Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Oyekan) v Secretary of State for the Home Department IJR [2015] UKUT 00410(IAC)

on an application for JUDICIAL REVIEW

At **Field House** Decision signed: **16.11.2014**
on **14.11.2014**

Before

Upper Tribunal Judge
John FREEMAN

Between

The Queen on the application of Janet Foyeke OYEKAN

Applicant

and

Secretary of State for the Home Department

Respondent

Solicitor advocate for the applicant: Mr CT Emezie
Counsel for the respondent: Mr Z Malik

JUDGMENT

1. This is an application for judicial review of the decision of the respondent on 29 September 2013, for administrative removal of a citizen of Nigeria, born 23 January 1988. That decision did not carry any in-country right of appeal; but before it was made, she had been through the statutory appeal process against a previous decision, to refuse her an EEA residence card on the basis of her marriage to a Swedish citizen. This ceremony had taken place by proxy in Nigeria.

2. By the time the First-tier Tribunal (Judge Anthony Metzer) dismissed the appeal, the decision in Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC) (16 January

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2014) was not yet available; but it now represents the law as declared by the Upper Tribunal on the question of validity of proxy marriages under EEA law. It was further explained, so far as explanation may have been necessary, in TA & others (Kareem explained) Ghana [2014] UKUT 316 (18 June 2014).

3. Nevertheless on 1 July 2014 Mr Emezie persuaded the Upper Tribunal (Judge Gleeson) to grant permission to apply for judicial review of the decision under challenge on the basis of evidence subsequent to Kareem from the Foreign and Commonwealth Office about the legal status of proxy marriages in Nigeria. It is by no means clear that he cited TA & others to her, as he should have done; but I need to say more about the basis for the decision in Kareem itself.

4. The position on formal validity of proxy (and other) marriages at common law, as set out in previous decisions of the appellate authorities, was that the question was governed by the *lex loci celebrationis*, in this case Nigeria, where it was never in any doubt that they were capable of recognition under the statutory arrangements for reception of customary law. However, Kareem made it clear that, on an appeal against refusal of a card, following a proxy marriage (see judicial head-note at *g*)

> *It should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of the EEA country and/or the country where the marriage took place, the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof.*

5. That was perhaps more clearly re-stated in the judicial head-note to TA & others:

> *Following the decision in Kareem (proxy marriages – EU law) [2014] UKUT 24, 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.*

6. The 'burden of proof' in Kareem of course referred to the general burden on an appellant to show the validity of a marriage: so far as that was a question of foreign law, whether Nigerian or Swedish, evidence was required. Nevertheless Mr Emezie persuaded the judge, not only to grant permission, but to make the following 'case management directions':

- Within 14 days from the date this decision was sent to her (see below), the Respondent must lodge and provide to the Applicant and the Upper Tribunal detailed grounds for continuing to contest this application and any written evidence upon which she will rely at the hearing, including in particular evidence of Swedish law as to proxy marriages between Swedish and Nigerian citizens.
- If no such grounds or evidence are received, the respondent will be taken to have accepted that the decision to remove the applicant to Nigeria on the basis of the First-tier Tribunal determination of May 2013 was unlawful.
- If the respondent lodges any grounds or evidence for continuing to contest this application, then within 21 days of her being provided with such grounds or evidence for continuing to contest the judicial review application, the applicant must lodge and serve any reply, and any application to lodge further evidence, in particular on the Swedish law point identified above. In default of such Reply or application, the applicant will not be permitted to adduce further grounds or evidence at the hearing of this application without the leave of the Upper Tribunal.

7. These directions were later varied by consent order, giving the Secretary of State more time to comply with them; but instead on 3 September the Treasury Solicitors e-mailed the applicant's, with a copy of a further consent order, by which the judicial review proceedings would be withdrawn. The basis for this offer was a further decision to refuse a residence card, giving an in-country right of appeal, made on 28 August. This would have enabled the applicant to challenge the decision before the First-tier Tribunal once more, but this time with full knowledge of the evidential requirements set out in Kareem and TA & others.

8. On 2 September the applicant's solicitors wrote back to the Treasury Solicitors, essentially taking up their position on the directions given by Judge Gleeson, as Mr Emezie did at the hearing which followed before me. Mr Emezie's arguments were these:

(a) the directions had effectively reversed the burden of proof, turning it from the applicant (where in my view Kareem had clearly left it), to the Secretary of State;

(b) if the Secretary of State had had any complaint about that position, then she could have applied to set aside the grant of permission;

(c) in any case, she had chosen to agree to the consent order, by which she was bound; and

(d) she had not considered the full merits of the application under the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations].

9. While there may be a certain superficial logic about each of these arguments, in my view the position on the case as a whole is quite clear. Judge Gleeson could not, and clearly did not intend to reverse the view of the law taken by the three-judge vice-presidential panel in Kareem, and followed ever since by the Tribunal as a whole (except for those first-tier judges who seem to have misunderstood it, and had to be set right in TA & others) . What this applicant, and anyone else in his situation was entitled to, was a fair decision according to law on his application.

10. This the applicant was offered in the decision of 28 August, and the correspondence which followed. While the course which the application had taken so far certainly entitled him and his solicitors to a few days for reflection, the barest familiarity with the law as declared by the Tribunal should have led them to accept the offer made on 3 September, and withdrawn it. The decision provided a clear alternative remedy, by which the application could be reconsidered on appeal by a First-tier Tribunal judge with the full facts and law before them: any argument on costs at that stage could have been put before the Tribunal to resolve, if necessary; and so the application is dismissed.

11. I dealt with the current argument on costs by e-mail between both sides: as the decision on it risks swamping the main one, it is given separately. So far as permission to appeal is concerned, the grounds put forward repeated those made in argument, and I see nothing in them.

Application dismissed
Costs as ordered
Permission to appeal refused

(a judge of the Upper Tribunal)