Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/07643/2014**

THE IMMIGRATION ACTS

Determined on the papers **Decision & Reasons Promulgated**
On 19th March 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

NADA ABDULLAH OSMAN MANSOUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. By a decision dated 1 June 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside:

> 1. I shall refer to the appellant as the respondent and to the respondent as the appellant, as they appeared respectively before the First-tier Tribunal. The appellant, Nada Abdullah Osman Mansour, was born on 1 January 1977 and is a female citizen of Sudan. The appellant had applied for admission to the United Kingdom on the basis of European Treaty rights. She claimed to be married to Mr Musa Mohamed (hereafter referred to as the sponsor). The appellant claims that the sponsor is a citizen of the Netherlands and he was exercising Treaty rights in the United Kingdom. The application was refused by a decision of the Entry Clearance Officer (Nairobi) dated 10 April 2014. The ECO did not accept that the marriage was valid given that is was polygamous and also did not accept that the sponsor was economically active in the United Kingdom. The appellant appealed to the First-tier Tribunal before which she argued that, in Sudan, polygamy is permitted.

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2. Both parties agreed that the judge incorrectly relied on the Upper Tribunal decision in Kareem (Proxy Marriages – EU Law) [2014] UKUT 00024 (IAC). Kareem has been overruled in the Court of Appeal (see Awuku [2017] EWCA Civ 178). In the circumstances, I set aside the First-tier Tribunal decision. None of the findings of fact shall stand.

3. As regards disposal, I see no reason why this decision cannot be remade in the Upper Tribunal. I refer to [21 – 23] of Awuku:

Furthermore, I consider that the reasoning by which the Upper Tribunal in Kareem arrived at its conclusions is flawed. In that case the Upper Tribunal took as its starting point the proposition that rights of free movement and residence stem directly from Union citizenship, which itself is derived from citizenship of a Member State. As a result, the rights of free movement and residence of a Union citizen are intrinsically linked to that person's nationality of a Member State. Furthermore, it is well established that under international law and EU law it is for each Member State to lay down the conditions for the acquisition and loss of nationality. (See, for example Case C-369/90 Micheletti [1992] ECR I-4239 at [10] and [14]). So much is uncontroversial. However, it does not follow that, because a person's rights of free movement and residence are linked in this way to nationality of a Member State, issues as to the marital status of his or her spouse or partner must also be governed by the law of his or her State of nationality. On the contrary, nationality and marital status are clearly distinguishable. Nationality is exclusively a matter for the law of the Member State concerned. Marital status and its recognition in any given case, by contrast, are matters in respect of which the Directive contemplates that different Member States may take different views. As a result, there is no need to defer to the law of the State of nationality of the EU national when determining the marital status of his or her spouse or partner for the purposes of the Citizens Directive.

Moreover, the alternative route by which the Upper Tribunal in Kareem arrived at its conclusion is also open to objection. I accept that if it is open to a host Member State to determine by its law, including its rules of private international law, whether an EU citizen had contracted a marriage, this could have an effect on freedom of movement and residence within the EU. A spouse would be able to move to a Member State which recognised the marriage but not to a Member State which did not. However, similar inequalities arise if the issue is determined by the law of the State of nationality of the EU national. Mr. Malik provided the following example. Let us assume that German law recognises proxy marriages in third states and that French law does not. In those circumstances, such spouses of German nationals would enjoy rights of free movement to and residence in the United Kingdom (and indeed in other EU States) while such spouses of French nationals would not. Whether marital status is determined by reference to the law of the home State or the law of the host State, it is at risk of being determined differently by different Member States. This is an inevitable consequence of the fact that the Citizens Directive does not employ an independent rule for determining marital status. Once again, it is not a reason for conferring the power to determine marital status on the law of the Member State of nationality of the qualifying EU national.

More fundamentally, I consider that in cases such as the present the application of the rules of private international law in the law of England and Wales would not, on any view, result in any incompatibility with EU law. The law of England and Wales recognises proxy marriage if valid by the *lex loci celebrationis*. Accordingly, a spouse of an EU national who has concluded such a marriage will qualify as a family member within Article 2 of the Directive. There is no threat to

EU rights here. As a result, there was simply no reason for the Upper Tribunal in Kareem to create a new rule of private international law requiring reference to the law of the State of the EU national.

4. I make the following directions with a view to disposing of the appeal in the Upper Tribunal.

A. The decision of the First-tier Tribunal promulgation on 24 November 2016 is set aside. None of the findings of fact shall stand.

B. No later than 21 days from the date upon which the parties shall receive these directions, they shall file at the Tribunal and serve on each other (and send by email to Upper Tribunal Judge Lane: [ ] copies of any updating written evidence upon which they may respectively intend to rely.

C. No later than 14 days after they have served and filed any evidence in accordance with paragraph A above, the parties shall file at the Upper Tribunal and serve on each other and send to Upper Tribunal Judge Lane any written submissions upon which they may respectively intend to rely as regards the remaking of the decision. Upon receipt of submissions or at the expiry of the 14 day period, Upper Tribunal Judge Lane shall remake the decision on the basis of the evidence before the First-tier Tribunal together with any further updating evidence and without a further hearing.

2. In accordance with the directions, the appellant’s solicitors sent me an updated statement by the sponsor and written submissions prepared by Mr Richard Smyth. I have received no further communication from the Secretary of State. I have proceeded on the basis that the respondent does not take issue with the contents of the latest statement of the sponsor. I have determined the appeal on the papers.

3. As Mr Smyth’s submissions state, the appeal turns on the question of the domicile of the parties to the marriage, the appellant and the sponsor, as at the date of marriage, June 2012. The sponsor has been permanently resident in the United Kingdom since 2015. The fact that the appellant is making this application which will, if successful, result in her joining the sponsor in the United Kingdom would appear to indicate that the domicile of choice of both appellant and sponsor the present time is the United Kingdom and not Sudan. However, that was not necessarily the case in 2012. At that time, the evidence clearly shows that the appellant’s domicile could only be Sudan, her country of nationality where she had resided since birth. The sponsor had some years earlier obtained humanitarian protection in the Netherlands but he claims that he has had achieved little, if any, integration in the society of that country; he does not and has not owned property there and, in 2012, he had spent only a matter of months in the United Kingdom. His permanent home was in Sudan where he married the appellant.

4. Domicile depends on both intention and residence. On the evidence that has been produced, I am satisfied that in June 2012 the sponsor resided in Sudan and his domicile as evidenced by his intention as to where you then intended to reside and to focus his life was also Sudan. There is no question, on the evidence, that his domicile at that time was the United

Kingdom and, although he had been achieved citizenship following a grant of humanitarian protection in the Netherlands, every indication was that his domicile at that time was Sudan.

5. The appellant has produced evidence to show that, notwithstanding the fact that the sponsor's previous marriage had not been dissolved, the appellant and sponsor validly married in Sudan in June 2012. I am satisfied, on the evidence, that the marriage was legally entered into by the *lex loci celebrationis.* Consequently, for the reasons succinctly summarised by Mr Smyth in his submissions at [16], the appellant is a 'family member' of the sponsor a Dutch national who is exercising Treaty rights in the United Kingdom as a worker. It follows that the appeal should be allowed and that the Entry Clearance Officer should, pursuant to Regulation 12, issue to the appellant an EEA family permit.

Notice of Decision

6. The appeal against the decision of the Entry Clearance Officer is allowed.

Signed Date 2 February 2019

Upper Tribunal Judge Lane