**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/16282/2013

**THE IMMIGRATION ACTS**

| **Heard at : Field House** | **Determination Promulgated** |
|---|---|
| **On : 16 July 2014** | **On : 4 August 2014** |

**Before**

**THE HONOURABLE MR JUSTICE LEWIS**
**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**TEMITOPE BENEDICTA ENAHORO**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr J Aina of John & Co Solicitors

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Enahoro's appeal against a decision to refuse to issue her with a residence card as the family member of

an EEA national, under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). For the purposes of this decision, we shall refer to the Secretary of State as the respondent and Ms Enahoro as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria, born on 21 November 1970. On 14 September 2012 she made an application for a residence card as the spouse of an EEA national who was exercising treaty rights in the United Kingdom. She claimed to be the spouse of a Slovakian national, Jan Tokar, whom she had married by way of a proxy marriage under Nigerian customary marriage laws on 15 January 2012.

3. The appellant's application was refused on 25 April 2013. The respondent, in refusing the application, noted that as evidence that she was related to an EEA national she had provided a marriage certificate dated 19 January 2012 that stated that she married the EEA national on 15 January 2012. The respondent noted that no history had been submitted to show that the relationship existed prior to her being issued with the marriage certificate. The respondent did not accept that the marriage was valid since there was no evidence to show that either party had travelled to Nigeria to attend the wedding and it was not accepted that customary marriage via proxy was considered to be valid. Furthermore, it was considered that the various conditions which needed to be fulfilled for a customary marriage to be valid in Nigeria had not been fulfilled, such as the need for consent and for a dowry. The respondent also found that the appellant had failed to demonstrate that she was in a durable relationship with, and thus an extended family member of, the EEA national for the purposes of regulation 8(5) of the EEA Regulations.

4. The appellant's grounds of appeal before the First-tier Tribunal asserted that the marriage was valid in the United Kingdom because it was valid in the place where it was celebrated, namely Nigeria. It was asserted further that the appellant was in a durable relationship with her EEA national spouse. The grounds also raised Article 8 of the ECHR.

5. The appellant's appeal was heard by First-tier Tribunal Judge Tootell on 7 January 2014. The appellant attended and gave oral evidence. Her EEA national spouse was not present and was said to be in Bradford, further to a disagreement they had had just before Christmas. She was nevertheless content to proceed with the appeal in his absence. She gave evidence that she had been in a relationship with her husband since June 2010 and that they had started cohabiting in 2012, after the wedding. Her husband's cousin and her own parents had been present at the wedding in Lagos.

6. Judge Tootell allowed the appeal, finding that the appellant's marriage was valid. She noted the absence of any allegation from the respondent that the marriage certificate was inauthentic and the lack of any suggestion that the authority issuing the marriage certificate in Nigeria did not have the legal power to confirm the facts to which it had attested in the documentation. She

found that the respondent was wrong to consider that proxy marriages were not valid under Nigerian law and she considered that the relevant conditions for a customary marriage to be valid in Nigeria, such as consent to the marriage and evidence of the payment of a dowry, had been fulfilled. She concluded that since the marriage was considered valid under Nigerian law the appellant fell within subparagraph (b) of the head-note to Kareem and was accordingly validly married to an EEA national and, as such, was entitled to a residence card.

7. The respondent sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had failed to follow the approach in Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24 with respect both to the consideration of the recognition of the marriage under Slovakian law and to the validity of the marriage under Nigerian law.

8. Permission to appeal was granted on 11 April 2014.

## Appeal before the Upper Tribunal

9. The appeal came before us on 16 July 2014. We handed Mr Aina a copy of the Upper Tribunal decision in TA and Others (Kareem explained) [2014] UKUT 316 and gave him an opportunity to read it. Having done so he nevertheless confirmed that he was maintaining that there was no error of law in the judge's decision and he produced an internet article from the "Migration Information Center" which he said addressed the status of the marriage under Slovakian law.

10. We heard submissions from both parties and concluded that the judge had materially erred in law such that her decision had to be set aside with respect to her finding on the validity of the marriage. She had clearly misunderstood what Kareem decided in regard to the consideration of the law of the EEA national's country and had, by concluding that there was no need to go on to consider the validity of the marriage under Slovakian law, adopted an approach which the Upper Tribunal in TA had specifically found to be wrong. The internet article produced by Mr Aina had not been before the judge and neither had there been any other evidence relating to Slovakian law. As the Upper Tribunal found in TA, 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 obtains nationality. Accordingly the judge's decision could not stand.

11. Mr Aina confirmed that there was no further evidence to be produced in the appellant's appeal and accordingly it was agreed by all parties that there was no reason why we could not proceed to heard submissions in order to re-make the decision.

12. Mr Aina relied upon the internet article from the "Migration Information Center" in submitting that the appellant's marriage would be recognised under

Slovakian law. He submitted that the marriage was recognised as valid in Nigeria and the Slovakian authorities could not go behind the conclusions of the Nigerian authorities in that respect. In the alternative, the appellant was in a durable relationship with the EEA national.

13. Mr Avery submitted that the internet article was inadequate as evidence of the recognition of the appellant's marriage under Slovakian law and that it could not be argued that the appellant and the EEA were in a durable relationship since it was accepted that they were separated.

