Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02707/2014

THE IMMIGRATION ACTS

Heard at Sheldon Court Birmingham	**Determination Promulgated**
On 23rd July 2014	**On 04th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

KELVIN OTENG
(ANONYMITY ORDER NOT MADE)
Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr S Awal of The Law Clinic

DETERMINATION AND REASONS

Introduction and Background

1. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to him as the Claimant.

2. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Aziz dated 18th April 2014.

3. The Claimant is a Ghanaian citizen born 26th July 1976 who applied for a residence card as confirmation of a right to reside in the United Kingdom,

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as the spouse of Mavis Danso, a Dutch national (the Sponsor) exercising Treaty rights in the United Kingdom. The parties claimed that they had married by proxy on 10th July 2013. The marriage had taken place in Ghana although both the Claimant and Sponsor had remained in the United Kingdom.

4. The application for a residence card was refused on 18th December 2013. In brief summary the Secretary of State did not accept that the proxy marriage had been properly executed and did not comply with Ghanaian law, and therefore the marriage was not valid, and the Claimant was not a spouse of an EEA national, and therefore not a family member as defined by regulation 7 of the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations).

5. The Secretary of State went on to consider whether the Claimant would be recognised as an extended family member of an EEA national, on the basis of being an unmarried partner in a durable relationship, and therefore entitled to a residence card pursuant to regulation 8(5) of the 2006 regulations. The Secretary of State found that insufficient evidence had been submitted to prove that the parties were in a durable relationship.

6. The Secretary of State did not consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) as it was contended that for this to be considered, a separate application needed to be made.

7. The Claimant appealed to the First-tier Tribunal, and requested that his appeal be determined on the papers. It was contended that the Secretary of State had been wrong to find that a proxy marriage was not valid. There was no appeal against the decision to find that the parties were not in a durable relationship, and Article 8 was not raised as a Ground of Appeal.

8. The appeal was considered on the papers by Judge Aziz (the judge) who found that the proxy marriage was valid, and therefore because the parties were validly married, the Claimant was entitled to a residence card as the spouse of an EEA national. The judge did not consider regulation 8(5) of the 2006 regulations, or Article 8, as these issues were not raised as Grounds of Appeal.

9. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in law by failing to take into account the guidance given in Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC). It was contended the judge should have decided, as a starting point, whether the marriage was contracted between the Claimant and the EEA national, according to the national law of the EEA country which in this case would be The Netherlands. The judge had therefore erred by focusing on the validity of the marriage in relation to UK law, and should have decided whether the proxy marriage was valid in Dutch law. Permission to appeal was granted.

10. Following the grant of permission the Claimant lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary, that the determination disclosed no error of law and the judge was correct to find the proxy marriage was valid.

11. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Error of Law

12. Mr Smart relied upon Kareem, and TA & Others [2014] UKUT 316 (IAC). Mr Awal confirmed that he was familiar with the case law. Mr Smart relied upon the grounds contained within the application for permission to appeal. I was asked to find that because the judge had not given any consideration to whether the proxy marriage was valid in Dutch law, the determination was wrong in law and must be set aside.

13. Mr Awal disagreed and relied upon his rule 24 response, and skeleton argument dated 22nd July 2014. I was referred to paragraph 68b of Kareem which indicated that the production of a marriage certificate issued by a competent authority would usually be sufficient. Mr Awal argued that the judge was satisfied that the marriage certificate in this case had been issued by a competent authority, and therefore he did not need to consider Dutch law, because the marriage was valid according to Ghanaian law.

14. I decided that the judge had materially erred in law by not taking into account the guidance given in Kareem which was promulgated on 16th January 2014 and published on 23rd January 2014, although he was not assisted by the fact that this appeal was determined on the papers, and neither party drew his attention to the decision.

15. Kareem makes it clear that where there is a proxy marriage the judge should as a starting point, decide whether a marriage would be recognised as valid under the national law of the EEA national concerned. In this case the judge should have considered whether the marriage would be recognised under the law of The Netherlands. He did not do so and that was a material error. The decision of the First-tier Tribunal was set aside.

