Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14266/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th November 2014	**On 8th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS VIVIAN DZANDZE ATSU
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Akohene, Solicitor
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ghana born on 8th June 1968. She was last admitted to the United Kingdom on 7th April 2004 as a visitor until 30th September 2004. Since 1st October 2004 she has illegally resided in the

UK. On 5th October 2012 she made application for a residence card as confirmation of a right of residence under European Community law as the spouse of an EEA national exercising treaty rights in the United Kingdom. That application was refused by the Secretary of State by Notice of Refusal dated 12th April 2013.

2. The Appellant appeals and the appeal came before Judge of the First-tier Tribunal Dineen sitting at Hatton Cross on 18th December 2013. In a determination promulgated on 12th May 2014 the Appellant's appeal was allowed under the Immigration (European Economic Area) Regulations 2006.

3. On 19th May 2014 the Secretary of State lodged Grounds of Appeal. Those Grounds of Appeal contended that in reaching his findings the judge had not had due regard to the decision in *Kareem (Proxy Marriages – EU law) Nigeria [2014] UKUT 24* and that in determining the validity of the marriage the judge should have firstly established whether this type of marriage was recognised in the EEA state of the Sponsor, the Netherlands. As no evidence was advanced by the Appellant to support the recognition of the marriage in the Netherlands the Grounds of Appeal contended that the Appellant had failed to discharge her burden of proof and that the appeal should have been dismissed.

4. On 13th June 2014 First-tier Tribunal Judge Pooler granted permission to appeal. It was on that basis that the appeal came before me to determine whether or not there has been a material error of law in the decision of the First-tier Tribunal. For the sake of continuity throughout the Tribunal process Ms Dzandze Atsu is referred to herein as the Appellant and the Secretary of State as the Respondent albeit that I acknowledge that the appeal in question is the Secretary of State's.

5. Part of the difficulty in this case related to the time period that evolved between the date of hearing and the date of decision. Not only during that period was the case of *Kareem* decided but also the decision in *TA (Kareem explained) [2014] UKUT 316 (IAC)*. That case is authority for stating that the appeal turns on whether the Appellant's Ghanaian proxy marriage is considered valid by Dutch law and is authority for stating that the Appellant must establish that her marriage is recognised by the Dutch authorities in order to qualify for a residence card as the family member of an EEA national exercising treaty rights. It is not merely sufficiently for the Appellant to rely on the marriage certificate issued by the Ghanaian authorities.

6. In such circumstances I found that there was a material error of law in the approach adopted by the First-tier Tribunal Judge. I gave specific directions in this matter that the issue outstanding was whether or not the Appellant's proxy marriage was recognised by the Dutch authorities and I granted leave to the Appellant to file and serve at least seven days prehearing an additional bundle of documents addressing:-

(a) Such proof that the customary marriage has been legalised by a competent authority such as the Dutch Embassy in the state where the marriage took place; or

(b) such evidence that suggested registration with the competent authority in the country of origin was sufficient to warrant recognition under Dutch law.

On that basis I adjourned the matter to be heard before me on the first available date after 1st October 2014. The matter came back before me on 10th October 2014 when the Appellant advised that she was having difficulty in obtaining the relevant documentation and a request was made for a further six week extension. I granted such extension and adjournment indicating that I was unlikely to entertain any further extension in obtaining the relevant information. It is on that basis that the matter reappears before me. Mr Akohene appears again on behalf of the Appellant. The Secretary of State is represented by her Home Office Presenting Officer, Mr Kandola.

7. I note that the documentation that the Appellant sought to disclose and upon which directions were given has not been produced. In fact there is no further evidence before the Tribunal. Mr Akohene concedes that it has not been possible to obtain such evidence. Advising that the papers are still awaited.

Submissions/Discussion

8. Mr Akohene seeks to persuade me that there is authority for me to proceed under Regulation 8(5). That Regulation or any submissions thereunder is not before me. Mr Kandola points out that it was not an issue that was raised either before me or before the First-tier Tribunal albeit that it is contended by Mr Akohene that it was in the original Grounds of Appeal from the refusal by the Secretary of State to the First-tier Tribunal. It is pointed out that there is no "alternative" recited in the Grounds of Appeal and Mr Kandola submits that it is, as a matter of law, necessary if the Appellant wishes to cross-appeal the decision of the First-tier Tribunal Judge even though he was successful on other issues before the First-tier Tribunal Judge to make such application to the First-tier Tribunal.

Findings

9. There are two issues that I am asked to determine effectively in this appeal. I start by reminding myself so far as the primary issue is concerned namely whether or not the Appellant can meet the requirements of the Immigration (EEA) Regulations 2006 that the burden of proof is on the Appellant when making her application for a residence card as a confirmation of a right to reside in the United Kingdom and the burden of proof is on the balance of probabilities. In this instant case I have given very considerable opportunity to the Appellant to show that

she meets those requirements. Despite that the Appellant has failed to produce requisite information. It is for the Appellant to discharge that burden of proof. Following the decision in *Kareem (proxy marriages – EU law) [2014] UKUT 24* the determination of whether there is a marital relationship for the purposes of the Immigration (EEA) Regulations 2006 must always be examined in accordance with the laws of the Member State from which the union citizen obtains nationality. The issues were explained further in detail in *TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)*. The Appellant has failed to discharge the burden of proof or to show to the satisfaction of the Tribunal that the marital relationship as set down in *Kareem* has been satisfied. The Appellant consequently cannot succeed under the 2006 Regulations.

10. Further the submission by Mr Akohene that he seeks to appeal pursuant to a different Regulation which was neither before the First-tier Tribunal nor before the Upper Tribunal when an error of law is found and is purely made I consider an appeal of last resort at the hearing cannot be sustained. As the Tribunal found in *EG and NG (UT Rule 17: withdrawal; Rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC)* a party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be made under Rule 24 for permission to appeal to the First-tier Tribunal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused it or declined to admit the application. Consequently is not for an Upper Tribunal Judge to entertain any late application. Such application should, if it is to be made, be made to the First-tier Tribunal. The Appellant consequently is not granted permission to raise the late Ground of Appeal that her instructed solicitors seek to rely on.

11. In such circumstances the Appellant cannot meet the requirements of the EEA Regulations and her appeal is dismissed.

Decision

The Appellant's appeal is dismissed under the Immigration (European Economic Area) Regulations 2006.

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris