Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50154/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 July 2014	**On 12 August 2014**
Oral determination given following hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS FLORENCE ASANTE DENKYIRAH

Respondent

Representation:

For the Appellant (Secretary of State): Mr T Wilding, Home Office Presenting Officer
For the Respondent (Ms Denkyirah): Mr B Owusu (Solicitor) of Bennard Wiseman Family Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge L Murray promulgated on 25 April 2014 following a hearing at Columbus House, Newport on 9 April 2014 in which she had allowed Ms Denkyirah's appeal against the decision of the Secretary of State of 19 November 2013 to refuse to issue her with a residence card as

confirmation of a right of residence in the UK. For ease of reference I shall throughout this determination refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Ms Denkyirah, who was the original appellant, as "the claimant".

2. Following the determination which as noted above found in favour of the claimant the Secretary of State appealed and permission to appeal was granted by First-tier Tribunal Judge Chambers on 22 May 2014.

3. The issues in this appeal can be set out relatively briefly. The claimant is a Ghanaian national who was born on 1 April 1969. She applied for the grant of a residence card on 4 October 2013 claiming to be entitled to this pursuant to Regulation 7 of the Immigration (European Economic Area) Regulations 2006 on the basis of her marriage to a national of the Netherlands who was exercising treaty rights within the UK. She had provided a marriage certificate dated 6 September 2013 which showed the date of marriage as 26 February 2013 the marriage having taken place in Ghana. It was the claimant's case that this was a marriage which had taken place by proxy.

4. This application was refused by the Secretary of State. The claimant appealed and as noted above her appeal was heard before Judge Murray sitting at Columbus House, Newport on 9 April 2014. In support of her appeal the claimant submitted a bundle which included what was said to be expert evidence provided by a Dutch lawyer, a Ms M van Yperen-Groenleer, and also a document which was produced at the hearing from the Dutch Embassy in the UK dated 13 March 2014. I shall refer to these documents below.

5. At paragraph 13 of her determination, when considering the decision of this Tribunal in *Kareem (Proxy marriages - EU law)* [2014] UKUT 24, Judge Murray stated as follows:

> "… At paragraph 68D *Kareem* stated that only if it was doubted [that is that the claimant was married] then the appellant would need to prove the validity of marriage. In any case there was evidence with regard to the Netherlands and there was a letter from a Dutch lawyer from B9 to B10. The Netherlands Embassy did not give a conclusive response. Proxy marriages were not bad in Dutch law and the lawyer's opinion was they were not bad in Dutch civil code. I was asked to allow the appeal on the basis of valid marriage certificate but there was also evidence that the marriage is valid in the Netherlands."

6. When setting out her "Findings and Reasons" from paragraph 16 onwards, the judge did not make any finding as to whether or not the letter from the Dutch lawyer referred to at paragraph 13 was reliable evidence which could justify the Tribunal in making a finding that the marriage would be regarded as valid in the Netherlands. It was also accepted before me on behalf of the claimant that the view expressed by the judge in her determination that following *Kareem* it was only necessary to consider whether a marriage was valid in the country of

nationality of the EU resident in circumstances where a valid marriage in the country in which it was said to have taken place had not been established was not correct and that in fact it was necessary to show that the marriage in addition to being a valid marriage also had to be regarded as valid in the country of nationality of the EU national through whom the right of residence was said to be derived. I shall deal with the submissions made on behalf of the claimant below.

7. The grounds of appeal argue that there was a material error of law in the determination of the First-tier Tribunal because there was not "independent or reliable evidence about the recognition of the marriage under the laws of the EEA country" (in this case the Netherlands) as required as stated in head note g. of *Kareem*. It is also said that the judge had failed either to address the issue or to provide adequate reasons for accepting that the marriage was valid according to Dutch law.

The Hearing

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

9. On behalf of the Secretary of State, Mr Wilding essentially relied upon the grounds. He submitted that the head note in *Kareem* was not entirely helpful because it did not set out entirely accurately what was contained within paragraph 11 of that determination, which is as follows:

> "We conclude that in EU law the question of whether a person is in a marital relationship is governed by the national laws of the member states. In other words, whether a person is married is a matter that falls within the competence of the individual member states."

10. It was clear from *Kareem* that it was essential that in order for an appeal under the EEA Regulations to succeed an applicant had to establish not just that the marriage was a valid marriage in the country where it is said to have taken place but that it would be regarded as valid in the country of nationality of the EU national who was the other party to that marriage. Mr Owusu did not seek to contest this interpretation of what the Tribunal had found in *Kareem*.

11. Mr Wilding also referred the Tribunal to what was said by the Tribunal in *Kareem* at paragraph 14, as follows:

> "Whilst considering the issue of evidence of marriage, we remind ourselves that the proof of the law of another country is by evidence, including proof of private international law of that other country. Such evidence will not only have to identify relevant legal provisions in the other country but

> identify how they apply in practice. A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail."

12. Accordingly the key question was whether or not the marriage was valid in Holland and the judge had made no finding with regard to that.

13. Even though the judge had referred at paragraph 11 of her determination to the claimant's assertion that there was evidence from the lawyer to the effect that the marriage would be recognised in the Netherlands, she had not made any finding on this point and had not even implicitly accepted that evidence. In any event, if the Tribunal had actually looked at the letter from the lawyer this did not even go as far as to say that the marriage **would** be considered as valid in the Netherlands.

14. On behalf of the claimant Mr Owusu accepted that the First-tier Tribunal had been wrong to find that it was only if it did not consider that there was a valid marriage in Ghana that it would have to go on to consider the second requirement which was whether or not the marriage would be considered as valid in the Netherlands. However, he referred to paragraph 13 of the determination (which I have already set out above) and sought to argue that it was implicit within the determination that the judge had considered that there was evidence supporting the contention that the marriage would be regarded as valid in the Netherlands. Although Mr Owusu accepted that the judge had not expressly stated that she found that the marriage was valid according to Dutch law, at paragraph 19 reference was made to the head note in *Kareem* and it was implicit in her decision that the marriage **was** valid in the Netherlands because not only was there a letter from the Dutch lawyer but there was also a letter from the Dutch Embassy which referred to paragraphs 27 and 28 of *Kareem*.

15. In answer to a question from the Tribunal, it was accepted, however, that the letter from the Dutch Embassy did not make any reference to what was said at paragraph 29 of *Kareem* to which reference will be made below.

16. Mr Owusu then addressed the Tribunal with regards to what was said in the letter from the Dutch lawyer and acknowledged that in that letter she only said that the marriage was "probably not against our public order".

Discussion

17. In my judgment it is quite clear that the First-tier Tribunal Judge did not have proper regard to the guidance given in *Kareem*, which as a reported decision was binding upon her. It is clear from paragraph 11 of *Kareem* (as Mr Owusu acknowledged he was obliged to accept) that in the words of the Tribunal the issue of "whether a person is married is a matter that falls within the competence of the individual member states". In other words, in order for this claim to succeed it has to be established that the marriage would be regarded as valid in the Netherlands. As the Tribunal in *Kareem* made clear at paragraph 14 the evidence to justify this finding "will not only have to identify relevant legal provisions in the other country but

identify how they apply in practice" and that "a lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail."

18. *Kareem* was concerned with the position in Holland and sets out relevant extracts from the Dutch Civil Code (that is Articles 10.31 and 10.32) at paragraphs 27 and 28 but then at paragraph 29 states as follows:

> "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."

19. This must be seen in the context of the Tribunal's finding at paragraph 68 which forms the substance of the head note of *Kareem* of which for present purposes the relevant passage is that contained at paragraph 68(g) (set out at the beginning of the reported decision in the head note) which is as follows:

> *"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."*

20. Before turning to consider the "evidence" provided before the First-tier Tribunal (and no further evidence has been produced to this Tribunal for the purposes of this appeal) I must first make formal findings with regard to Judge Murray's determination. As I have indicated above it is in my judgment quite clear that she misunderstood the effect of the guidance given in *Kareem* because she did not understand that the validity of the marriage in Holland needed to be established in addition to the validity of the marriage in Ghana and that this was necessary even if a decision was reached that the marriage would be regarded as a valid marriage in Ghana. This was an error of law. Whether this was a material error such that it is necessary to set aside the decision and remake depends upon whether or not there was anyway a finding that the marriage would be regarded as valid in the Netherlands, or whether such a finding was implicit in the determination, and if so whether it would have been open to the judge to make such a finding; this is because if there was an explicit or even implicit finding to this effect which is sustainable, then the error which I have just identified would not be a material one.

21. Plainly, and as accepted on behalf of the claimant by Mr Owusu, there was no explicit finding that the marriage was valid in the Netherlands. In my judgment also there was not even an implicit finding to this effect. The judge simply recorded the assertion by Counsel that the marriage would be treated as valid in the Netherlands but did not consider this aspect of

the case at all in her findings. This is possibly because having found that the marriage was valid in Ghana she did not appreciate that it was necessary also to consider whether or not the marriage would be treated as valid in the Netherlands. Indeed, as already recorded above she stated in terms that it would not in those circumstances be necessary to reach such a finding. In the absence of such a finding, therefore, clearly the judge was not in a position to find in light of the guidance in *Kareem* that this was a valid marriage. It is accordingly incumbent upon this Tribunal now to remake the decision.

