Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30203/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 April 2014	**On 20 June 2014**
Oral determination given following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR SOPIRIALA HANS HARRY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Physsas, Counsel instructed by Graceland Solicitors (Lewisham)
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case is a national of Nigeria who was born on 24 January 1982. On 1 May 2012 he made an application for a residence card

pursuant to Regulation 7 of the Immigration (European Economic Area) Regulations 2006 on the basis that he was the spouse of an EEA national exercising treaty rights in the UK. His alleged wife is a French national. The respondent refused to grant him a residence card and the decision refusing this application was made on 1 November 2013. The basis of the respondent's decision was she was not satisfied that there was a valid marriage between the parties.

2. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Boyes sitting at Hatton Cross on 2 December 2013. By the time of this hearing it was the appellant's case that he was not living any longer with his wife and that she had moved out of the matrimonial home on 30 June 2013 because he had not changed the job which he was in. It was possibly for this reason that no alternative claim to an entitlement to a residence card was made pursuant to Regulation 8 on the basis that there was a durable relationship in any event even if the parties were not validly married.

3. The appellant's case was that he had been lawfully and validly married to Ms Labarde who was a French national exercising treaty rights in the UK by means of a customary proxy marriage in Nigeria. It appears that the First-tier Tribunal Judge considered his appeal on the basis that his case was that the marriage was a statutory marriage whereas that was not his case. In any event the judge was not satisfied that there was a valid proxy marriage in accordance with Nigerian law and the appeal was accordingly dismissed in a determination which was promulgated on 5 February 2014.

4. Not only did the First-tier Tribunal Judge consider that there was not a valid proxy marriage in accordance with Nigerian law but in her determination she also relied upon the decision in this Tribunal in *Kareem (Proxy marriages - EU law)* [2014] UKUT 00024 which was promulgated after the hearing but before the promulgation of the determination in this case.

5. In the grounds of appeal it is asserted that the judge made a number of mistakes of fact, in particular by considering that the marriage asserted on behalf of the appellant was a statutory marriage whereas it had been his case that the marriage was a customary marriage. It is said that this led to "a series of errors rendering the determination unsafe". It is also submitted that the judge should not have relied upon the decision of this Tribunal in *Kareem* without at least giving the parties or in this case the appellant an opportunity of making submissions as to the effect of this decision or if appropriate submitting further evidence in light of that decision.

6. Permission to appeal was granted by First-tier Tribunal Judge Hemingway on 26 February 2014. When stating his reasons for granting permission to appeal Judge Hemingway stated as follows:

> "...

2. The grounds of application for permission assert, with arguable merit, that the judge erred in misunderstanding the type of marriage it was said to be contracted and in relying upon new matters not canvassed at the hearing including matters raised in the decision in *Kareem* ..., without affording the parties an opportunity to address them ...".

7. Following the grant of permission to appeal on 28 February 2014 this Tribunal gave directions to the parties which included the following:

"1. Any response which the respondent of this appeal wishes to make under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 must be sent or delivered to the Upper Tribunal so that it is received no later than fourteen days after the respondent was sent notice that permission to appeal had been granted. At the same time, a copy of the response must be sent to the appellant.

2. The parties shall prepare for the forthcoming hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to remake the decision, can be so considered at that hearing. ...".

8. In accordance with these directions the respondent made a response under Rule 24 dated 19 March 2014 but no further evidence was submitted on behalf of the appellant.

The Hearing

9. I heard submissions on behalf of both parties which I recorded contemporaneously. As these submissions are contained within my Record of Proceedings I shall not set out below everything which was said to me during the course of the hearing but shall refer only to such parts of the submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said to me in the course of the hearing as well as to all the documents contained within the file whether or not the same is specifically referred to below.

