



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/39942/2013

Appeal Numbers:

THE IMMIGRATION ACTS

**Heard at Field House
On 28 August 2014**

**Determination
Promulgated
On 02 October 2014**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MATILDA APEKU

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr A Aminu of KA Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the applicant's appeal against the decision made on 20 September 2013 refusing her a residence card as confirmation of her rights of residence as a family member of an EEA national. In this determination I will refer to the parties as they were before the First-tier

Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. In brief outline the background to this appeal is that the appellant is a citizen of Ghana born on 05 July 1968. On 09 July 2012 she applied for a residence card on the basis that she was the wife of a French citizen exercising treaty rights in the UK. She relies on a customary marriage taking place in Accra on 09 April 2011. Her application was supported by a customary marriage certificate and a statutory declaration to that effect together with evidence that her partner was a qualified person within the Immigration (European Economic Area) Regulations 2006 (“The 2006 Regulations”).
3. However, the respondent was not satisfied that a valid marriage certificate had been produced as evidence that the relationship was as claimed. She went on to consider the position under reg 8 of the 2006 Regulations but was not satisfied that the appellant had demonstrated sufficiently that she was in a durable relationship with an EEA national. For these reasons the application was dismissed.

Findings of the First-tier Tribunal

4. The appellant appealed against this decision and her appeal was heard on 06 May 2014. The appellant and her husband relied upon the witness statements they had submitted and gave oral evidence confirming that they had met in Luton in December 2009 through a mutual friend, had fallen in love and subsequently married on 09 April 2011 by proxy in Ghana. There was a dispute as to whether the parties had taken part in a valid marriage. The judge commented that it was correct to say that the statutory declaration did not contain the address where both parties were residing at the time of marriage but the documentation had been put before the Ghanaian High Commission and in a letter dated 18 January 2013 it was confirmed that the marriage was genuine and lawful. On the basis of the evidence before him the judge found that notwithstanding the reservations of the respondent the Government of Ghana had provided clear evidence that this was a valid marriage by proxy [30].
5. He went on to consider the substance of the relationship, noting that there was some doubt as to whether her husband had met the appellant’s sister and whether her sister had recently died given that he had visited in 2013 commenting that on the face of this there may appear to be something suspicious [32] but he held that the other evidence of the durable relationship was clear from the documents referring to the marriage invitation at page 80 of the appellant’s bundle as well as photographs of the appellant and his wife at a celebration in the UK and pictures of the

customary marriage. He found that this lent credibility to the fact that they were in a durable relationship and had lived together at the date of the decision for a period of more than 2 years.

6. The judge summarised his findings as follows:

“35 I am satisfied that this is not contrived and this together with the other evidence satisfies me on a balance of probabilities that these parties are in a durable relationship and that they continue to live together as husband and wife which is what they have been doing since the date of their marriage.

36 I therefore allow this appeal on the balance of probabilities and find that this was a valid customary marriage by proxy in Ghana as certified as such by the Ghanaian High Commission in London and the Ghanaian Foreign Ministry.

37 I find that the assertion and interpretation of the law by the respondent does not have much credibility and therefore allow this appeal on that basis.

38 In any event I am satisfied that this couple are in a durable relationship for the reasons set out above and therefore notwithstanding the validity of the marriage documentation, I am satisfied of the EEA regulation 7 and 8 of the Immigration (EEA) Regulation 2006.

39 I therefore allow this appeal on a balance of probabilities for the reasons set out above.”

The Grounds and Submissions

7. The respondent sought permission to appeal on the basis that the judge had failed to follow the guidance in Kareem (proxy marriages- EU law) [2014] UKUT 24 and, in so far as the appeal was allowed on the basis that the appellant was an extended family member under reg 8, had failed to have regard to the provisions of reg 17 (4) and should have limited his decision to a finding that the decision was not in accordance with the law so that the respondent could exercise her discretion under that regulation.
8. Mr Tufan adopted the grounds in his submissions and relied on TA and Others (Kareem explained) Ghana [2014] UKUT 00316 which confirmed that whether there was a valid marriage for the purposes of the 2006 Regulations must be examined in accordance with the laws of the Member State from which the relevant union citizen obtained nationality. He also adopted an argument identified when permission to appeal was granted by Judge Holmes that the judge had failed adequately to engage with evidence which he had himself described as suspicious in [32]. There was no adequate explanation, so he submitted, for the finding that the couple were living in a durable relationship akin to marriage. Even if there were,

the judge should not have simply allowed the appeal when there was a discretion still to be exercised by the respondent under reg 17.

9. Mr Aminu submitted that there was no error of law and that the judge had properly applied Kareem. He argued that once it had been found to be a genuine marriage under Ghanaian law, that resolved the issue of validity. In any event, the judge was satisfied that there was a durable relationship and on this basis had been entitled to allow the appeal. There was no proper basis for a challenge to the judge's findings of primary fact and he had given adequate reasons for his decision.

Consideration of whether there is an error of law

10. I must consider whether the judge erred in law such that his decision should be set aside. The main argument raised by the respondent in her grounds is that the judge failed to take into account the decision of Kareem and in particular failed to consider the issue of whether the marriage would be recognised under French law. The reason for this approach is set out in [18] of Kareem: in the light of the intrinsic link between nationality of a Member State and the exercise of free movement rights, the legal system of the nationality of the union citizen governed whether a marriage had been contracted. It was argued in TA and others that if the marriage was shown to be valid in the country where the ceremony took place, there was no need for its lawfulness to be considered further. However, that argument was rejected in TA as inconsistent with Kareem. In substance this was the basis of Mr Aminu's submission but in the light of Kareem and TA and others it cannot succeed. I am therefore satisfied that the judge erred in law in finding that the appellant was able to show that she was a spouse within the provisions of reg 7.
11. The next point was not made in the respondent's grounds but arises from the terms of the grant of permission by Judge Holmes. It is argued that the judge erred in finding that the couple were in a durable relationship by failing adequately to engage with the evidence. However, I am not satisfied that there is any substance in this ground. The judge identified in [31] and [32] aspects of the evidence which might raise suspicions but he was entitled to balance those matters with the evidence which supported a finding that a durable relationship had been formed. I am satisfied that there was ample evidence on which the judge could find that there was such a relationship. This was an issue of fact for him to assess on the evidence as a whole and it is not arguable that he reached findings which were not properly open to him. His finding that the appellant was an extended family member within reg 8 cannot be challenged on legal grounds.
12. The final issue is whether on this basis the judge was entitled simply to allow the appeal. It is clear from the Tribunal determination in Ihemedu (OFMs-meaning) Nigeria[2011] UKUT 340 that reg 17 [4] makes the issue

of a residence card to an extended family member a matter of discretion and where that discretion has not yet been exercised the most an immigration judge is entitled to do is to allow the appeal as being not in accordance with the law leaving to the respondent the matter of whether to exercise discretion in the appellant's favour or not.

13. For these reasons, I am satisfied that the judge did err in law in relation to his assessment of whether the appellant had been able to show that she was married as claimed and the decision is set aside on this issue. The judge was, however, entitled to find that there was a durable relationship and on the basis of that finding the appeal should have been allowed but only to the extent that the decision was not in accordance with the law as discretion has not yet been exercised by the respondent.

Decision

14. The First-tier Tribunal erred in law. I set aside the decision. I re-make the decision by dismissing the appeal under reg 7 but allowing it under reg 8 on the basis that the appellant established that she and her partner were in a durable relationship. The decision is not in accordance with the law: the discretion under reg 17 (4) remains to be exercised by the respondent.

Signed

Date 28 September 2014

Upper Tribunal Judge Latter