14. Mr Aina, in response, submitted that the respondent had not produced evidence to rebut the suggestion that the marriage was recognised under Slovakian law. He submitted that it was possible to be separated but also in a durable relationship. At that point he asked that in the event we found the marriage not to be a valid one we remit the appeal to the First-tier Tribunal for evidence to be considered as to the durability of the relationship. However we reminded him that he had advised us that there was no further evidence and that there was therefore no purpose to be served by remitting the appeal when all issues could be determined by ourselves. He accepted that that was the case.

## Consideration and Findings

15. In TA, the claimants sought to argue that the decision in Kareem involved a two stage process for consideration of the validity of a marriage for the purposes of the 2006 Regulations, whereby it was only if there was doubt as to whether a marriage had been lawfully contracted in the country in which the marriage took place (ie Nigeria) that it was necessary to go on to consider whether the marriage had been contracted in accordance with the national law of the sponsor's EEA country. The Upper Tribunal unequivocally rejected that approach, concluding that:

> "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."

16. Accordingly, even if it were the case that the appellant's marriage was recognised as valid under Nigerian law (and we shall address that matter later), she still has to demonstrate that the marriage is recognised under the law of the country of her EEA national sponsor, namely Slovakia.

17. The only evidence produced by the appellant in that respect consists of a print-out from the internet of an article from the Migration Information Center entitled "Marriage between a Slovak citizen and a foreign national". In Kareem, when referring to the evidence required to establish the validity of marriage in the EEA national's country, the Tribunal found 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."

18. The article relied upon by the appellant is no more than a general guidance. It does not contain references to the relevant legislation and gives no details of the authority or expertise of the author. Further, whilst it states that marriage between a Slovak citizen and a foreign national concluded with a competent authority in a foreign country is recognised in the Slovak Republic if valid in the country in which it was concluded, it makes no reference to customary or proxy marriages and whether they are recognised under Slovakian law. Indeed, the article commences by stating that "A Slovak citizen may marry a foreign national in Slovakia or in a foreign country in front of that country's authorities", which suggests that proxy marriages are not in fact recognised. In addition, the article provides a list of documents to be submitted before the wedding ceremony, with no accompanying evidence from the appellant to confirm that the relevant documents were submitted in accordance with the requirements. In the circumstances, we consider that the evidence relied upon by the appellant in respect to the status of her marriage under Slovakian law is wholly inadequate and does not go anywhere near meeting the requirements as set out in Kareem.

19. We are accordingly in no doubt that the appellant has failed to demonstrate that her marriage to the EEA national sponsor, even if recognised as valid under Nigerian law, was contracted according to the national law of Slovakia. On that basis alone we are not satisfied that the appellant has shown that she is in a marital relationship with a qualified person for the purposes of the EEA Regulations and it is not, therefore, necessary for us to consider the validity of the marriage under Nigerian law.

20. However for the sake of completeness we would add that we do not accept that the documentary evidence produced by the appellant satisfactorily establishes that she has contracted a valid marriage in Nigeria. Judge Tootell accepted that there was evidence of her father's consent to the marriage and we assume that that evidence consisted of an affidavit purporting to have been sworn by him at the Customary Court. However, there is no evidence of such consent from the appellant's family, nor indeed of their presence at the ceremony. Likewise, whilst Judge Tootell found there to be evidence of the payment of a dowry, we cannot see that there is any such evidence other than the reference in the appellant's statement and a letter dated 18 January 2012 purportedly from Barrister Sikiru Adisa Busari referring to a dowry being paid but providing no details. As is made clear in Kareem, such requirements have to be met in the case of a customary marriage (see paragraph 54) and, as in that case, the evidence before us is extremely weak. When taken together with the absence of any evidence that the relationship between the appellant and

the EEA sponsor had existed prior to the issue of the proxy marriage certificate, despite such a matter being raised in the refusal letter, and the lack of evidence of the relationship existing subsequent to the date of the certificate, as well as the absence of any evidence from the EEA sponsor, we consider that the evidence overall of an existing marriage is highly dubious and unreliable. However even taking the case at its highest we do not consider that the appellant has fulfilled the documentary requirements for a customary marriage and we are not satisfied that she has demonstrated that she entered into a valid marriage in Nigeria.

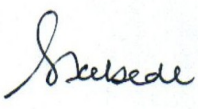
21. Accordingly, we do not accept that the appellant is married to Mr Tokar and as such she is not entitled to a residence card as the spouse of an EEA national. In the absence of any satisfactory evidence of a genuine and durable relationship and in the light of the appellant's own evidence that she and her sponsor have separated, it is plain that she cannot meet the regulations as an extended family member of an EEA national under the Regulations. We find therefore that she is not entitled to a residence card under the EEA Regulations.

22. The appellant cannot succeed on Article 8 grounds. For the reasons given above we do not accept that there is any family life between her and Mr Tokar. She cannot meet the requirements of Appendix FM or paragraph 276ADE of the immigration rules. There is no evidence before us to suggest that there are any arguable grounds for looking beyond the rules in regard to private life, pursuant to the guidance in Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640. Any requirement for the appellant to leave the United Kingdom would not be in breach of Article 8.

23. Accordingly we would dismiss the appellant's appeal under the EEA Regulations and on Article 8 grounds.

## DECISION

24. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. We re-make the decision by dismissing Ms Enahoro's appeal on all grounds.

Signed 

Upper Tribunal Judge Kebede