Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18386/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19th June 2014	**On 27th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FLORA OWUSU ANSAH
(NO ANONYMITY DIRECTION MADE)

Claimant

Representation:

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Claimant: Ms A Okyere-Darko of BWF Solicitors

DETERMINATION AND REASONS

1. The Claimant, Mrs Flora Owusu Ansah, date of birth 20th November 1977, is a citizen of Ghana.

2. This is an appeal by the Secretary of State for the Home Department (the SSHD) against the determination of First-tier Tribunal Judge Colyer whereby the judge allowed the appeal of Mrs Flora Owusu Ansah (the Claimant) against the decision of the SSHD to refuse her a residence card. The Claimant had applied for a residence card as the spouse of an EEA national exercising treaty rights in the United Kingdom.

3. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking account of all the circumstances I do not consider it necessary to make an anonymity direction.

Facts

4. The Claimant, Mrs Flora Owusu Ansah, date of birth 20th November 1977 is a citizen of Ghana. On 26th September 2012 she applied for a residence card as confirmation of a right to reside in the United Kingdom as the spouse of Mr Jean Jacques Ngeu (the Sponsor). The Sponsor is a French national who is working in the United Kingdom and as such is exercising treaty rights. Whilst the Sponsor has been previously married that marriage was terminated by divorce on a date prior to any date relevant to these proceedings.

5. The Claimant came to the United Kingdom prior to 2010. In January 2010 the Claimant met the Sponsor. Their relationship developed and by June 2010 the Claimant had moved into the Sponsor's address in Cambridge. From that day on the parties have lived together.

6. In late 2010/early 2011 the Claimant and the Sponsor determined to marry. Because the Claimant was from Ghana she wanted their marriage to be recognised by her family in Ghana. Arrangements were therefore made for a marriage ceremony to take place in Ghana. The Claimant and the Sponsor were in the United Kingdom throughout. The marriage ceremony in Ghana was conducted by proxy. It took place in Kumasi with various members of the Claimant's family present. Members of the Claimant's family not only represented the Claimant but also the Sponsor at that ceremony.

7. The issue in this appeal is whether that wedding ceremony should be recognised as valid in EU law. The judge found that the wedding ceremony was lawful and in accordance with the laws of the country in which it took place, namely Ghana. In coming to that conclusion the judge assessed the evidence presented including an expert report from a Professor Woodman.

8. It was accepted by all parties that issues of foreign law are matters of fact to be determined on the basis of evidence presented to the Tribunal. Whilst the evidence was such that the ceremony was performed in accordance with the laws of Ghana there was no evidence as to how French law would treat the marriage.

9. The contention by the SSHD is that whilst the marriage has been validly performed in Ghana it was necessary for the Appellant to prove that the marriage would be recognised as valid by French law. The SSHD relies upon the case of Kareem (Proxy marriages – EU law) [2014] UKUT 24. The SSHD contends that the Appellant has the burden of proving not only that the marriage is valid as to form in the country where the marriage was performed, but also that the "personal" law of the individuals concerned have to recognise that that is a valid marriage. That is that it was necessary for French law to recognise that the marriage was a valid marriage.

10. The contention on behalf of the Claimant is that the case of Kareem sets out a series of sequential questions as set out in the headnote and that once it has been established that there is a lawful marriage certificate there is a valid marriage and there is no need to go on to the remaining questions set out within the headnote.

11. In respect of this appeal there is no challenge to the fact that in its form the marriage of the Claimant to the Sponsor is lawful under Ghanaian law. It was accepted that it was a proxy marriage conducted according to customary law and that there was the appropriate level of certification and confirmation that the marriage was recognised in Ghanaian law.

12. The issue was whether or not it was necessary for the Appellant to prove that it would be recognised in French law.

13. Both sides have relied upon the case of Kareem. The headnote in Kareem provides as follows:-

> "(a) A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.
>
> (b) The production of a marriage certificate issued by a competent authority (that is issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English law (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.
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> (c) A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.
>
> (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 provided 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 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. …"

14. The contention on behalf of the Claimant is that here there is a marriage certificate and as such there is no requirement to go on from step (d) to step (e). By reason of paragraphs (c) and (d) above it is suggested that the requirement of producing a valid marriage certificate recognised in a country where the marriage was performed

was sufficient to establish that a marriage had taken place and was a valid marriage which should be recognised in the UK..

15. It is clear from paragraph 7 of Kareem that:-

> "In terms of EU law, the law of marriage can be said to be within the competence of the Member States."

16. As recognised in paragraph 10 of Kareem marriage is special kind of contract in that it changes a person's civil status. In dealing with the change of status and by what law that should be determined Kareem at paragraph 11 states:-

> "11. We conclude that in EU law the question of whether a person is in a marital relationship is governed by the national laws of the Member States. In other words, whether a person is married is a matter that falls within the competence of the individual Member States."

It is for the law of individual Member States to determine whether or not their citizens are married.

