Tribunals Service
Asylum and Immigration Tribunal

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
IA/02903/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24th September 2014	**On 9th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALMA ESI HOLDBROOKE

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr N Garrod, instructed by Justice and Law Solicitors

DETERMINATION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Ghana born on 17th April 1961. Her appeal against the Respondent's decision refusing her a residence card as confirmation of a right of residence under Regulation 7 of the Immigration (EEA) Regulations 2006 was allowed by the First-tier Tribunal on 17th July 2014. The Secretary of State appealed.

2. The Appellant entered the UK on 17th January 2005. She entered into a Ghanaian customary marriage by proxy to Emmanuel Adu-Amankwah, the Sponsor, a Belgian national, on 25th September 2012. On 15th December 2012, the Appellant applied for a residence card. The Respondent refused the application on 17th December 2013 because she was not satisfied that the Sponsor was of Ghanaian descent, the statutory declaration was not valid and there was insufficient evidence confirming the registration of marriage. The issues before the First-tier Tribunal were whether the Appellant and Sponsor were validly married and whether they were in a durable relationship.

3. First-tier Tribunal Judge Prior found that the marriage certificate was issued by a competent authority and was sufficient to establish that the marriage was valid. The Appellant was therefore entitled to a residence card.

4. Permission to appeal was granted by First-tier Tribunal Judge Foudy on 11th August 2014 on the grounds that the Judge had arguably erred in law failing to refer to Kareem (Proxy marriages – EU Law) [2014] UKUT 24 and therefore failed to consider whether the marriage was lawful in Belgium.

5. Mr Duffy submitted that the Judge had failed to apply Kareem and TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC) at paragraph 27 of the determination. This was an error of law and the decision should be remade.

6. Mr Garrod relied on his skeleton argument and submitted that TA should not be followed. In McCabe v McCabe [1994] 1 FLR 410, the Court of Appeal held that a Ghanaian marriage where the appropriate documents were available was valid under the law of England and Wales. Further, following Papajorgi (EEA spouse – marriage of convenience) Greece [2012] UKUT 38, the burden was on the Respondent to show that the marriage was not valid. TA sought to preclude the scenario where the marriage was recognised in the UK, but not in the Member state. There was no legal basis for this restriction. Mr Garrod referred to Micheletti (C-360/9) [1992] ECR I-4239 at paragraphs 10 and 14 and submitted that the head note in Kareem was correct. CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080 was another authority accepting the legality of proxy marriages in the law of England and Wales. The Upper Tribunal in Kareem did not seek to overturn CB. McCabe should be followed in preference to TA.

7. Mr Duffy submitted that TA represented the current position and Kareem had been misread. The burden was on the Appellant to show that she was a spouse. This was not a marriage of convenience. There was not an onerous burden on the Appellant and the Tribunal guidance in TA should be followed.

Discussion and Conclusion

8. I am not persuaded by Mr Garrod's submission that the burden was on the Respondent to show that the marriage was not valid. In Papajorgi, the Tribunal held that there was an evidential burden on the Respondent to show that the marriage was one of convenience. A marriage of convenience was a marriage entered into without the intention of matrimonial co-habitation and for the purpose of securing admission to the country. The issue was whether there had been an abuse of rights within EU not whether there was a legal marriage. I find that the burden is on the Appellant to show that the marriage is valid and she is the spouse of an EEA national.

9. Nor am I persuaded that in normal legal precedent, the head note takes priority over the legal discussion contained within a determination (paragraph 9 of the skeleton argument) or the submission that the head note in Kareem was correct. The Tribunal in Kareem found that Member States did not share a common definition of spouse and Member States could not use their own legislation to determine whether a person was a family member. Rights of free movement stemmed from Union citizenship which was within the competence of Member States. Accordingly, in EU law, the question of whether a person was in a marital relationship was governed by the law of the Member State from which the Union citizen obtained nationality and from which that citizen derived free movement rights.

10. The Tribunal in Kareem went on to find that, if it was for the host Member State to decide whether a person was married, different Member States would be able to reach different conclusions and this would leave Union Citizens unclear as to whether their spouses could move freely with them. Such principles would be contrary to fundamental EU law principles.

11. The Tribunal adopted this approach in order to determine the appeal, but also acknowledged that it may not apply in every situation, for example a Member State could not apply its own competence in a way that would restrict a person's right as a Union citizen even where EU law did not provide a harmonised approach that was applicable throughout the Union.

12. In Micheletti the CJEC held that it was not permissible for the legislation of a Member State to restrict the effects of the grant of nationally of another Member State because the consequence of allowing such a

possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.

13. Accordingly, I find that TA explains Kareem and is consistent with it. There is not a two-stage approach as suggested by Mr Garrod. In addition, Kareem is not inconsistent with McCabe. The issue of whether a marriage is valid depends on the production of the appropriate documents and therefore must be decided on a case by case basis. It does not follow that just because in McCabe the Court of Appeal found that a Ghanaian marriage was valid under the law of England and Wales, all Ghanaian marriages were valid.

14. I find that First-tier Tribunal Judge Prior erred in law in failing to properly apply Kareem and I set aside his finding, at paragraph 29, that the marriage was valid and the Appellant was entitled to a residence card.

15. Mr Garrod relied on Micheletti in an attempt to persuade me that since the law of a host Member State could not be used to restrict freedom of establishment, TA should not be followed because in effect it imposed an additional condition for the recognition of the marriage. This was contrary to the principles of EU law. In CB the Tribunal held that if proxy marriages were recognised in the country where they were celebrated, the marriage was valid under English law. The Tribunal in Kareem had not sought to over turn CB.

16. Whilst I find there is some merit in this argument, I am not persuaded by it for the following reasons. Kareem and TA, require the Appellant to show that the marriage was valid in the Member State of the Union Citizen's nationality. There is no requirement to show that the marriage is also valid in the host Member State. There was no additional condition to be satisfied.

17. The Tribunal in Kareem, at paragraph 6, found that there was no legal basis for the assumption which was presented and adopted without discussion in CB. There was no need to over turn CB because, on the facts of the case of Kareem, the appellant had failed to show that the marriage was valid in Nigeria.

18. In re-making the decision under appeal, there was no evidence before me of the validity of the marriage under Belgian law, and the burden of proving that the marriage was valid was on the Appellant. I find that she has failed to show that she was a family member for the purposes of

Regulation 7 of the EEA Regulations 2006.

19. The issue, therefore, is whether the Appellant is in a durable relationship with an EEA national. The First-tier Tribunal found the Appellant and Sponsor to be credible witnesses. They Appellant married the Sponsor by proxy on 25th September 2012 and they have been living together since that date. On the evidence before me, I find that they are in a durable relationship for the purposes of Regulation 8(5) of the EEA Regulations 2006. The Appellant has shown that she is an extended family member.

20. Under Regulation 17(4), the Secretary of State has a discretion to issue a residence card to an extended family member. I allow the appeal in so far as the decision to refuse to issue a residence card was not in accordance with the law.

Deputy Upper Tribunal Judge Frances
8th October 2014