Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51070/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 October 2014	**On 9 January 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

OLIVIA KWABIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Adama-Adams
For the Respondent: Mr Duffy

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born in 1971. She appealed against a decision of the Secretary of State made on 2 December 2013 to refuse to issue a residence card as confirmation of a right to reside as a family member of Joseph Ewusi Kusi a citizen of the Netherlands.

2. The application was considered under Regulation 7 and 8(5) of the Immigration (European Economic Area) Regulations 2006.

3. In refusing the application the Respondent was not satisfied that the customary marriage by proxy on 8 August 2010 was registered in accordance with the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. In addition the Respondent was not satisfied that the Appellant was in a durable relationship.

4. She appealed.

5. In a determination promulgated on 8 July 2014 Judge of the First-tier Tribunal Abebrese dismissed the appeal under the Regulations.

6. The judge's main findings are at paragraphs [14 ff]. He stated (at [14]) *'In respect of the requirement for a statutory declaration ... this is a mandatory requirement in the proving of the validity of a Ghanaian customary marriage'.*

7. He went on: *'The statutory declaration that accompanies the marriage it was concluded by the Respondents* (sic) *did not state that a dowry had been paid and it did not state the current condition or marital status of the parties at the time of the marriage. As such the declaration is not valid in accordance with Customary Marriage and Divorce (Registration) Law 1985 and therefore the marriage certificate is not valid without a valid statutory declaration'* [15].

8. The judge went on to note submissions on the Appellant's behalf that the requirement for a statutory declaration may be replaced by the obtaining of a certificate which had occurred in this case.

9. Also, the comments of Professor Woodman who had lodged a report in support of that proposition. However the judge considered that *'in this instance the wording of the 1985 law is clear in that one is required to provide a statutory declaration. This is mandatory in as far as the words which are inserted to make this absolutely clear is* (sic) *"shall" as opposed to "may".'* [15].

10. The judge concluded on this matter: *'The statutory declaration is defective in relation to the matters which ought to have been stated in that declaration but which were not. The statutory declaration states that the Appellant was represented at the customary wedding by a family member. The relationship to the Appellant is stated as her father, but the Appellant has not provided evidence in the form of birth certificates/marriage certificates, etc., to show that she is related to this person as claimed. The Tribunal therefore concludes that the findings of the Respondent is* (sic) *in accordance with the 1985 law and that it is not acceptable not to have had these requirements dealt with in the statutory declaration. The Tribunal also makes the finding that the fact an updated statutory declaration was provided in order to cover any defects is an indication that*

the original one did indeed have defects and that the later document was created for immigration purposes and that this does cast doubts on the credibility of the documentation.' [16].

11. Having concluded that the marriage and the relationship had not been proved in accordance with the requirements for registration and statutory declaration, the judge went on to consider the relationship under Regulation 8(5) in respect of whether or not there is a durable relationship.

12. The judge on the evidence before him found that there was not. He stated: '*The parties to the marriage were not credible in relation to evidence that they both gave in respect of the relationship. They gave inconsistent answers in relation to occasions when they may have gone to a restaurant, whether or not they have arguments as a couple and it was significant that there had been no celebration recorded of their marriage in Ghana by the parties. The Tribunal do not attach any significance to the fact that the Appellant was not wearing a wedding ring, this in itself in customary marriages is not untypical. Weight however is being attached to the above mentioned inconsistencies, particularly bearing in mind that it has been the Appellant's case that they have been living together for a significant amount of years, one would have expected there to be some sort of celebration to mark their marriage which had taken place in their absence in Ghana*.' [17].

13. He also dismissed the appeal under Regulation 8(5).

14. The Appellant sought permission to appeal which was granted by a judge on 15 September 2014.

15. At the error of law hearing before me Mr Adama-Adams sought essentially to rely on the brief grounds. In summary, the judge had failed to have regard to the cases of **Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC)** and **TA and Others (Kareem explained) Ghana [2014] UKUT 00310 (IAC)**. This was material because letters had been produced from Dutch sources which supported the claim that Dutch law recognised customary marriage by proxy. Also, the judge failed adequately to explain why he preferred the Secretary of State's position on customary marriage to that of the expert, Professor Woodman.

16. Mr Adama-Adams also sought to raise a challenge to the First tier judge's decision to dismiss the appeal under Regulation 8(5). Mr Duffy objected. Nothing had been raised in the grounds seeking permission in that regard. I agreed and upheld the objection. The decision under Regulation 8(5) stands.

17. Mr Duffy accepted that the judge had erred in failing to refer to **Kareem** but questioned whether it was material as the evidence produced from the Dutch sources did not, in his view, show that the marriage was recognised by the EEA State of which her partner is a member.

18. In considering this matter I concluded that in failing to have regard to the relevant law and evidence that was before him the First tier judge materially erred. I set aside the decision in respect of Regulation 7 and proceed to remake it in light of the guidance in **Kareem** and having regard to the Dutch evidence. Nothing further was put before me.

19. In paragraph 11 of its determination the Tribunal in **Kareem** recognised that the question of whether a person is married is a matter governed by the national laws of the individual Member States.