17. In respect of this appeal paragraphs 12 to 18 are relevant, they provide as follows:-

> 12. In addition to these points, the CJEU has established that a Member State can expect persons claiming to be family members to establish that they meet the requirements of EU law (cf Jia (C-1/05) [2007] Imm AR 439, para 37ff). Article 10(2)(b) of the Citizens Directive (2004/38/EC) [1] indicates that non-EEA nationals can establish that they are family members by the production of a document attesting to the existence of a family relationship. We are also aware that the jurisprudence of the CJEU just cited indicates that in the absence of a document attesting to the existence of a family relationship, other evidence may be considered.
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> 13. From this we infer that usually a marriage certificate issued by a competent authority will be sufficient evidence that a marriage has been contracted. Of course, a document which merely calls itself a marriage certificate does not have any legal status. A certificate will only have legal status if it is issued by an authority with legal power to create or confirm the facts it attests, that is, by an authority that has such competence. Where a marriage document has no legal status or where such status is unclear, other evidence may be used to establish that a marriage has been contracted. However, once again we find that these principles do not help us determine whether a person is a spouse because it will depend on identifying the authority with legal power to create or confirm that a marriage has been contracted.
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> 14. Whilst considering the issue of evidence of marriage, we remind ourselves that the proof of the law of another country is by evidence, including proof of private international law of that other country. Such evidence will not only

have to identify relevant legal provisions in the other country but identify how they apply in practice. A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail.

15. In light of the preceding considerations, the question we must answer is how we might identify which national legislation applies in a particular situation and how the relevant national legislation applies to the facts of the present case.

16. To answer this question, 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 (cf Micheletti (C-369/90) [1992] ECR I-4239, para 10 & 14). This is because nationality remains within the competence of the individual Member States.

17. Spouses' rights of free movement and residence are derived from a marriage having been contracted and depend on it. In light of the connection between the rights of free movement and residence and the nationality laws of the Member States, we conclude that, in a situation where the marital relationship is disputed, the question of whether there is a marital relationship is to be examined in accordance with the laws of the Member State from which the Union citizen obtains nationality and from which therefore that citizen derives free movement rights.

18. The same conclusion may readily be reached by a different route. Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system in which a marriage is said to have been contracted in such a way as to ensure that the Union citizen's marital status is not at risk of being differently determined by different Member States. Given the intrinsic link between nationality of a Member State and free movement rights, we conclude that the legal system of the nationality

> of the Union citizen must itself govern whether a marriage has been contracted.

18. It is clear from paragraph 16 set out that a union citizen's rights of free movement are intrinsically linked to that person's nationality. The CJEU has set out that where there are issues of EU law that involve the nationality law of Member States then the law that applies will be the law of the Member State of nationality and not the host Member State.

19. Whilst in the normal course of events a marriage certificate from the country where the marriage was performed should be sufficient to establish that the parties have married. There is still within EU law where the issue is the rights of free movement a requirement that a person's law of nationality has to recognise the marriage.

20. To do otherwise would mean that an individual's status may vary according to which of the Member States the individual is in. Thus an individual may be married in the United Kingdom but not married according to French law and capable of entering into a further marriage or of avoiding the consequences of the marriage by merely returning to France.

21. That is clearly not the intention and effect of the case of Kareem. Kareem clearly requires that the law of the nationality of the individual EU citizen is the law that determines the individual's status. The effect of that is that having defined whether an individual is married according to the law of the person's nationality other Member States will give due recognition to that subject always to the caveat of public policy.

22. Accordingly it was necessary not only for the Claimant to prove that the form of the marriage ceremony was legal according to the laws of Ghana but also that the marriage was lawful according to the laws of France. There was no evidence before the judge as to what the law of France was. The burden was upon the Claimant to produce evidence to show that the change of status was lawful according to the national law of the Sponsor. That they failed to do.

23. Accordingly the burden being upon the Claimant, the Claimant failed to discharge that burden. The judge therefore made a material error of law in ruling that the marriage between the Sponsor and the Claimant was a valid marriage and by reason thereof the parties were married.

24. I considered with the representatives if I found an error of law what course I should take as to the future disposal of the appeal, It was accepted that I had all the necessary evidence before me to determine the case. I therefore indicated that I would decide the case on the basis of the evidence presented.

25. In any event the judge has gone on to consider that the Claimant and the Sponsor are in a durable relationship.

26. As the parties are in a durable relationship consistent with the case of FD (Algeria) v SSHD [2007] EWCA Civ 981 there is an exercise of a discretion to be made by the Secretary of State as to whether or not to grant free movement rights to the Sponsor's partner, the Claimant.

27. For the reasons set out the Claimant has failed to prove that there is a valid marriage between herself and the Sponsor which would be recognised in French law. Evidence has been submitted subsequently by the Respondent that French law does not recognise proxy marriages entered into by its citizens. On the basis outlined it has not been proved that there is a marriage which is recognised by French law. As the rights under the EEA Regulations and Charter derived from there being a valid marriage the Claimant is not entitled to a residence certificate on the basis of marriage.

28. However there is a durable relationship and it is not challenged that there is a durable relationship. It is a matter under Regulation 8 for the Secretary of State to consider all of the circumstances and consider whether or not he will exercise his discretion to grant the Claimant a residence card on that basis.

29. For the reasons set out the appeal is allowed and the following decision is substituted:-

    (a) The appeal is dismissed under Regulation 7 and Regulation 17 of the EEA Regulations 2006.

    (b) The appeal is allowed to the extent that there being a durable relationship between the Claimant and the Sponsor, there is an application for a residence card which is outstanding before the SSHD and which requires the SSHD to make a lawful decision on including the exercise of the discretion set out within Regulation 8 and Regulation 17.

Signed Date

Deputy Upper Tribunal Judge McClure