Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52172/2013

THE IMMIGRATION ACTS

Heard at Field House

On 22nd July 2014

Determination Promulgated
On 11th Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR KWAKU ADU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Neil Garrod (Counsel)
For the Respondent: Mr Chris Avery (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Symes promulgated on 28th April 2014, following a hearing at Hatton Cross on 4th April 2014. In the determination, the judge allowed the appeal of Kwaku Adu. The Respondent Secretary of State applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Ghana, who was born in 1987. He appealed against the decision of the Respondent Secretary of State dated 26th November 2013 to refuse to issue him with a residence card confirming his right to reside in the UK as a third country national spouse of an EEA national exercising treaty rights in the UK.

The Appellant's Claim

3. The Appellant's claim is that he is the spouse of a Belgian national, Faustina Manu, with whom he underwent a customary proxy marriage under the laws of Ghana, given that both of them are of Ghanaian descent, and that his marriage is genuine, and not one of convenience, such that he and his EEA national wife should be allowed to remain in the UK as husband and wife. Therefore, he is entitled to extended right of residence under Regulation 14(2) of the Immigration (European Economic Area) Regulations 2006.

The Judge's Findings

4. The judge was faced with two challenges to the Appellant's marriage. The first was that this was a marriage of convenience, and this was forcibly expressed by the representative appearing on behalf of the Respondent Secretary of State. The second challenge was that his marriage was not in compliance with the latest Tribunal jurisprudence, as expressed in the case of **Kareem (Proxy marriages – EU law) Nigeria [2014] UKUT 24** because the marriage, of an EEA national with a citizen of Ghana, was not in accordance with the laws of an EEA national country, namely, in this case Belgium, for which there was no expert evidence to attest to the validity of such a marriage.

5. The judge had little difficulty in disposing with the challenge to the genuineness of the marriage. The allegation of a "marriage of convenience", was raised only at the hearing, and not in the refusal letter, and amounted to a "fishing expedition" (see paragraph 33) which was to no avail because the couple were living together in a genuine marriage, and there had even been a child of the marriage. The challenge to the form of marriage, namely, a customary traditional marriage by way of a proxy arrangement, as recognised in Ghana, was a more creditable challenge.

6. However, the judge dealt with this on the basis that this was a marriage which was conducted in accordance with the relevant customs and traditions, with participation of duly authorised family members, and with the registration that followed with a local registrar, together with a letter from the Ghanaian diplomatic legation in this country, which expressly confirmed the marriage as a valid one (see paragraph 22).

7. In addition, the judge drew attention to the oft forgotten case of **McCabe v McCabe**, which did not require both parties to a marriage to be Ghanaian citizens, for a marriage to be valid if performed as a customary marriage (see paragraph 8). The judge had regard to the factual issues before the Tribunal which were not insignificant. He pointed out that both parties believed the marriage was valid, there was a certificate of authentication from the Ghana High Commission in London, the wife's parents were both Ghanaian nationals resident in Ghana, she herself was born in Accra as shown in her Belgian passport, and there had been no intention to represent themselves as present at their proxy marriage by signing the marriage certificate (paragraph 11).

8. They had not married in the United Kingdom because they had wanted their families to be able to participate in the ceremony. They could not afford to travel to Ghana because she was the sole breadwinner. They had deliberately opted out for a proxy marriage (see paragraph 12).

9. Most interestingly, the judge also observed that Home Office policy was not to seek confirmation of a marriage by formal registration. The case of **NA (Ghana)** recognised the possibility that customary marriages would be valid for the purposes of English law (see paragraphs 21 and 24 of the determination).

10. In the circumstances the burden of proof lay upon the Respondent Secretary of State if there was an attempt by her to limit the exercise of treaty rights of the wife of the Appellant (see paragraph 19).

11. Finally, as far as the latest Tribunal jurisprudence in the case of **Kareem [2014] UKUT 24** was concerned, this did not pose a problem. The reason was that the headnote at paragraphs A to C, made it quite clear that the spouse of an EEA national could provide proof of the marital relationship from a competent authority and where there was a marriage certificate this was good evidence if it was issued by an authority with legal power.

12. Where there was no marriage certificate then the marital relationship could be proved by other evidence.

13. This was directly the outcome of the jurisprudence in **Kareem**. Moreover, the Home Office Immigration Directorate Instruction, which the judge referred to at paragraph 24, directly addressed the position under the Customary Marriage and Divorce (Registration) Law 1985, in a way that suggested that authentication could be requested of the Ghanaian High Commission in cases of doubt, and such authentication had been provided in this case, so as to lead to the conclusion that the Appellant had discharged the burden of proof on him (see paragraph 24). The judge allowed the appeal.

Grounds of Application

14. The grounds of application state that this was a case that raised the question of the validity of a Ghanaian proxy marriage and this being so, the Tribunal determination in **Kareem [2014] UKUT 00024** had not been followed. On 4th June 2014, permission to appeal was granted.

Submissions

15. At the hearing before me on 22nd July 2014, Mr Avery, appearing on behalf of the Respondent Secretary of State, submitted that the case of **Kareem** had not been followed. The rights to free movement of the EEA national arose only by way of her status as an EEA national, and if she had married by way of her proxy marriage, then **Kareem** required there to be expert evidence which would confirm her ability in law to so marry by way of a proxy marriage, which expert evidence was not forthcoming before the judge, so the only conclusion should have been for the judge to dismiss the appeal. The Appellant could not bring himself under EEA law.

16. For his part, Mr Garrod submitted that the decision of Judge Symes was well-reasoned and comprehensive in its analysis. Consideration had been given to the case of **Kareem** and to the case of **Papajorgi [2012] UKUT 00038**, and the judge was entitled to come to the decision that he did. Since the case of **Kareem**, there had been another Tribunal determination in the case of **TA (Kareem explained) Ghana [2014] UKUT 00316**, but this only served to confuse matters even more because it was difficult to see what the jurisprudential principles were following this determination. **Kareem** itself was based upon the European Court judgment in **Micheletti (Case C-369/90)**, which Mr Garrod very helpfully placed before me to consider.

17. Yet, in his submission, **Micheletti** was a very different proposition to what was being suggested in **Kareem**. The fact was that member states cannot retreat from a person’s EEA rights. It is possible to determine national rights by reference to EEA rights. It is not necessarily possible to determine EEA rights by reference to national rights. The Appellant’s wife had EEA rights and this included her right to marry. Paragraph 15 of **Kareem** had dealt with these issues but had misrepresented them in **Kareem**.

18. In the instant case, as Judge Symes had explained, the marriage of the Appellant with his Ghanaian wife, who was now a Belgian citizen, was one that would be recognised under English law, because it followed Ghanaian tradition, as made clear in the well-known case of **McCabe v McCabe**, which was all to often apt to be overlooked. If that marriage was a genuine one and it was legally recognised in UK law then consideration of the position under Belgian law was superfluous.

19. **Micheletti**, which was referred to in **Kareem**, did not suggest otherwise. In any event, paragraph 68 of **Kareem** allowed for the very exceptions which the judge referred to in his determination, and which the Appellant could point to by way of evidence that he had produced from the

authorities of Ghana, to throw light on his marriage. The judge was entirely right to allow the appeal.

Error of Law

20. I am satisfied that the decision of the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision and remake the decision. There is only one reason why I come to this decision. It is not on account of the failure of the judge to reason the determination for the conclusions reached. The determination is on any view a clear and comprehensive determination that deals with all the outstanding issues. It is not on account of the representation made on behalf of the Appellant by Mr Garrod, who argued his case persuasively and in a measured and thoughtful way. The only reason is that the Tribunal cases of **Kareem**, and now also of **TA (Ghana) [2014]** suggest that expert evidence from the member state is necessary.

21. The case of **TA (Ghana) [2014]** does indeed expressly set out to explain the decision in **Kareem**. In so doing, it makes it clear in its headnote that, "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." It is significant that the words "must always" are underlined expressly in that determination.

22. These determinations, including that of **Kareem**, are of relevant authority for this Tribunal and are expected to be followed in the interests of uniform jurisprudence, until such time that they are successfully appealed or altered in any way.

23. That being so, whilst I accept that the claimant has plainly here not entered a marriage of convenience and whose marriage is in every other respect a genuine one, I must make a finding of an error of law and remake the decision to the contrary.

Remaking the Decision

24. I have remade the decision on the basis of the findings of the original judge, the evidence before the original judge, and the submissions that I have heard today. I am dismissing this appeal for the reasons that I have given above, namely, that the decision of the judge below is not in compliance with **Kareem** and with the latest Tribunal determination of **TA (Kareem explained) Ghana [2014] UKUT 00316**.

Decision

25. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is dismissed.

26. No anonymity order is made.

Signed	Date
Deputy Upper Tribunal Judge Juss	11th August 2014