



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

Appeal Number: EA/02255/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 20 April 2018**

**Decision &
Promulgated
On 23 April 2018**

Reasons

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ABIGAIL AMOAKOA ASIAMAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr K Siaw of R Spio & Co solicitors

For the Respondent: Mrs Z Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Higgins promulgated on 27 July 2017 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 20 October 2015 refusing her application for a residence permit as the spouse of an EEA (French) national spouse ("the Sponsor") who it is said is exercising Treaty rights in the UK.

2. The Appellant's case is that she and the Sponsor married in Ghana in person. However, for reasons set out at [22] to [25] of the Decision to which I refer below, the Judge came to the conclusion that the marriage certificate on which the Appellant relied should be given little weight because that recorded that the marriage was a customary one, in other words, one conducted by proxy in the absence of the parties.
3. The Judge went on to note the evidence concerning the legal validity of the marriage in French law and concluded at [26] that the marriage would not be recognised as valid in that country. The Judge thereafter relied on the case of Kareem (proxy marriages - EU law) [2014] UKUT 00024 (IAC) ("Kareem") as reason not to accept the marriage as valid because it would not be accepted as such in the Sponsor's home country.
4. The Judge also did not go on to consider whether the Appellant could qualify for a permit as the extended family member (durable partner) of the Sponsor because, at that time, the case of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC) ("Sala") determined that there was no right of appeal in such a case (see [28] of the Decision).
5. The case of Kareem was held by the Court of Appeal to be wrongly decided in Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178 ("Awuku"). The case of Sala was held to be wrongly decided by the Court of Appeal in Khan v Secretary of State for the Home Department [2017] EWCA Civ 1755 as confirmed by the Supreme Court in SM (Algeria) v Entry Clearance Officer, UK Visa Section [2018] UKSC 9. Accordingly, neither Kareem nor Sala now represent the law.
6. The Appellant appealed the Decision on the sole ground that the Judge had erred by following the case of Kareem.
7. Permission to appeal was granted by First-tier Tribunal Judge Mark Davies on 19 January 2018 in the following terms (so far as relevant):-

"... [2]It is arguable that the Judge made an error of law when she considered the case of Kareem referring only to the Upper Tribunal decision and making no reference to the fact that the Court of Appeal overturned the Upper Tribunal's decision.

[3] The grounds and the decision do disclose an arguable error of law."
8. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing.

Discussion and conclusions

9. In light of the Court of Appeal's judgment in Awuku, the Respondent concedes that the Decision does disclose an error of law. Mrs Kiss indicated that, in light of that concession, the Respondent proposed that the appeal be remitted to the First-tier Tribunal for redetermination. She asked however that I preserve the findings at [22] to [25] of the Decision where, she submitted, the Judge had not accepted that the documents

evidencing the marriage are genuine. She pointed out that the Appellant has not challenged those findings.

10. Mr Siaw agreed that the appropriate course is for the appeal to be remitted to the First-tier Tribunal, not only because the Judge has erred in relying on Kareem but also because no findings had been made on the genuineness of the relationship and whether the Sponsor is exercising Treaty rights because the Judge did not consider it necessary to go on to consider the position if the couple are not legally married and are instead durable partners. That is because the Judge considered himself bound by Sala (as indeed he was at the time) to find that there is no valid right of appeal as a durable partner.
11. The Judge was wrong to rely on the case of Kareem as he did at [27] of the Decision in support of his finding that the marriage is not legally valid because it would not be valid in France. As the Court of Appeal held in Awuku, the question of formal validity of a marriage in the law of England and Wales is governed by the law of the country where the marriage was celebrated ([15]). Accordingly, the issue here is whether the marriage between the Appellant and the Sponsor is legally valid in Ghana and not as a matter of French law.
12. In Ghana, customary marriages conducted in the absence of the parties are accepted as legally valid where certain conditions are met. The Judge did not consider whether those conditions were met here because he considered himself bound to consider that question based on French law. That was an error and a material one. For that reason, it is appropriate to set aside the Decision.
13. There is an additional complicating factor here in that the Appellant's case is that she and the Sponsor were both present in Ghana for the wedding. They were unable to prove this because they said that their passports were lost after their return from Ghana, there was no evidence of them having exited the UK, travelled to Ghana and returned to the UK and, as Mr Siaw pointed out, no exit records held by the authorities in the UK. There was evidence in the form of statutory declarations from two persons who were said to have witnessed the ceremony but the Judge rejected that evidence as holding little weight at [24] of the Decision. The Appellant and the Sponsor said that there were photographs taken but they had lost those also and the photographer could not provide copies.
14. As Mrs Kiss pointed out, the Judge disbelieved (or rather placed little weight) on the Appellant's evidence to have married the Sponsor in Ghana. Those are the findings which appear at [22] to [25] of the Decision. He did so because there were inconsistencies in the evidence of the Appellant and the Sponsor and, for example, that the marriage certificate stated that it was one conducted "under customary law" whereas the Appellant's case is that it was not because both parties were present.

15. The Respondent is right to point out that the findings at [22] to [25] of the Decision were not challenged. However, I accept that since the Appellant saw the Kareem issue as a “knock-out” point, a decision might have been taken that there was no need to raise any additional issues. Further, although the Judge found that he could not place weight on the documents for the reasons given, there is no express finding that the marriage did not take place at all.
16. There is a further error of law relating to the position if the parties are not married as a Judge may have to go on to decide whether the Appellant should be entitled to a residence permit as the extended family member of the Sponsor. Of course, if a Judge again finds that the documents evidencing the marriage cannot be given weight and reaches the conclusion that the marriage did not take place, this would raise serious questions about the genuineness of the relationship. I cannot though discount the possibility that a Judge could accept that the marriage took place but that the documents do not confirm the validity of it in which case it would be necessary for the Judge to go on to consider the genuineness of the relationship.
17. For those reasons, the question of whether the marriage is one which took place as the Appellant claims, by proxy or at all and whether it is legally valid on the basis it took place is one which will form part and parcel of consideration of the genuineness of the relationship. Depending on the Judge’s findings on those issues, it may also be necessary for the Judge to make findings whether the Sponsor is in the UK exercising Treaty rights. I say that because at the hearing before the First-tier Tribunal as at the hearing before me, the Sponsor did not attend. Judge Higgins did not accept the reason given for the Sponsor’s absence ([11] and [21] of the Decision).
18. I agree with the parties that this is an appeal which should be remitted to the First-tier Tribunal. There have been no factual findings made about the genuineness of the relationship because of the Judge’s reliance on the legal invalidity of the marriage and because he was bound to accept (per Sala) that he could not determine whether the Appellant is the extended family member of the Sponsor. Factual findings will also now be required both as to the genuineness of the documents relied upon in support of the marriage and whether the documents show that the Ghanaian authorities accept the marriage as legally valid. Depending on the findings about the relationship, the First-tier Tribunal Judge may also need to consider whether the evidence confirms that the Sponsor is in the UK exercising Treaty rights. For the reasons given above, I have not preserved any of the findings made by Judge Higgins.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Higgins promulgated on 27 July 2017 is set aside. The appeal is

remitted to the First-tier Tribunal for re-hearing before a different Judge.

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Signed
Upper Tribunal Judge Smith

Dated: 20 April 2018