marriage. She separated from her German national husband. It was not a formal separation until 2010. However, they were divorced after July 2013 (see paragraph 14).
4. The evidence before the judge was that Mrs Danso then moved in with the Appellant in his four bedroom rented flat which cost £550 per month. They shared interests together. They married. Their marriage certificate, dated 13th September 2013, shows that they married according to the Muslim Marriage Law of 1941. The Respondent does not accept that this was a valid marriage registration because it was two weeks and three days outside of the one month time limit allowed by the law in Gambia (see paragraph 20). The law is that if the parties are domiciled in Banjul and married there, their marriage has to be registered within a month of it taking place (see paragraph 21).
5. The judge held that the parties, although married in Banjul, are not domiciled there. They do not have the benefit of being able to register their marriage when they get back to the Gambia or to Banjul. The basis of the Respondent's objection to the marriage was that it was registered outside the time limits. However, as the judge observed, Section 16(A) of the 1941 Act, states that nothing in the Act "shall be construed to render invalid, merely by reason of its not having been registered, a Muslim marriage or divorce which otherwise would be valid". The judge held that in all other respects the marriage was valid.
6. Accordingly, he would have to be satisfied "that Section 16 means that the marriage is legally registered in Gambia even though there is no evidence of payment of the late registration fee and thus it is valid in the UK for immigration purposes" (paragraph 22).

7. The judge went on to say that the Appellant did not raise his human rights grounds but does say that the decision is discriminatory. He observed that Article 8 rights were raised, but that no findings would be made in relation to these rights (paragraph 24). The appeal was allowed.

Grounds of Application

8. The grounds of application state that the decision is contrary to the case of **Kareem [2014] UKUT 00024**, which states that “the rights of free movement and residence stem directly from union citizenship”. Accordingly what was clear was that “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” (paragraph 16). In this case, no regard had been given to the position under German law, which was the EU state in question. It mattered not whether the law of Gambia allowed for a discretion to be exercised in particular circumstances. It mattered not whether the Appellant could fulfil the requirements of that discretion. That was not the proper law.
9. On 30th December 2014, permission to appeal was granted on this basis. Reference was also made to **TA (Ghana) [2014] UKUT 00316**.

Submissions

10. At the hearing before me on 19th February 2015, Mr Mills, appearing on behalf of the Respondent, submitted that the case of **TA (Ghana) [2014] UKUT 00316**, had put paid to any argument that **Kareem** was only applicable in certain circumstances. It applies in every case. The recognition of the marriage has to be under the law of the EU country. Second, the argument that the Appellant could succeed on the basis of having a “durable relationship” would not cure the error of law committed by the judge because the judge made no findings in relation to the durable relationship himself. Regulation 8 requires the parties to demonstrate that they are in a genuine and subsisting relationship for there to be a durable relationship. No findings were made in this respect. Third, Article 8 was not properly pleaded before the judge. The judge simply said (at paragraph 24) that he would make no findings in relation to it. Therefore, the error of law remained. If the error of law remained, then the only proper course of action was for this Tribunal was to make a finding of an error of law and to remit the matter back to the First-tier Tribunal for a proper finding to be made in relation to the validity of the marriage as well as in relation to whether there was a durable relationship.
11. For her part, Ms Rutherford relied upon her skeleton argument. Citing the head note of **Kareem**, she argued that what the determination suggests is that “a person must show that he is validly married in the country where the marriage took place and that in order to do so a marriage certificate from a competent authority should be produced” (see paragraph 5). Here there was a marriage certificate issued by a competent authority. Accordingly, the judge was right to give it credence. Alternatively, the Appellant’s removal would breach Article 8 ECHR because he has established a family life with Mrs Danso in the UK. He has also in his six years in the UK studied and worked here and has established a private life. Mrs Danso was

exercising treaty rights in the UK. To separate the couple now would be disproportionate. She asked me to allow the appeal.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. The determination in **Kareem [2014] UKUT 00024** was promulgated on 16th January 2014. The determination of the judge in this case was promulgated on 26th June 2014, with the hearing being on 9th June 2014. **Kareem** should have been applied and should have been brought to the attention of the judge. Any doubts about its application have been laid to the rest by the case of **TA (Ghana) [2014] UKUT 00316**. The validity of the marriage in this case has to be assessed not by reference to the law in the Gambia, but the law in Germany. Ms Rutherford helpfully submitted that she was in no position to assist the court in relation to the law in Germany even today. The only outstanding issue is in relation to whether this is a case involving a “durable relationship”, but again, evidence on this has not been presented before this Tribunal. Accordingly, the appropriate course of action is for this appeal to be remitted back to a First-tier Tribunal Judge other than Judge Hawden-Beal, to be determined afresh.

Remaking the Decision

13. I have accordingly remade the decision on the basis of the findings of the original judge, the evidence before him and the submissions that I have heard today. I am allowing the appeal of the Secretary of State to the extent that this appeal is remitted back to the First-tier Tribunal for proper findings to be made in relation to the application of **Kareem** to the position under German law as far as this marriage is concerned, as well as in relation to the findings regarding whether this is a “durable relationship” between the parties in this relationship.

Notice of Decision

14. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted to the First-tier Tribunal to be determined by a judge other than Judge Hawden-Beal under Practice Statement 7.2.
15. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

25th February 2015