Re-Making the Decision

16. Both representatives indicated that they were ready to proceed to re-make the decision. Mr Awal indicated that he did not intend to call further evidence.

17. I firstly heard from Mr Smart. I was asked to find that there was no evidence before the Tribunal that indicated that this proxy marriage would be recognised under Dutch law. The validity of the marriage was the only

issue before the Upper Tribunal. In the absence of any evidence that the proxy marriage would be recognised under Dutch law, the appeal must be dismissed.

18. I then heard from Mr Awal who submitted that this appeal could be distinguished from Kareem, but in any event paragraph 68(b) of Kareem indicated that if a marriage certificate was produced which had been issued by a competent authority, then this would be sufficient, and there was no need to go on and consider Dutch law.

19. Mr Awal also contended that paragraph 29 of Kareem indicated that a proxy marriage would be recognised by Dutch law.

20. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

21. In re-making this decision, I remind myself that the burden of proof in relation to the 2006 regulations is on the Claimant, and the standard of proof is a balance of probabilities.

22. I have taken into account all the evidence placed before me by both parties, and taken into account the oral submissions of both representatives.

23. The only issue before me relates to the validity of the proxy marriage said to have taken place in Ghana on 10th July 2013. It is clear that neither the Claimant nor the Sponsor attended that ceremony.

24. In my view it is relevant to consider the guidance in both Kareem and TA & Others, and I set out the head note to TA & Others below;

> "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."

25. It appears that in TA & Others a submission was made to the Upper Tribunal, in similar terms to that made by Mr Awal, in that production of a marriage certificate issued by a competent authority in the country where the marriage took place is sufficient. That submission is contained in paragraph 9 of the determination in TA which I set out below;

> "9. Mr Akohene submits that it is clear that there is a two stage process in the determination of whether a marriage can be considered to be valid for the purposes of the 2006 regulations. Where a marriage certificate has been issued by a competent authority, this would usually be enough to demonstrate the validity of the marriage under the 2006 regulations [paragraph 68(b) of Kareem]."

26. It was submitted that if a marriage certificate has been issued by a competent authority, it is not necessary to move on to the second stage of the consideration, which is relevant only where there is doubt about whether the marriage has been lawfully contracted, as set out in paragraph 68(b) of Kareem. It is only in the second stage that there needs to be consideration of whether the marriage has been contracted in accordance with the law of the country in which the EEA Sponsor is a national. The Upper Tribunal dealt with that submission in paragraph 20 which I set out below;

> "20. Given that which I set out above, it is difficult to see how the Upper Tribunal in Kareem could have been any clearer in its conclusion that when consideration is being given to whether an applicant has undertaken a valid marriage for the purposes of the 2006 regulations, such consideration has to be assessed by reference to the laws of the legal system of the nationality of the relevant Union citizen. Mr Akohene's submissions to the contrary are entirely misconceived and are born out of a failure to read the determination in Kareem as a whole."

27. In my view the correct approach to consideration of proxy marriages is set out in Kareem, and TA & Others. In this case there has been no evidence adduced that a proxy marriage would be recognised under Dutch law. I reject Mr Awal's submission that paragraph 29 of Kareem indicates that such a marriage would be recognised by Dutch law. I set out below paragraph 29 of Kareem;

> "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, as we have indicated, we have not received evidence on these complex issues and have been given no help on how Dutch law might apply."

28. I therefore do not find that the above paragraph assists the Appellant in this case as no evidence has been submitted to indicate that Dutch law would recognise this proxy marriage. The burden of proof is on the Claimant and that burden has not been discharged.

29. I conclude that the appeal must be dismissed. The issues of durable relationship and Article 8 were not appealed to the First-tier Tribunal and so were not before the First-tier Tribunal, or the Upper Tribunal.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date: 25th July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date: 25th July 2014

Deputy Upper Tribunal Judge M A Hall