



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/02277/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 11 October 2017

On 14 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**SOUMAILA KANADJIGUI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge McGrade promulgated on 30 December 2016.
2. The Appellant is a citizen of Mali born on 15 July 1988. On 22 May 2015 he made an application for a Residence Card as confirmation of a right of residence as the spouse of an EEA national. His application was based on his relationship with Ms Marieme Abdoulaye Kane, born in Senegal on 22 May 1987 but subsequently a French national.

3. The Appellant and Ms Kane had been married by proxy in a ceremony in Mali on 12 April 2015. In support of the application it was said that Ms Kane was exercising 'Treaty rights' as a worker by reason of her employment with Malindobiko Limited, such employment having commenced on 9 February 2015.
4. The Secretary of State for the Home Department refused the Appellant's application pursuant to the case of **Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC)**. The decision-maker identified that the Appellant's marriage to Ms Kane was a proxy marriage and that the available evidence indicated that such a marriage was not recognised in France, that is to say the country of nationality of the relevant EEA national in this case. In such circumstances the decision-maker was not satisfied that the Appellant could claim to be a family member within the meaning of regulation 7 of the Immigration (European Economic Area) Regulations 2006.
5. The decision-maker also considered regulation 8(5) in respect of 'durable relationship', but was not satisfied in this regard bearing in mind the amount of time that had elapsed between the date of the marriage and the application, and the absence of any evidence that the couple had been in any sort of relationship prior to that date.
6. The decision-maker also expressed doubt in respect of the exercise of Treaty rights by Ms Kane. The relevant passage in the 'reasons for refusal' letter is in these terms:

"In addition to the above the Home Office would also cast doubt upon that of your EEA national's employment with Malindobiko Limited T/A BinkoCartridges.com as the wage slips you have provided denote that your EEA Sponsor is being paid by cash, however, this office is unable to see any deposits of a similar amount being paid into her bank account. In addition to this after researching the EEA Sponsor employer via Companies House it has also become apparent that the EEA Sponsor's employment company is currently dormant and not recently filed their accounts that were due in June 2015."
7. The Appellant appealed to the IAC. The grounds of appeal attached to the Notice of Appeal are in generic terms and do not descend to any factual particulars in respect of the circumstances of the Appellant, and do not otherwise engage directly with the reasoning of the Respondent.
8. The appeal was listed before First-tier Tribunal Judge McGrade on 8 December 2016. The Appellant did not appear and was not represented.

The Judge expressed his satisfaction that reasonable steps had been taken to notify the Appellant of the hearing and in all of the circumstances considered that it was in the interests of justice to proceed with the hearing in the absence of the Appellant (paragraph 4).

9. The Judge, like the Respondent, also relied upon the decision of **Kareem** and concluded that the Appellant did not satisfy regulation 7 for essentially the reasons given by the Respondent in the 'reasons for refusal' letter.
10. The Judge then went on to observe that pursuant to the case of **Sala (EFMs: Right of Appeal) [2016] UKUT 411** the Tribunal had no jurisdiction to determine an appeal based on regulation 8(5) and took no further action in respect of that aspect of the case. The appeal was dismissed in respect of the regulation 7 issue. The Judge in those circumstances, not surprisingly, did not turn his mind to the issue in respect of the exercise of Treaty rights by Ms Kane.
11. An application for permission to appeal was made by the Appellant by way of application form signed on 16 January 2017. The grounds of appeal are limited to the following: "*Procedural unfairness **FP (Iran)***".
12. Notwithstanding the extremely limited nature of those grounds, First-tier Tribunal Judge McGinty – quite properly bearing in mind that the Appellant appeared to be an unrepresented individual – gave close and careful scrutiny to all the circumstances of the case. In respect of **FP (Iran)** Judge McGinty identified that the Appellant appeared to be referring to a case where an Appellant's legal representative had failed to notify the Tribunal of a change of address (see paragraph 3 of the grant of permission to appeal). Judge McGinty noted that the Appellant had previously been represented and that the address given on his application for permission to appeal was a different address from the address on the notice of hearing that had been sent. In such circumstances Judge McGinty observed:

"It is therefore possible that the Appellant is arguing that there was procedural unfairness in the Judge having to decide the appeal in the absence of the Appellant, in circumstances where he had moved address and had not been notified by his solicitors of the appeal hearing."
13. Judge McGinty also identified that the case of **Kareem** had been overtaken by the decision in **Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178**. In those circumstances Judge

McGinty also granted permission on the basis that it was arguable that the Judge had erred in law when finding that the Appellant and the sponsor had not shown that they were legally married.

14. For completeness I should note that Judge McGinty also decided to extend time for the appeal.
15. The Respondent has filed a Rule 24 response dated 30 August 2017. So far as the procedural fairness point is concerned that response submits that the onus is on the Appellant to show that there had been any procedural unfairness in respect of notification. Otherwise the Respondent acknowledges the impact of **Awuku** on the decision in **Kareem** and therefore the decision in the instant appeal.
16. It is in the above circumstances that the matter comes before me today.
17. The Appellant has not attended the appeal, nor has there been any communication from him explaining his non-attendance. I am satisfied that notice of hearing has been communicated to the Appellant at the address that he provided on his application for permission to appeal, and there has been no intervening communication from the Appellant to suggest that he has changed address in the meantime. In the circumstances I am satisfied that it is appropriate to proceed in the Appellant's absence.
18. I note that the Appellant has filed no evidence, and, as I say, he has not attended today, to support the allegation of procedural unfairness. In the circumstances I am not satisfied that the factual premise of the potential challenge identified by Judge McGinty has been made out. Accordingly I reject that line of challenge.
19. However, as Mr Avery very properly accepts, the Judge was clearly in error in applying **Kareem** to the Appellant's circumstances in light of the decision in **Awuku**. It may well be that the decision in **Awuku** had not been published by the time of the decision and consideration by Judge McGrade, but nonetheless it now provides an accurate statement of the law and the decision of Judge McGrade must be considered in that light.
20. In the circumstances it seems to me that that error of law was material because it led to the rejection by Judge McGrade of the case pursuant to regulation 7. I conclude that the decision of the First-tier Tribunal contained a material error of law and must be set aside.

21. It falls to me to consider how best to remake the decision. I note that the Appellant has not explained his non-attendance before the First-tier Tribunal and there is nothing by way of explanation of his non-attendance before this Tribunal. In the circumstances I do not consider it appropriate to remit this appeal again to the First-tier Tribunal but am of the view that it should now be determined on the basis of all of the available evidence.
22. Pursuant to **Awuku** I do not uphold the Respondent's reasoning with regard to the proxy marriage: in the circumstances I am satisfied that the Appellant did produce evidence in support of his application that showed he was in a marital relationship with an EEA national.
23. However, the Appellant has not addressed in his grounds of appeal before either the First-tier Tribunal or the Upper Tribunal the issues raised in respect of the exercise of Treaty rights by Ms Kane. Nor was there anything filed before the First-tier Tribunal in this regard. Nor has anything now been filed before the Upper Tribunal, and neither the Appellant nor Ms Kane have attended in order to assist in the event that the Tribunal decided it was appropriate to proceed to remake the decision. (In this latter regard I note the Directions issued by the Tribunal to the parties on 30 August 2017.)
24. In such circumstances I consider there is substance to the matters raised in the 'reasons for refusal' letter in respect of Ms Kane's claimed employment. I find that those concerns have not been allayed by the Appellant or by Ms Kane. Accordingly I find that the Appellant has failed to demonstrate on a balance of probabilities that his partner is exercising Treaty rights in the UK. In those circumstances the appeal fails under the EEA Regulations.

Notice of Decision

25. The decision of the First-tier Tribunal contained a material error of law and is set aside.
26. I remake the decision in the appeal. The appeal is dismissed.
27. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: 13 November 2017

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed:

Date: 13 November 2017

Deputy Upper Tribunal Judge I A Lewis
(*qua* a Judge of the First-tier Tribunal)