Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02817/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 July 2014	**On 25 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VIDA AMANKWAH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr E Akohene, Solicitor

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Norton-Taylor allowing Ms Amankwah's appeal against the decision to refuse to issue Ms Amankwah a residence card in acknowledgement of her right of residence as a family member of an EEA national. Although the Secretary of State is now the appellant in this appeal and Ms Amankwah is the respondent, it is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall refer to Ms Amankwah as "the appellant" from now on and the Secretary of State as "the respondent".

2. I was not asked and saw no reason to make an anonymity direction.

3. The appellant applied for a residence card on 21 August 2013 through her representatives. She relied on her proxy marriage to Mr Thomas Halley Hanson, a Spanish national, said to have taken place in Ghana on 7 July 2012. Relying on *NA (customary marriage and divorce – evidence) Ghana* [2009] UKAIT 00009, the respondent was not satisfied the marriage was valid according to Ghanaian law. In particular, the refusal reasoned that both parties to the marriage must be either Ghanaian citizens or be able to demonstrate that their parents are Ghanaian citizens. The respondent did not accept, in the alternative, that the appellant and Mr Hanson were in a durable relationship because they had not provided sufficient evidence. The appellant was refused a residence card by reference to Regulations 7 and 8(5) of the Immigration (European Economic Area) Regulations 2006, as amended.

4. The appellant submitted grounds of appeal which argued the marriage was valid. Reliance was placed on *CB (Validity of marriage: proxy marriage) Brazil* [2008] UKAIT 00080. The grounds made no mention of Regulation 8(5). The grounds argued in the alternative that the decision breached article 8 of the Human Rights Convention.

5. The appellant requested that her appeal be determined on the papers without a hearing. Her representatives forwarded a bundle of 24 pages for consideration by the First-tier Tribunal. Judge Norton-Taylor also had the earlier determination of Judge Bircher, who had dismissed a previous appeal on the basis the statutory declaration produced to evidence the customary marriage did not state the place of residence of the parties. A fresh statutory declaration had been prepared for the renewed application.

6. In a clear and logical determination, Judge Norton-Taylor set out his reasons for allowing the appeal. He noted there was no allegation that any of the documentation produced by the appellant was not genuine and he found the documents were genuine and reliable regarding their contents. He made the following primary findings of act:

* the appellant is Ghanaian;
* Mr Hanson was born in Ghana;
* it was highly likely Mr Hanson was a Ghanaian national at least until he obtained his Spanish citizenship;
* Mr Hanson was a person with Ghanaian parents and Ghanaian descent;
* both the appellant and Mr Hanson were eligible to marry under Ghanaian customary law;
* the witnesses to the marriage were the respective fathers of the couple;
* the new statutory declaration did state the place of residence of the couple, namely London;
* the couple were resident in the UK at the date of their marriage;
* they were both free to marry as the appellant was a divorcée; and

* the marriage was valid and in accordance with Ghanaian law, which was implicit from the documents issued by the authorities.

7. Judge Norton-Taylor concluded the appellant was married to an EEA national and was therefore his 'family member'. There was no dispute over the fact Mr Hanson was exercising Treaty rights in the UK. He found the appellant was entitled to a residence card and allowed the appeal. He did not determine whether the appellant fell within Regulation 8(5) or whether her removal in consequence of the decision would breach article 8.

8. The respondent was granted permission to appeal because it was arguable that the judge erred. His conclusion was not in accordance with the principles set out in *Kareem (Proxy marriages – EU law)* [2014] UKUT 00024 (IAC), which held that it was necessary to establish whether the marriage was recognised in Spain, the EEA State of the sponsor.

9. The appellant has not filed a Rule 24 response opposing the appeal.

10. I should record that the appellant and Mr Hanson attended the hearing. A short bundle had been prepared in advance of the hearing by the appellant's solicitors, presumably in case an error was found and the Upper Tribunal re-heard the appeal.

11. I heard submissions from the representatives as to whether the judge made a material error of law. Having done so, I decided the judge did make a material error. My reasons are as follows.

12. In *Kareem* the Upper Tribunal set out its conclusions in paragraph 68 as follows:

> "We make the following general observations.
>
> 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.
>
> b. The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.
>
> c. A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.
>
> 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.

h. These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships."

