IAC-HX-MC/12-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09916/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4th December 2014	**On 18th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ADWOA AFRIYIE

Respondent

Representation:
For the Appellant: Ms Holmes, Senior Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

The Background to this Appeal

1. The respondent applied for a residence card as confirmation of the right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights in the United Kingdom. That application was refused and the respondent's appeal came before First-tier Tribunal Judge Beg on 21st July 2014. In a decision promulgated on 6th August 2014 the appeal was allowed.

2. The appellant sought permission to appeal arguing that the judge had made a material misdirection of law in failing to follow and apply **Kareem (Proxy marriages – EU law) [2014] UKUT 00024**. The grounds were in the following terms:

> *"Ground one: Making a material misdirection of law*
>
> 3. *The decision in Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC) was promulgated on 16 January 2014. This decision provides important guidance as to how the Tribunal should determine whether a marriage has been properly contracted.*
>
> 4. *At [6] the appellant's representative claims that the Secretary of State has misapplied the Ghanaian Registration of Marriages Act; that the appellant has complied with the Act. Further, that there was no need to consider the Matrimonial laws of France since she satisfies Ghanaian law.*
>
> 5. *This is incorrect. The law on proxy marriages involving EEA nationals has been clarified by two upper Tribunal decisions in recent times: Kareem (Proxy marriages – EU law) [2014] UKUT 24, published on 23 January 2014) and TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (ICA), published on 14 July 2014. Kareem states that in cases concerning proxy marriages and EEA rights, the crucial question is whether the country of the EEA nationality recognises such marriages;*
>
> 6. *At [16] Kareem finds 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'.*
>
> 7. *Accordingly, in determining whether the marriage was contracted, the Immigration Judge ought to have turned to the law of the Member State of France as the appellant's claimed family member is a French national [6];*
>
> 8. *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];*
>
> 9. *In this case, no finding was made that any evidence of the relevant foreign law was provided by the appellant. In failing to provide evidence of the relevant foreign law, the appellant has failed to satisfy the required burden;*

10. In accordance with Kareem, the Immigration Judge was obliged to consider French law in determining this case. Failure to do so amounts to a material misdirection of law;

11. Permission to appeal is respectfully sought;

12. An oral hearing is requested"

3. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 6th November 2014 thus the matter came before me to determine whether the decision of Judge Beg contains an error of law.

4. The respondent did not attend the appeal hearing nor did he file submissions in response to the application for permission to appeal. No further evidence was heard from the respondent.

The Decision of Judge Beg

5. The core findings of Judge Beg with regard to the customary marriage in Ghana is set out at paragraphs 7 to 12 which I set out below:

"7. The Home Office is wrong to state that this type of marriage in Ghana was governed by PNDC law 112, Customary Marriage and Divorce (Registration) Law 1985. The 1985 Act governs the Registration of the Marriage and not the marriage itself which take place under traditional custom and the parties do not have to be present.

8. The Appellant submit that the Home Office have imputed essential conditions into the Customary Marriage and Divorce (Registration) Law 1985 which are not within the Statute itself. If the Parliament of Ghana had intended that Ghanaian marriages should only be between two Ghanaians the Parliament would have stated that in the Act. The 1985 Act do not categorically state that customary marry could only be validly contracted between two Ghanaians and it is inconceivable that any country would statutorily stop its nationals from marrying foreign national.

The essentials of a valid Ghanaian Customary marriage are as follows:-

(a) agreement by the parties to get together as man and wife
(b) consent of the families of the man and woman to the marriage
(c) consummation of the marriage

As held in the Ghanaian Court of Appeal in Asumah v Khar (1959) GLR 353, the procedure is that where a man desire to marry, he applies to the woman's family for consent taking to them customary gift. If the family gives their consent by accepting the gift and drink, that concludes a valid marriage under customary law.
The giving and acceptance of the customary drink and gift usually takes place at a marriage ceremony attended by both the paternal and maternal members and friends of both prospective husband and wife. ***The man or woman or both may or may not be present at the***

ceremony. In fact their presence is not necessary at the ceremony. The customary drinks are received and customary rites are performed at the ceremony in the presence of or with the consent of the families of both the prospective husband and wife.

In Ghana customary marriage is legally valid without registration, the couple being considered legally married when the customary marriage is consummated. One characteristic of customary marriage is that it allows polygamy thus it allows the man to marry more than one woman.

The customary marriage may be registered for record purposes only.

Under the PNDC Law 112 in Ghana, a customary marriage may be registered and a Customary Law Marriage Certificate issued under PNDC 112 to the couple.

9. *That the Customary Marriage and Divorce (Registration) Law 1985 makes provisions for the registration of customary marriage and that the law does not govern Ghanaian Customary marriages as stated by the UK Border Agency. Customary marriages are governed by the Tribal Custom.*

10. *The Appellant submitted that the UK Border Agency has the whole status from which they cited the above quotation, Section 4(1) of the same statute as amended by Customary Marriages and Divorce (Registration) (Amendment) Law, 1991, states that 'The Registrar, shall, upon receipt of an application for the registration of a marriage register the marriage and shall by notice in the form set out in the second schedule to this Law notify the public of the marriage.'*

11. *The Appellant submit that the marriage was conducted under the customary law and subsequently registered under the Customary Marriage and Divorce (Registration) Law, 1985. That the marriage ceremony is separate from the registration of the said marriage.*

12. *Section 13 of the statute states that 'in any proceedings a true copy of the entry in the register certified under the hand of the Registrar shall be admissible in evidence as sufficient proof of the registration of the marriage or dissolution of the marriage. The statutory declaration is in support of the application. Upon submitting the application for registration of marriage the Registrar makes further enquiries to satisfy him or herself that the requirements have been met before issuing the marriage certificate."*

6. The Tribunal in **Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC)** have given guidance concerning the marriage of an EEA national to a non-EEA national. In particular the Tribunal has indicated that 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 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. The qualified person's nationality in this appeal is French. The Tribunal have gone on to note that 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.

7. In this case as can be seen from the decision from which I have set out the key parts from above, Judge Beg did not take into account **Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC)**. Had he done so I am satisfied that he could not have concluded that the appellant and the qualified person had shown they had contracted a valid marriage recognised by the laws of France which was a requirement for the marriage to be recognised in the United Kingdom.

8. For all of these reasons I am satisfied that the judge erred in law for the reasons set out in the grounds seeking permission to appeal. In the circumstances I set aside the decision and remake the decision by dismissing the appeal.

Conclusions

9. The judge made an error of law and the decision is set aside.

10. I remake the decision dismissing the appeal.

Signed 15 December 2014

Deputy Upper Tribunal Judge E B Grant