22. I now turn to remake the decision. The only issue before me is whether on the evidence which is now before this Tribunal it is established that the marriage is recognised or would be recognised as valid in the Netherlands. If it is, then in light of the judge's finding that the marriage would be regarded as valid in Ghana the conditions set out in *Kareem* would be satisfied; however, if there is insufficient evidence which can satisfy this Tribunal that the marriage would be regarded as valid in the Netherlands, then I cannot so find and the claimant's appeal must be dismissed.

23. I turn first of all to the letter from the Dutch Embassy which is in very brief terms and while referring to the relevant Articles contained within the Dutch Civil Code merely says that

> "an English summary of the relevant parts is given in [paragraphs] 27 and 28 of the Upper Tribunal's determination in the case of *Kareem (Proxy marriages - EU law)* [2014] UKUT 00024",

but which very significantly does not refer to the finding at paragraph 29 of *Kareem* that

> "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."

24. It is in this context that I set out the final paragraph of this letter which is as follows:

> "The Dutch Embassy will only draw conclusions on the recognition of a marriage in the context of an application such as a Dutch passport application. It is therefore not possible to comment on the documentary evidence required."

25. Plainly this cannot by any stretch of the imagination be regarded as "reliable evidence about the recognition of the marriage under the laws" of the Netherlands.

26. I therefore have to turn to what is said to be the expert evidence of the Dutch lawyer and as it is short I set this out in full (it is a letter which was written to the claimant's solicitor, Mr Owusu who represented the claimant today). This letter is as follows:

> "Dear Mr Owusu,

> You asked me if a proxy Ghanaian marriage will be recognised in the Netherlands.
>
> I am specialised in international family law. As a family lawyer I represent a lot of expats with their divorce or other family law related matters. My clients live all around the world. I am a publisher in specialist journals as well. I am a teacher international private law at the University in Leiden next to my job as a lawyer. For answering your question I also had contact with a specialist working at the municipality in Amsterdam. He is an expert in international lineage law and we once gave a course together about problems in the area of international family law.
>
> According to Article 10:31 from the Dutch Civil Code an outer the Netherlands closed marriage that is legally follow the law of the state where the marriage took place will be recognised as such. There is one exception. Article 10:32 of the Dutch Civil Code stipulates that approval to an enclosed outdoor wedding is dismissed when the marriage is incompatible with the public policy. A valid foreign proxy marriage is (probably) not against our public order, so the proxy part will not be a stay in the way for recognition. Almost all valid foreign marriages are recognised in the Netherlands as long as they are not bigamies.
>
> However, I expect that the municipality will not consider for granted proved the existence of the marriage. Therefore I assume that recognition in the Netherlands should start with proving the marriage. If this marriage can be proven and if it is a formal marriage as you informed me, I don't expect problems with the recognition of this marriage in the Netherlands. Of course I can't give you guarantees. If you want to be sure, you should ask the municipality where the registration of the marriage should take place.
>
> I hope I informed you sufficiently. If any questions arise, please do not hesitate to contact me.
>
> ..."

27. This is in my judgment again clearly not "reliable evidence" about the recognition of this marriage under the laws of the Netherlands. It is clear from the use of the word "probably" that the writer of this letter is unable to give definitive evidence as to whether a foreign proxy marriage would be held to be against the public order of the Netherlands which is the issue on which the Tribunal in *Kareem* recognised the relevant Articles were silent and it is also clear from the use of the words "I can't give you guarantees" and "if you want to be sure, you should ask..." that the writer recognises that her advice, whatever it is, might be open to challenge. Further, this "evidence" does not "identify relevant legal provisions" in the Netherlands nor "identify how they apply in practice". Although it sets out the relevant codes it clearly does not purport to give a definitive answer to the question which at paragraph 29 the Tribunal in *Kareem* stated had not yet been answered.

28. In these circumstances the claimant has not satisfied the evidential burden which is upon her and in accordance with what was said by the Tribunal in *Kareem* at the end of paragraph 14, and I repeat "a lack of

evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail."

29. In this case the party with the burden of proving the relevant foreign law, which is this claimant, has failed to prove it and the inevitable consequence must be that her appeal fails and I will so find.

30. Before so doing, it is right that I deal briefly with one point which was made on behalf of the claimant when I had almost concluded giving my oral determination which was that the First-tier Tribunal Judge had not made any finding as to whether or not there was a durable relationship between the claimant and her alleged spouse. Had the Judge made a finding with regard to this it might have been open to the claimant to argue that the Secretary of State's decision was not in accordance with the law because she had not considered whether or not to grant a residence card under the provisions of Regulation 8. However, no application was made on behalf of the claimant to cross-appeal this aspect of the decision and in these circumstances such an argument is not before me and cannot be considered.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law and substitute the following decision:

The claimant's appeal against the decision of the Secretary of State, refusing to issue her with a residence card, is dismissed.

Signed:

Upper Tribunal Judge Craig Date:
11 August 2014