Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **IA 50026-13**

THE IMMIGRATION ACTS

At **Field House**	Decision signed: **18.06.2014**
on **09.06.2013**	sent out: **25.06.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Hayford BOAKYE

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Neil Garrod* (counsel instructed by Justice & Law)
For the respondent: Mr Ian Jarvis

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Sureta Chana), sitting at Hatton Cross on 13 March, to allow an EEA appeal by a citizen of Ghana, born 26 March 1980, and married there by proxy to a citizen of the Netherlands. The Home Office had refused him a residence card, because they were not satisfied of the validity of the marriage; but the judge found that the marriage had been valid by the *lex loci celebrationis*, and allowed the appeal.

2. There is no dispute but that the marriage was valid by Ghanaian law; nor that the *lex loci* is the test to be applied under the common law of England and Wales: it was made clear in *CB* (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080 that this applied in immigration cases, just as in others. The point on which permission to appeal was given was on *Kareem* (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC). That decision was given on 16 January 2014, and it was the duty of both sides (neither of them represented by the same advocate as before me) to bring it to the attention of the judge, if she hadn't noticed it herself. It is

declaratory of the EU/EEA law on the point, and it was clearly an error of law not to apply it, if relevant.

3. In those circumstances, I asked Mr Garrod whether the judge had not been wrong not to decide the law in accordance with *Kareem* : to this his reply was that that decision was “a complete red herring”. It remains to be seen whether this rather cavalier style of advocacy was to be justified in the outcome, if not in the manner of it. *Kareem* is a very useful and formidably learned decision, written by deputy Upper Tribunal Judge John McCarthy, sitting with Mr CMG Ockelton, vice-president, and Upper Tribunal Judge Richard McKee. It is not however always the simplest of the Tribunal’s decisions to follow; so it is best to start by deconstructing it: the references are to the paragraphs in *Kareem*, so that anyone who wants to can compare my summary with the decision itself. I shall leave out those parts not relevant for present purposes.

4. I will start by setting out the judicial head-note, though it is important to note that Mr Garrod’s argument very much hung on how far one part of that depended on another.

> *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 (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.*
> *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 proved 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.*
> *f. In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person’s rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.*
> *g. 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.*
> *h. These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might*

be regarded as similar to marriage, such as civil partnerships or durable relationships.

5. This, in short, is the reasoning behind that statement of the law: an EU member state cannot use its own law to decide, for EEA purposes, whether or not a person is validly married to another, and EU law must decide that (6). In EU law the question of whether someone is married is governed by the national laws of the member states (11). A marriage certificate issued by a competent authority will usually be sufficient evidence that a marriage has been contracted (13). A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail. The law that applies will be the law of the member state of the EU citizen's nationality (16-17). This is important, so as to avoid a marriage recognized in one member state not being recognized in another (18).

6. Going on to the individual case in *Kareem*, the appellant was a Nigerian, married by proxy, in Nigeria, to a citizen of the Netherlands, with neither of them present; so Dutch law should decide the validity of the marriage for EEA purposes (23 -24). Dutch law on the point is then reviewed and findings made on it: since the present case too involved a Netherlands citizen, I am prepared to take those findings in the appellant's favour, despite what was said in *Kareem* about the need for evidence.

7. Dutch law (article 10:31 of the Netherlands Civil Code: 27) generally recognizes marriages valid by the *lex loci celebrationis*, and presumes them valid if the certificate has been issued by a competent authority. However, there is a restriction on this general rule (article 10:32: 28), which withholds recognition "… where such recognition obviously would be incompatible with Dutch public order". While article 1:66 permits marriage by representation in certain circumstances, which suggested that marriage in the absence of one of the parties might not be regarded as contrary to Dutch public order, there was no evidence before the panel in *Kareem*, and none before the hearing judge or me in the present case, as to how Dutch law would regard a marriage where, as here, both parties were represented by proxies (29).

8. Furthermore, the section of the Netherlands Civil Code which contains articles 10:31-32 is described by article 10:27 as enacted to implement the Hague Convention on the Celebration and Recognition of the Validity of Marriages. The Netherlands is one of the few countries to have ratified that Convention; but it expressly excludes proxy and informal marriages from its scope (30). I can pass over the next part of *Kareem* (paragraphs 31 – 62), because there is no issue in the present case but that this marriage is valid under Nigerian law.

9. The panel observed in *Kareem* (63) that they didn't know whether Dutch law would regard the appellant as having married in England and Wales or in Nigeria; but, in view of their finding of fact against its validity in Nigeria, this was irrelevant. They pointed out (64 – 66) that their decision on the individual case depended on this finding of fact; but they went on to say

(67) that all concerned were well aware that their decision as a whole "… would seek to give general guidance as to how similar appeals – those involving proxy customary marriages – might be considered".

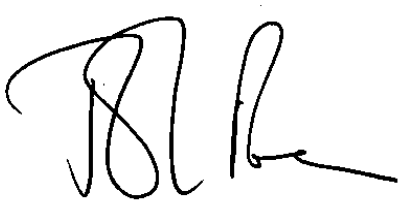
10. In those circumstances, I do not see any need for me to go into the question of how far that guidance (68) was part of the *ratio* of the decision, or merely *obiter*. It was 'reported' for the benefit of judges sitting in this field, made by a panel specially convened for the purpose, and with the issues of law fully considered. The judge in this case should have followed its terms, though not referred to it, as she should have been, thanks to the professional shortcomings of both sides before her, which I hope represented nothing worse than gross negligence.

11. Mr Garrod's argument was, a good deal more shortly than he put it, but I hope no less effectively for that, to the effect that the guidance given in paragraphs *e – g* of *Kareem* applied only to cases within *d*, in other words, those where there is no marriage certificate, or a doubt as to whether it has been issued by a competent authority: otherwise (see **2** above), the *lex loci celebrationis* applies. While there is some elementary syntactic support for that view to be had in the panel's prefacing *e* and *f* with the words "In *such* an appeal …" and "In all *such* situations …", the argument in its favour ignores two considerations, at least the second of which, on my analysis of *Kareem* as a whole, is more important.

12. First, the individual case in *Kareem* was within paragraph *d*; so it was not unnatural that the panel, despite what they had said at 67, should have given the impression that their general remarks related to those circumstances. However, and much more importantly, the suggestion that the guidance in *e – g* is limited only to the case of marriages within *d*, has nothing to do with the panel's own analysis of EU law (see **5**), which they held was the overall governing law for all questions of recognition of marriages for EEA purposes.

13. While Mr Garrod was, as might be expected, content to rely on the findings on Dutch law in *Kareem* to support his own case, his argument also failed to deal with the salient point in the panel's remarks on that (see **7**). There was no 'independent and reliable evidence' in *Kareem* as to whether the Netherlands would have withheld recognition from a double-proxy marriage (as this one was), as contrary to Dutch public order. There was and is none in the present case either, and, if the judge had followed not only the express terms of the guidance in *Kareem*, but the decision as a whole, as she should have done, then she would inevitably have dismissed the appeal. It follows that her decision must be reversed.

Home Office appeal allowed
Appellant's appeal against refusal of residence card dismissed



(a judge of the Upper Tribunal)