



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/25284/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 24th February 2016**

**Decision & Reasons
Promulgated
On 16th March 2016**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**CHINYERE MERCEDES OFOBIKE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss S Sreeraman, Home Office Presenting Officer
For the Respondent: Mr T Ogunnubi, Counsel, instructed by TM Legal Services

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal with permission by the Secretary of State. The Appellant before the First-tier Tribunal is a Nigerian national and she had appealed against the refusal of the Secretary of State to issue

her with a residence card under the EEA Regulations as confirmation of her right of residence as a spouse.

2. The judge was probably not helped in the First-tier by the absence of a Presenting Officer. However it is clear from the judgment that the Appellant was represented by Mr Ogonnubi who appears before me. The judge heard evidence from the Appellant and from her “husband” dealing particularly with discrepancies that the Secretary of State pointed to in the refusal letter as a result of which due in no small part to the absence of the transcript of the interview the judge found the evidence pointed to a genuine relationship.
3. The judge in his findings noted the evidence and referred himself, because this was a proxy marriage carried out in Nigeria, to the case of CB (Validity of marriage – proxy marriage) Brazil [2008] UKAIT 80. That governed the validity of proxy marriages and informs that a marriage that is recognised in the country in which it is celebrated is a valid marriage. However, when one is dealing with a case under the EEA Regulations that is not the end of the matter and it is not just the validity of the marriage that is the only criteria. The cases relevant to the issue, that the Judge failed to take into account are Kareem (Proxy marriage – EU law) [2014] UKUT 24, subsequently affirmed in the case of TA [2014] UKUT 316. Those cases make clear that when dealing with a proxy marriage in relation to a marriage between an EEA national and a foreign national what is important is whether the marriage is recognised in the EEA state from which the EEA national comes, in this case Portugal.
4. The judge did not consider at all that case, he simply considered whether the marriage was valid under Nigerian law and concluded that it was. He concluded it was not a marriage of convenience as asserted by the Secretary of State and he also found that the parties were in a durable relationship, and he then without more allowed the appeal.
5. On the face of it in failing to take into account **Kareem** and consider whether the marriage is recognised in Portugal the judge has erred. On the face of it, in finding there to be a durable relationship by allowing the appeal outright the judge had erred.
6. Mr Ogunnubi argued that the judge had not erred because the refusal letter did not refer to the lack of recognition of the marriage in Portugal or that the couple were validly married. I disagree with him on that point because it is quite clear from the refusal letter which is dated 4th June 2014 in the fourth paragraph where the Secretary of State says “On 19th June 2012 you applied for a residence card on the basis of your claim to be the spouse of a Portuguese national” and in the next paragraph the application was refused “due to the fact that this department did not accept that you were legally married as claimed”. In the next paragraph “It is noted that the Appellant did not appeal against that decision instead submitting a second application in relation to the same Portuguese national”.

7. It follows in my view that the Secretary of State having refused to recognise that the couple were legally married and that decision not having been appealed, it must therefore have been an issue to be decided by the judge. The judge clearly recognised it was an issue for him to decide because he has decided it; unfortunately on the basis of CB rather than Kareem.
8. Therefore I conclude that the judge has erred in considering the question of the recognition of the marriage by failing to apply Kareem. The judge therefore erred in allowing the appeal without consideration of that fact and it is accepted there was no evidence in front of him about the marriage being recognised under Portuguese law.
9. There is no challenge, however, to the judge's finding that this couple are in a durable relationship, so that is a finding which will stand. However, in then allowing the appeal outright on that basis the judge erred again because parties to a durable relationship are not family members but extended family members and as extended family members it is a matter of discretion for the Secretary of State to consider whether or not it is appropriate to issue a residence card.

Notice of Decision

10. Therefore, I set aside the decision of Judge Kanagaratnam and I re-decide it and for the reasons I have indicated above I allow it to the limited extent that the case is remitted to the Secretary of State to consider issuing a residence card to the Appellant as an extended family member.

No anonymity direction is made.

Signed

Date 4th March 2016

Upper Tribunal Judge Martin