Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30956/2013
IA/07196/2014

THE IMMIGRATION ACTS

Heard at Field House

On 8 October 2014

Determination Promulgated
On 15 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

TEMITOPE PETER AKERELE
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jafferji, Counsel instructed by Fitzpatrick & Co Solicitors
For the Respondent: Miss S L Ong, Home Office Presenting Officer

DETERMINATION AND REASONS

The History of the Appeal

1. The Appellant, Mr Temitope Peter Akerele, a citizen of Nigeria who was born on 7 February 1986, applied on 20 July 2012 for an EAA residence card as the spouse of Miss Jana Vanakova, a citizen of Slovakia. The

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application was refused on 1 November 2012. The Appellant's ensuing appeal was heard initially by Judge Morgan, who remitted the application to the Respondent for reconsideration, and following reconsideration on 7 April 2014 by Judge Courtney, who in a determination of 13 April 2014 dismissed it under the Immigration (European Economic Area) Regulations 2006 ("the Regulations").

2. Permission to appeal having been granted on 14 May 2014 by Judge Lambert, I heard the error of law hearing on 29 July 2014. In a determination of 30 July, promulgated on 1 August, 2014, I set aside the determination of Judge Courtney and directed that the appeal be re-heard on all issues.

3. The basis for my decision was that the judge had not afforded the parties an opportunity to address the implications of **Kareem (Proxy marriages – EU law) Nigeria** [2014] UKUT 24 (IAC). As subsequently explained in **TA and Others (Kareem explained) Ghana** [2014] UKUT 316 (IAC), this provides that in cases of marriage between a non-EEA national and an EEA national who is a qualified person the starting point is to decide whether the marriage was contracted according to the national law of the EEA country of which the qualified person is a national, so that he marriage must always be examined in accordance with the laws of that member state.

4. On 2 October 2014 the Appellant's solicitors wrote to the Tribunal seeking to convert the hearing on 8 October into a case management review hearing and thus effectively seeking an adjournment. They submitted that, whilst it was for the Appellant to establish whether the marriage was valid under the law of Slovakia, the Appellant did not have a reasoned refusal from the Respondent setting out the issues as to validity under Slovakian law. Only if the Respondent rejected the application, with reasons, would the issues between the parties have been identified, which fairness to the Appellant required.

5. The duty judge refused this application, whilst permitting it to be raised again at the hearing. Mr Jafferji renewed the application, which Miss Ong opposed. I took into account both of their submissions in rejecting the application for an effective adjournment. I said that the issue was entirely clear, and had been since promulgation of my determination on 1 August 2014. There was no evidence from the Appellant's solicitors that they had sought advice upon the law of Slovakia and how it might treat the marriage. Had they submitted, for example, that they had sought to do so, for which they needed more time, I would have been receptive. A decision by the Respondent with reasons would have added nothing to clarifying the issue. The Appellant had not been in any way disadvantaged and the hearing should proceed.

6. I said that, subject to any submissions which Mr Jafferji wished to make, it seemed to me that the appeal could not succeed on the issue of the

Appellant's status as a spouse of an EEA national exercising treaty rights as a qualified person. The issues were therefore those of a durable relationship between the Appellant and the Sponsor and whether the Sponsor was exercising treaty rights as a qualified person and perhaps alternatively Article 8 of the 1950 Convention.

7. Mr Jafferji withdrew with the Appellant and another gentleman whom I took to be his solicitor in order to take instructions. He returned to say that the Appellant was no longer relying on the issue of a durable relationship because the relationship was no longer durable, which was why the Sponsor was not present to give evidence. Mr Jafferji did however ask that I preserve the positive and unchallenged finding of Judge Courtney that the Sponsor had been exercising treaty rights.

8. The hearing therefore took the form of submissions, which I have taken into account, after which I reserved my determination.

Determination

9. As stated, **Kareem** at paragraphs 14 and 68(g) and **TA** hold that in such cases the starting point is to decide whether a marriage was contracted according to the national law of the member state of which the qualified person is a national:

> "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." (**Kareem**, paragraph 14).
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> "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." (**Kareem**, paragraph 68(g)).
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> "…the determination 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." (**TA**, head note).

10. There is no evidence about the law of Slovakia. The Appellant cannot therefore discharge the burden of showing that it recognises the marriage between him and the Sponsor as a marriage.

11. Accepting this, Mr Jafferji made alternative submissions. Acknowledging that the marriage could not be shown to be recognised as valid under the law of Slovakia and thus under European Union law, he submitted that on the evidence it was valid under Nigerian law and was capable of being recognised as valid under English law. Regulations 2 and 7 did not serve to negate its validity and, properly interpreted, recognised it was valid. The appeal should therefore be allowed as a matter of English law under the Regulations.

12. The short answer to that submission, as Miss Ong submitted, is that **Kareem** and **TA** prescribe how such marriages are to be appraised in the context of English law including the Regulations and the Citizens' Directive. They do not leave any scope for such an alternative construction. I accordingly find that, on the issue of the validity of the marriage, the appeal fails.

13. The alternative basis for the appeal was initially that of a durable relationship between the Appellant and Miss Vanakova as an EEA national exercising treaty rights as a qualified person in the capacity of a worker. As stated, Mr Jafferji said that the relationship was no longer a durable one. With a view to any further application by the Appellant in the future, he invited me to preserve the unchallenged finding of Judge Courtney that at the date of the hearing the Sponsor had been a qualified person exercising treaty rights as a worker within the meaning of the Regulations.

14. This finding is unchallenged because it was the Appellant who sought permission to appeal and this finding was in his favour. Other findings which were challenged were the subject of his application for permission to appeal. The finding is now historic. It remains open to the Appellant to argue in the future that it was made and was not subsequently challenged. Following the error of law hearing I set the determination aside and directed that the appeal be re-heard on all issues. It is not appropriate to preserve one finding which may assist the Appellant whilst setting aside all of the others. I am not required to review Judge Courtney's finding on this subject, but nor do I preserve it alone out of a determination which I have otherwise set aside.

15. Nor, for the same reasons, do I make any findings about the validity of the marriage under Nigerian or, as a matter of private international law, English law.

16. In the absence of any removal directions, Mr Jafferji stated, and asked me to record, that he was making no submissions under Article 8 of the 1950 Convention. He said that it might be open to the Appellant to adduce arguments under Article 8 in any future application which he might make.

17. The appeal fails, and is dismissed.

Decision

18. The previous determination contains an error of law, and has been set aside.

19. The appeal is dismissed under the Immigration (European Economic Area) Regulations 2006.

Signed Dated: 15 October 2014

Deputy Upper Tribunal Judge J M Lewis