20. Moving forward to paragraph 16, the Tribunal once again observed that:-

> *'… where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of the nationality and not the host Member State.'*

21. The reasoning continues in paragraph 18:

> *'Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to the fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system of which a marriage is said to have been contracted in such a way as to ensure that the Union citizen's marital status is not at risk of being differently determined by different Member States. Given the intrinsic link between nationality of a Member State and free movement rights, we conclude that the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted.'*

22. That such was the position was made clear in **TA and Others**. The head note reads: *'Following the decision in **Kareem** … 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.*

23. The Dutch sources do not advance the Appellant's case. A letter (13 March 2014) from the Embassy of the Kingdom of the Netherlands states merely that the *'recognition of marriages contracted outside the Netherlands is governed by articles 10:31 to 10:34 of the Dutch Civil Code'*. It adds that an English summary of the relevant parts is given in paragraphs 27 and 28 of **Kareem**. The letter concludes: '*The Dutch*

embassy will only draw conclusions on the recognition of a marriage in the context of an application such as a Dutch passport application. It is thus not possible to comment on the documentary evidence required'.

24. The second item is a letter (28 February 2014) apparently from a Dutch 'advocaat', Mr Van Yperen-Groenleer. He states in response to the question whether or not a proxy Ghanaian marriage will be recognised in the Netherlands: *'According to article 10:31 from the Dutch Civil Code an outer* (sic) *the Netherlands closed marriage that is legally follow* (sic) *the law of the State where the marriage took place will be recognized as such. There is one exception. Article 10:32 of the Dutch Civil Code stipulates that approval to an enclosed outdoor wedding is dismissed when the marriage is incompatible with the public policy. A valid foreign proxy marriage is (probably) not against our public order, so the proxy part will not be a stay in the way for recognition. Almost all valid foreign marriages are recognised in the Netherlands as long as they are not bigamies'.*

25. The writer continues: *'However, I expect that the municipality will not consider for granted proved* (sic) *the existence of the marriage. Therefore I assume that recognition in the Netherlands should start with proving the marriage. If this marriage can be proven and if it is a formal marriage as you informed me, I don't expect problems with the recognition of this marriage in the Netherlands. Of course I can't give you guarantees. If you want to be sure, you should ask the municipality where the registration of the marriage should take place'.*

26. The writer provides no personal details or a curriculum vitae. He describes himself as *'specialised in international family law'*. As a family lawyer he represents '*a lot of expats with their divorces and other family law related matters'*. He is *'a publisher in specialist journals*' though no details are given. He is a '*teacher international private law at the University in Leiden next to my job as a lawyer'*. He adds that to answer the question he '*also had contact with a specialist* (no details) *working at the municipality in Amsterdam* (who, he says, is an expert) *in international lineage law and we once gave a course together about problems in the area of international family law'.*

27. The Tribunal in **Kareem** considered Dutch law (from [25]). It noted Articles 10:31 and 10:32 of the Dutch Civil Code and stated at [29] *'The passages we cite are silent on whether a proxy or customary marriage would be recognised in the Netherlands or whether such a marriage would be incompatible with Dutch public order. We do recognise, however, that article 1:66 permits marriage by representation in certain circumstances, which would suggest that marriage in the absence of one of the parties would not be contrary to Dutch public order. However, … we have not received evidence on these complex issues and have been given no help in how Dutch law might apply'.*

28. The Tribunal went on at [30] to take note of article 10:27 which explains that section 10.3 of the Civil Code which addresses the contracting and

recognition of the validity of marriages, of which articles 10:31 and 10:32 are part is to implement the Convention on the Celebration and Recognition of the validity of marriages concluded at the Hague on 14 March 1978. The Tribunal added that *'even insofar as it applies to the Netherlands, we note that article 8 of the Convention, which addresses the recognition of the validity of marriages, specifically, excludes proxy marriages and informal marriages from its scope'.*

29. As the Tribunal in **TA** noted at ([22]): *'It is relevant to observe that the Tribunal in **Kareem** itself gave consideration to the relevant legal provisions of the Dutch Civil Code and concluded on the evidence before it, that it was not satisfied that the Netherlands was one of the countries that recognised the validity of proxy marriages.'*

30. I do not doubt that the Dutch 'advocaat' has sought to give to the best of his knowledge an accurate response to the question asked of him. However, I do not consider that he has established that he is an expert in this field. I also do not consider that some sixteen lines in half a page in a letter remotely equate to an expert report providing reliable evidence about the recognition of the marriage under the laws of the EEA country. His brief comments do not show how the law is understood or applied. Mere assertion as to the effect of such laws can carry no weight. He is uncertain: *'A valid foreign proxy marriage is (probably) not against our public order*...' The burden of proving the fact that it is a valid marriage is on the Appellant. There is simply insufficient evidence before me on, as the Tribunal in **Kareem** put it, '*these complex issues'* [29]. As indicated the letter from the embassy does not advance the case.

31. Professor Woodman's report which does not address the issue of recognition of the marital relationship under Dutch law does not take the Appellant's case forward.

32. For the reasons stated I find that the Appellant and Mr Kusi are not to be treated as married for the purposes of the 2006 Regulations and, therefore, that the Appellant cannot establish that she is a family member for the purposes of Regulation 7 of those Regulations.

Decision

The decision of the First-tier Tribunal contained an error on a point of law and it is set aside. I remake the decision and dismiss the appeal under the Immigration (European Economic Area) Regulations 2006.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway