Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33144/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2015	**On 6 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL ARTHUR
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr P. Nath, Senior Home Office Presenting Officer
For the Respondent: Mr Okech, Solicitor

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of Ghana born on 25 December 1985. In a decision promulgated on 6 March 2015, the First-tier Tribunal allowed the claimant's appeal against a decision of the appellant (hereinafter "the Secretary of State") to refuse him an EEA Residence Card as the family member of a Belgian national.

2. The Refusal Letter, dated 5 August 2014, stated that the reason the claimant was being refused a residence card was because his marriage to an EEA national, which took place by proxy in Ghana on 10 April 2013, was considered to be a marriage of convenience. This decision was made following an interview with the claimant and his Belgian national sponsor where, accordingly to the Secretary of State, there were significant inconsistencies.

First-tier Tribunal Decision

3. The claimant appealed and the appeal was heard by First tier Tribunal Judge Courtney ("the judge"). The Secretary of State was not represented at the hearing.

4. It is clear from the decision that the judge carefully considered the issue of whether the marriage was one of convenience. Having heard oral evidence from the claimant and his sponsor, and considered the papers, the judge determined that the marriage was not one of convenience and therefore that the claimant was entitled to be issued with a residence card as a family member under Regulation 17 of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations").

5. There was no consideration of, or even reference to, whether the marriage, which was between a national of Ghana and a national of Belgium by proxy in Ghana, was a recognised and valid marriage.

Submissions

6. Mr Nath, for the Secretary of State, referred to *Kareem (proxy marriages – EU law)* [2014] UKUT 24 and *TA and Others (Kareem explained) Ghana* [2014] UKUT 00316 (IAC), and submitted that the law, as set out in these cases, is clear that the relevant question, and the question the judge should have (but failed to) consider was whether the marriage between the claimant and his Belgian national sponsor was in accordance with the laws of Belgium.

7. Mr Nath recognised that the Refusal Letter focused on whether there had been a marriage of convenience but argued that because the letter referred to the marriage being by proxy it also raised the issue of the validity of the marriage.

8. Mr Okech, for the claimant, submitted that under *Kareem* the relevant question is whether the marriage was valid in either Belgium or Ghana, and the evidence was clear that the marriage was valid in Ghana. He referred to paragraph [68(g)] of *Kareem*, which makes reference to the relevant laws being those of the EEA country and/or those where the marriage took place. He also referred to, and provided a copy of, an unreported decision, which I note was promulgated after *Kareem* but before *TA and Others,* where it was held there was no need to consider whether a marriage is recognised in the home state of the sponsor unless there is difficulty over whether it is recognised in the state where the marriage was contracted.

9. He further submitted that there is no law in Belgium stating marriage by proxy is not acceptable and if the marriage was acceptable in Ghana, which in his view it was, then it would also be acceptable in Belgium.

Consideration

10. It is understandable that the judge did not consider the issue of whether the proxy marriage between the appellant and his sponsor was valid as this issue was not raised at the hearing (which was not attended by a Home Office Presenting Officer) or in the Secretary of State's Refusal Letter.

11. However, the validity of the marriage was clearly relevant to the question of whether a residence card should have been issued to the claimant as a family member of an EEA national under regulation 17(1) of the 2006 Regulations. The judge knew the marriage was by proxy and therefore should have considered its validity in accordance with *Kareem* and *TA and Others*. The judge's failure to do so was a material error of law.

12. In remaking the decision my starting point is *TA and Others* which makes it clear that the relevant law is that of the sponsor's country of citizenship, which in this case is Belgium, and not the law of the country in which the marriage took place. At paragraph [20] of *TA and Others*, it is stated:

> *When consideration is being given to whether an applicant has undertaken a valid marriage for the purposes of the 2006 Regulations, such consideration has to be assessed by reference to the laws of the legal system of the nationality of the relevant Union citizen.*

13. *TA and Others* makes clear that this is the same approach as required by *Kareem* and any alternative reading of *Kareem* is misconceived and born out of a failure to read the decision as a whole.

14. Mr Okech referred to a decision that had not been reported and which predates *TA and Others*. Although I have read the decision, I do not rely on it as it would not be appropriate for me to do so. See *AO (unreported decisions are not precedents) [2008]* UKAIT 00056. In any event, the legal issues considered in the unreported decisions are more than adequately addressed in the reported decisions of *Kareem* and *TA and Others*.

15. The burden of proof is on the claimant to show that the marriage to his sponsor is valid in Belgium. Mr Okech submitted that if the marriage is valid and acceptable in the country where it took place (ie Ghana) it is, in consequence, acceptable in Belgium. However, he has not provided any evidence to show the validity under Belgian law of the marriage and *Kareem* makes it clear that independent and reliable evidence about the law in a particular EEA country is required.
16. Accordingly, I find that the claimant and his sponsor are not to be treated as married for the purposes of Regulation 7 of the 2006 Regulations and therefore the Secretary of State is not required to issue the claimant with a residence card under Regulation 17.

17. However, although there is not a valid marriage between the appellant and sponsor, the judge's factual findings, which are not in dispute, strongly indicate that the

claimant and sponsor are in a genuine and durable relationship. Regulation 8(5) of the 2006 Regulations provides that a person will be considered an "extended family member" of an EEA national if they are in a "durable relationship". The unchallenged factual findings of the First-tier Tribunal lead me to the conclusion that the claimant and sponsor satisfy the requirement of being in a durable relationship under Regulation 8(5) such that the claimant should be considered as an "extended family member" for the purposes of the 2006 Regulations.

18. Under Regulation 17(1) of the 2006 Regulations the Secretary of State must issue a residence card to a "family member". In contrast, under Regulation 17(4) the Secretary of State may issue a residence card to an "extended family member". In other words, with respect to extended family members, such as the claimant, the Secretary of State has a discretion. That discretion has not yet been exercised. The position was clarified in *Ihemedu (OFM's – meaning) Nigeria* [2011] UKUT 00340 (IAC):

> *Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State.*

Decision

19. The First tier Tribunal's decision contains an error on a point of law and is set aside.

20. The decision I substitute is to allow the claimant's appeal to the extent that his application for an EEA residence card as an extended family member remains outstanding before the Secretary of State to exercise discretion under Regulation 17(4) of the 2006 Regulations.

21. No anonymity order is made.

Signed
Deputy Upper Tribunal Judge Sheridan

Dated