IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46537/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2015	**On 18 December 2015**
Delivered Orally	

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PATRICK ANKAMA ARTHUR-BADOO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss S Sreeraman, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of First-tier Tribunal Judge K W Brown who, sitting at Taylor House on 15 June 2015 and in a determination subsequently promulgated on 19 June 2015, allowed the appeal of the Respondent (hereinafter called the claimant) a citizen of Ghana born on 15 December 1977 against the decision of the Secretary of State to revoke his residence card and to refuse him admission to the United Kingdom in accordance with Regulation 19 of the Immigration (European Economic Area) Regulations 2006.

2. The claimant had sought admission to the United Kingdom under EC law in accordance with Regulation 11 of the 2006 Regulations on the grounds that he was a family member of a French national. He held a residence card issued by the Home Office on 2 July 2013 valid until 2 July 2018. However the Secretary of State was satisfied that the claimant was divorced from the French national on 1 August 2014 and there was a declaration to that effect dated 28 August 2014 and that he was not therefore the family member of an EEA national who had a right to reside in the United Kingdom.

3. In her letter of refusal the Secretary of State pointed out that in the letter sent to the claimant when he was issued with a residence card it was stated "The Directorate should be notified immediately if your family member decides to leave the United Kingdom or ceases to exercise treaty rights here or if you cease to be a family member". Whilst it was noted that the claimant married his spouse on 10 November 2012 it subsequently came to the Secretary of State's attention that the claimant and his French national wife were now divorced. Thus as he was no longer deemed to be a family member under the 2006 EEA Regulations the Secretary of State considered the claimant's application to see if he qualified for a Retention of Rights following divorce under Regulation 10(5).

4. It was the view of the First-tier Tribunal Judge that as the Secretary of State asserted that the claimant was now divorced from his wife the burden rested with her to show that the claimant and his wife were in fact divorced, and if that could not be shown then the judge must allow the appeal following the decision in Diatta (1985) ECJ 267/83. Further and even if the judge found that the claimant and his wife were estranged, the case of Diatta supported the claimant's case that the Secretary of State was wrong in law to make the decisions that were the subject to the appeal.

5. The judge concluded the Secretary of State had previously accepted that the claimant was validly married to an EEA national exercising Community rights in the UK but in order to take action to revoke the claimant's Resident Permit and to remove him to Ghana, it had to be shown by the Secretary of State, that the claimant and his wife were in fact divorced. Accordingly applying the case of Diatta he found in favour of the claimant and allowed the appeal.

6. In successfully seeking permission to appeal the Secretary of State in her grounds had this to say:-

> "The Judge of the First-tier Tribunal had made a material error of law in the determination.
>
> This was a hearing in which neither the Appellant nor the Respondent was represented. It is acknowledged at the outset that there were case working errors made by the Home Office in that it appears that firstly, relevant documents, namely the marriage dissolution papers from Ghana, were omitted from the appeal file. Secondly, it appears that a copy of the appeal

file was either not served on the IAC or not available to FtTJ Brown at the hearing.

That said, it is clear from the determination that the Home Office appeal file had been served upon the Appellant since he was able to produce his copy at the hearing and this was copied for use by the Tribunal.

It is submitted that the FtTJ has erred in the following ways.

Having been made aware as is clear from the determination that the marriage dissolution documents had been sent to the Home Office by the legal representatives of the Appellant's former wife, it was incorrect for the FtTJ to say at paragraph 13 that the Respondent had 'manifestly' to show that the Appellant was divorced."

7. I pause there because as Miss Sreeraman pointed out in the course of her submissions to me, at paragraph 9 of the determination, the judge had stated as follows:

> "9. The IO referred to the fact that it is noted on the Respondent's files that the Appellant's wife had informed the Home Office on 10 September 2014 that she had divorced the Appellant and that she would be sending proof of the divorce to the Home Office. It was also noted that on 16 September 2014 a letter was received from her legal representatives that included a copy of the divorce certificate. The IO noted that notes attached to the file relating to the correspondence stated that the Appellant's wife did not want the fact that she had informed the Home Office of the divorce and had provided proof to be disclosed to the Appellant. The IO telephoned the Appellant's wife who stated that he had not lived with her since 18 September 2014 when she had changed the locks on her fault because she had been subjected to emotional abuse from the Appellant. she had stated that she had called her family in Ghana to organise the divorce **and that the certificate had been sent to the Home Office**. She had said that she was still living with the Appellant at the time of the divorce but she was scared to tell the Appellant that he had threatened her that if she divorced she would live to regret it. A copy of the telephone interview was made available in the bundle." (Emphasis added)

8. In such circumstances Miss Sreeraman submitted that for the judge at paragraph 13 to state that "the Respondent has manifestly failed to show that they are divorced" flew in the face of the evidence to the contrary, indeed acknowledged by the judge at paragraph 9.