13. In view of submissions made in a number of cases since *Kareem* was promulgated to the effect that there was a two-stage process and it was only necessary to consider the validity against the laws of the EEA national's State if there was not clear evidence that the marriage lawfully contracted in the country in which it had been contracted, the Upper Tribunal provided clarification in *TA and Others (Kareem explained) Ghana* [2014] UKUT 00316 (IAC) as follows:

> "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."

14. It is right to point out the judge in this case was not alerted to the principles set out in *Kareem*. Nonetheless it is clear that he fell into error by not applying them. He did not make a finding as to whether the appellant's marriage would be recognised under Spanish law.

15. Mr Akohene argued that the error was not material. He did so by reference to evidence he produced at the hearing, which had not been served on the respondent, which he argued demonstrated that Spanish law would recognise the marriage anyway. He produced two documents in English which he had downloaded from the internet:

> (1) the Preliminary Title of the Spanish Civil Code; and
> (2) a summary of its provisions taken from the European Commission's European Judicial Website.

16. It is fair to say that a reading of the materials lends support to Mr Akohene's arguments. On the face of it, the Civil Code provides that Spanish nationals can marry outside Spain in accordance with the law of the place where the marriage is celebrated. It could well be that Ghanaian law would apply to the question of the validity of the marriage. The position would be akin to the UK's attitude as explained in *CB (Validity of marriage: proxy marriage) Brazil* [2008] UKAIT 00080, that a proxy marriage would be regarded as valid under English law if it was valid under the law of the place where it took place.

17. Whilst Mr Akohene is to be commended for his research, the fact remains that I have no way of knowing whether these documents reflect the current law or, better said, the law as at the date of the marriage. The copy of the Code is in English and the translation is not certified. The situation is precisely that encountered by the Upper Tribunal in *Kareem* (see paragraphs 14, 25, 29 and 68(g)). I have nothing to assist me with interpreting the Spanish Civil Code and, as far as I can see, it says nothing about customary and proxy marriages. I am not therefore persuaded by the available evidence that the judge's error could not have been material because the appeal would have had to have been allowed.

18. Mr Akohene also sketched out a submission made by reference to Article 24 of Directive 2004/38/EC on equal treatment. If I understood him, he argued that the proxy marriage of a British citizen would be recognised under English law and therefore it amounted to unlawful discrimination not to treat an EEA citizen in the same way. However, I think this argument is misconceived. The issue here is whether the appellant can establish an entitlement to a residence card, which she can only do if she establishes she has contracted a valid marriage. There is no infringement of equal treatment by requiring that to be done by reference to the party's own national laws.

19. I must set aside the decision of Judge Norton-Taylor insofar as he concludes the marriage is valid and the appellant is entitled to a residence card. I see no reason to disturb any of the positive findings he made with regards to the documents and Ghanaian law. However, in order to establish an entitlement, the appellant will need to address the *Kareem* issue with cogent evidence. It will also be necessary to examine and make findings on the issue of the relationship so as to be able to answer the question whether, in the alternative, the appellant and Mr Hanson are in a durable relationship so as to fall within Regulation 8(5). The parties were in agreement that this is an appropriate case to remit to the First-tier Tribunal for these findings to be made.

20. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. The appeal will be reheard in the First-tier Tribunal. To assist, I make the following directions:

(1) The parties should file and serve evidence on the question of whether the appellant's marriage is recognized under Spanish law;
(2) The appellant should file and serve evidence on the question of whether she and Mr Hanson are in a durable relationship;
(3) All evidence filed must be received by the Tribunal and the other party no later than ten days before the hearing date;
(4) The findings of Judge Norton-Taylor set out in bullet-point form in paragraph 6 above are preserved;
(5) The parties are reminded that the Tribunal will be assisted by skeleton arguments filed and served in advance of the hearing.
(6) The appeal will take the form of an oral hearing unless the appellant indicates within 7 days of receiving the notice of hearing that she wishes the appeal to be determined without a hearing; and
(7) If an interpreter is required, the Tribunal must be notified within 7 days of receiving the notice of hearing the language(s) required.

DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision allowing the appeal is set aside.

The appeal will be re-heard in the First-tier Tribunal at a place and on a date to be notified.

Signed **Date 21 July 2014**

Neil Froom,
sitting as a Deputy Judge of the Upper Tribunal