



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

**Appeal Number: IA/11773/2014**

**THE IMMIGRATION ACTS**

**Heard at Manchester Piccadilly  
On 20 November 2014**

**Decision Promulgated  
On 25 November 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**DAVID ASAMOAH POKU GYEMFI  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms L Mensah counsel instructed by A J O Solicitors  
For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.
2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Carswell promulgated on 12 May 2014 which allowed the Appellant's appeal under the EEA Regulations.

### Background

3. The Appellant was born on 18 May 1987 and is a citizen of Ghana.
4. On 13 December 2013 the Appellant applied for a Residence card as the spouse of an EEA national, his spouse being a citizen of the Netherlands, exercising treaty rights in the United Kingdom.
5. On 19 February 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons but in essence did not accept that the proxy marriage between the Appellant and her EEA sponsor was valid for the purposes of the EEA Regulations.

### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge Carswell (hereinafter called "the Judge") allowed the appeal finding that the marriage was valid under Ghanaian law and therefore valid under United Kingdom law.
7. Grounds of appeal were lodged and on 6 August 2014 First-tier Tribunal Judge Chohan gave permission to appeal on the basis that the Judge had failed to take into account the case of Kareem (Proxy Marriages- EU Law) Nigeria [2014] UKUT 24.
8. Mr Mc Vitie relied on the grounds of appeal.
9. At the hearing I heard submissions from Ms Mensah on behalf of the Appellant that she conceded that the Judge had made an error of law in failing to take into account the guidance in the case of Kareem and had therefore failed to consider whether the Appellant's marriage was valid under the law in the Netherlands. As a result of that no consideration had been given to the issue of whether theirs was a durable relationship under regulation 10(5). She asked that the case be remitted to the First Tier as the Appellant had been deprived of a fair hearing in relation to all the live issues in the case.

### **Finding on Material Error**

10. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
11. The failure of the First-tier Tribunal to address and determine the issue of whether the marriage was valid under Netherlands law as set out in Kareem constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome would have been different as there was no evidence before the Tribunal in relation to that issue. That in my view is the correct test to apply.

12. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety to be redetermined afresh.
13. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25<sup>th</sup> of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:
  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.*
14. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure of the Tribunal to consider the issue of whether the parties were in a durable relationship.
15. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on 25 February 2015 before me.

Signed

Date 20 November 2014

Deputy Upper Tribunal Judge Birrell