9. The grounds continue as follows:-

> "It was clear that the documents existed and who had them. It is submitted that the correct course of action would have been to have afforded the same courtesy to the unrepresented Respondent as would have inevitably have been afforded to an unrepresented Appellant in that he would have been given the opportunity by way of recess or, if necessary, adjournment of the case in order for the documents to be produced.
>
> It is submitted that failing to adjourn in these circumstances unfairly disadvantaged the Respondent notwithstanding her admitted case working errors.

> It is further submitted that the FtTJ has failed to have regard to the provisions of there relevant case law in this case, in that the matter of the continuance of a claimed marriage was at the centre of things.
>
> The FtTJ had had no regard whatsoever to Kareem (Proxy marriages – EU law) [2014] UKUT 24 or to TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC) in deciding on the original validity of the claimed marriage and subsequently whether a claimed divorce was either valid or not needed. The Appellant's former wife was a French national and TA requires the Tribunal to look at the validity of the marriage in the context of the laws of the EEA national's home country.
>
> It is submitted that failure to engage relevant case law is an error of law."

10. Indeed, in granting permission to the Respondent on 7 September 2015, First-tier Tribunal Judge Mark Davies stated as follows:

> "The judge finds at paragraph 13 of his decision that the Respondent had 'manifestly failed' to show that the Appellant and his wife were divorced. It is arguable that such a finding is in direct conflict with the acknowledgement by the judge in paragraph 9 of his decision that such evidence existed."

11. FtTJ Davies proceeded to grant permission in respect of all of the grounds having been satisfied that they disclosed arguable errors of law.

12. Thus the appeal came before me on 26 November 2015 when my first task was to decide whether the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

13. I was aware of the fact that the claimant was not legally represented and therefore I both carefully explained to him the nature of the hearing and also ensured that he was provided with a further copy of the Tribunal bundle in relation to which by way of refreshing his memory, I read over to him the Respondent's grounds of challenge to which I have above referred. He confirmed to me that he understood clearly what the position was and indeed told me that he had himself carefully considered the decision of the Tribunal in Kareem. I afforded him the opportunity to take notes of Miss Sreeraman's submissions which he did and having heard her submissions I listened carefully to the submissions of the claimant. Interestingly he told me that he had himself "not been given the chance to see the certificate" although he did not accept that it was genuine.

14. The claimant further submitted that having himself considered the guidance in Kareem he believed that even if the judge had followed that guidance, in the claimant's opinion, the judge was to come to the same decision.

15. Miss Sreeraman relied on the grounds and submitted that although no application for an adjournment was made by the Secretary of State prior to the hearing, the fact remained that the Secretary of State was not represented at the hearing and that the judge's failure to adjourn of his

own motion in circumstances when it was within his knowledge that the divorce document did exist, unfairly disadvantaged the Secretary of State and effective deprived her of a fair hearing.

16. Further and in any event, the determination was materially flawed by virtue of the fact that the judge failed to have regard to Kareem and TA in his consideration of whether or not there continued to be a valid marriage or indeed a valid divorce. He had then allowed the appeal when it conflicted with the evidence of the wife that a divorce had taken place. Miss Sreeraman maintained therefore that such reasoning was perverse and irrational "at the very least".

17. At the conclusion of the parties' respective submissions, I informed them that I was satisfied that the judge had materially erred in law such that his decision should be set aside.

18. It is well to remind ourselves that the important case of Kareem confirmed that the starting point was whether the marriage was contracted in accordance with the national law of the Member State of the qualifying person. Indeed at head note (g) it is stated *inter alia*

> "It should be assumed that without independent and reliable evidence about the recognition of the marriage and the laws of the EEA country and/or the country where the marriage took place the Tribunal is likely to be unable to find sufficient evidence has been provided to discharge the burden of proof."

19. This reflected paragraph 14 of Kareem where the following was stated:

> "14. 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."

20. This decision was reinforced by the Tribunal in TA and Others (above) in which the head note stated inter alia as follows:

> "Following the decision in Kareem ... the determination of whether there was 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 obtained nationality." [My underlining]

21. It would also be as well to point out that at paragraph 8 of Kareem, it was noted that the CJEU found that whether a person was married was a matter that fell within the competence of the individual member states. In that regard and whilst on the subject of relevant case law, it was well to take account of the following cases. In SH (Afghanistan) [2011] Civ 1284 it was held inter alia that when considering whether the judge ought to have granted an adjournment the test was not whether his decision was

properly open to him or was Wednesbury unreasonable or perverse. The test and the only test was whether it was unfair. In Nwaige (Adjournment: fairness) [2014] UKUT 00418, a decision of the President, the guidance in SH was endorsed and it was thus further stated that the question to ask was "was there any depravation of the affected party's right to a fair hearing". The President further referred to the fact that the provisions of the Rules had to be construed and applied by reference to the overriding objective enshrined in Rule 4, namely:

> "… to secure the proceeding before the Tribunal are handled fairly, quickly and as efficiently as possible; and where appropriate, that members of the Tribunal have responsibility for ensuring this in the interests of the parties to the proceedings and in the wider public interest."

22. In that regard I am mindful that no application in the present case for an adjournment was made by the Secretary of State prior to the hearing but as the grounds submit, give that it was clear that documents were said to exist to show that the claimant was divorced and mindful that the Secretary of State was as much a party to this appeal as was the claimant and thus entitled to the same sensitivity and duty of fairness, the judge could on his own volition have adjourned the appeal. He could for example have required the Secretary of State to adduce supporting documentary evidence and for the claimant to have the opportunity to comment upon such evidence. As held in MM (Fairness E&R) Sudan [2014] UKUT 00105 (IAC) where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring a decision of the First-tier Tribunal to be set aside.

23. I am mindful that as submitted by the Secretary of State there were case working errors made by the Home Office in that relevant documents, namely the marriage certificate and marriage dissolution papers from Ghana were omitted from the appeal file. Again MM further held that an error of law might be found to have occurred in circumstances where some material evidence through no fault of the First-tier Tribunal was not considered, with resulting unfairness and so I find in the circumstances of this case.

24. It is necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and in brief terms their reasons so that the parties can understand why they had won or lost. See Budhathoki (Reasons for decisions) [2014] UKUT 00340. I find that this has not happened in the present case. Further the decisions and guidance in Kareem and TA significantly predated the determination of the First-tier Tribunal Judge, yet there is nothing in his reasoning to suggest that he was mindful or even aware of their guidance. As the former Immigration Appeal Tribunal (IAT) made clear in the past, it was always unfortunate when an Immigration Judge appeared to operate in a vacuum as if reported decisions of the Tribunal did not exist for guidance and consideration.

25. For the above reasons I have concluded that the First-tier Tribunal Judge materially erred in law and as a consequence his decision should be set aside. I have considered how the decision should be remade and after discussion with both parties I have agreed with their submission that the case should be heard afresh. I agree.

26. We further agreed having regard to the error of law found and the likely length of the hearing that there were highly compelling reasons falling within paragraph 7.2(b) of the Senior President's Practice Statement as to why the decision should not be remade by the Upper Tribunal to determine in the interest of judge and that the appeal of the claimant should be heard afresh in the First-tier Tribunal.

27. For the reasons that I have above given and by agreement of the parties I conclude therefore that the appeal should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge K W Brown to determine the appeal afresh at Taylor House on the first available date with a time estimate of 3 hours. In this regard I am told by the claimant that there are likely to be three witnesses giving oral evidence including himself and that no interpreter will be required.

28. I was most helpfully advised by Miss Sreeraman on behalf of the Secretary of State that the divorce documents concerned in this case are contained in the claimant's former partner's file and she has undertaken to ensure that it is made available in advance of the remitted hearing in that copies will be served upon the claimant and the Tribunal comfortably in time.

Notice of Decision

29. The First-tier Tribunal erred in law such that the decision should be set aside and none of their findings preserved.

30. I allow the Secretary of State's appeal to the extent that I remit the making of the appeal to the First-tier Tribunal at Taylor House before a First-tier Tribunal Judge other than the judge to whom I have above referred.

31. No anonymity direction is made.

Signed Date 10 November 2015

Upper Tribunal Judge Goldstein