10. Ms Physsas' primary submission was that, for reasons which she gave in the course of her cogent and persuasive arguments, there had been substantial errors within the judge's determination. It is not necessary to set these out in any detail in light of my substantive decision below. The primary mistake which she says the judge made was to consider whether or not the marriage was or might have been valid in accordance with Nigerian law on the basis that it was a statutory marriage whereas it was the appellant's case that it was a customary marriage. However, when she was asked whether or not she was in a position to address the difficulties which it would seem were faced by this appellant in light of the

decision by this Tribunal in *Kareem* she properly and openly informed the Tribunal that she was not in a position to do so today. However, she wished to seek an adjournment if this Tribunal found an error of law in order to make further efforts to obtain such evidence as may be required in light of the decision in *Kareem*. For reasons which I give below I refused her application for an adjournment.

11. On behalf of the respondent Ms Everett accepted properly that with regard to Ms Physsas' argument that the judge would appear to have been wrong to apply some of the tests as to whether there was a valid statutory marriage this argument seemed to be correct. She did not contest that the appellant had argued that his asserted marriage was a customary one and that it was arguable that the judge had not dealt with these arguments satisfactorily. However, in light of the guidance now given in *Kareem* the appellant's appeal could not succeed. She also opposed the application for an adjournment.

Discussion

12. I am very grateful to both representatives for the very clear and concise way in which their respective parties' cases have been put before me. Ms Physsas in particular maintained her submissions notwithstanding the difficulties that she faced due to the lack of evidence which for reasons I give below this Tribunal considered it would be necessary to have before this appeal could succeed. She asked for an adjournment on the basis that she needed a reasonable amount of time in which to obtain this evidence.

13. I refused the application for an adjournment because following the directions which were sent to the parties as long ago as 28 February 2014 (that is two months ago) the appellant and those representing him must have been aware of the need to provide the material without which in light of the judgment in *Kareem* which I will refer to below it was necessary for him to provide. Whether or not the judge would have been better advised to have allowed the appellant an opportunity of addressing her as to the relevance of this decision before promulgating her determination the appellant has undoubtedly had an opportunity to do so before this Tribunal. Before an error can be shown to be material it must be apparent that but for this error another judge might have come to another decision.

14. I turn now to the reason why in light of the decision in *Kareem* this appellant's appeal cannot in my judgment succeed. I refer to the exposition of the law which is summarised in the head note as follows (I only quote the relevant parts of this head note):

> "a. A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.
>
> …

d. In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.

e. In such an appeal, the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.

f. In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European treaties, including the right to marry and the rights of free movement and residence.

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. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight".

15. In this case it is clear that there is an issue as to whether or not marriage certificate has been issued by a competent authority and this Tribunal must thus have regard to the guidance given in *Kareem* as summarised in head note e. that:

> "The starting point will be to decide [whether this asserted marriage] was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality"

which in this case it is said is France. Regard must be had by this Tribunal to what is summarised in head note g. to the effect that:

> "It should be assumed that, without independent and reliable evidence about the recognition of [this marriage under French law] the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof".

16. Ms Physsas recognised as she was obliged to do that there was no evidence before this Tribunal to the effect that the marriage which it is said took place between the appellant and the French national would be

recognised in France. The most she could do was to submit that she ought to be allowed a further opportunity to obtain such evidence. However, as I have already noted, the appellant has already had two months in which to obtain such evidence if it was available and I do not consider that there is any proper reason why he should be allowed any more time. In the event that the appellant is able to obtain such evidence there is nothing to preclude him making a further application either from within this country if he is still here or from outside but there is no proper justification for granting any more time. I consider that I can deal justly with this appeal on the basis of the evidence (or in this case the lack of evidence) which is before me. In the absence of any evidence that the marriage which according to the appellant was lawfully contracted between him and Ms Labarde according to Nigerian customary law, he is in my judgment unable to establish following the decision of this Tribunal in *Kareem* whether in fact a valid marriage has indeed been contracted because he is unable to establish that such a marriage was contracted according to the national law of France which is the country of Ms Labarde's nationality. In those circumstances even though there may well have been errors in the determination of the First-tier Tribunal Judge these errors could not have been material because this appellant's appeal would have been bound to fail in any event. It follows that this appeal must be dismissed and I will so find.

Decision

The appellant's appeal is dismissed.

Signed: Date: 18 June 2014

Upper Tribunal Judge Craig