



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

Appeal Number: IA/51820/2013

THE IMMIGRATION ACTS

Heard at Field House

On 24 April 2014

Determination

Promulgated

On 20 May 2014

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

**MR JAMES ABIAM DANSO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Awal

For the Respondent: Mr P Duffy

DETERMINATION AND REASONS

1. The appellant is a citizen of Ghana who was born on 15 September 1969. He applied for a residence card as confirmation of a right of residence as the family member of an EEA national who is a qualified person. The Secretary of State refused the application because the appellant failed to produce a valid marriage certificate as evidence that he is related as

claimed to the EEA national. In the alternative the refusal notice states that the appellant applied for a residence card as a person who is in a durable relationship with an EEA national and although the application had been considered in accordance with Regulation 8 of the 2006 Regulations the appellant failed to prove that he is in such a durable relationship.

The Appellant's Grounds of Appeal

2. The appellant's grounds of appeal in essence are to the effect that he entered into a proxy marriage in Ghana with the EEA national whose name is Rosemond Osei Gyamfi ("Ms Gyamfi") which marriage was in accordance with the customary laws of Ghana as confirmed by the Ghana High Commission in London and the High Court of Justice in Ghana. It is said in the grounds that (a) the respondent failed to appreciate the statutory declaration from a competent court in Ghana which unequivocally states that all the necessary rites pertaining to the validity of the customary marriage were performed in the presence of elders from the two families, (b) the statutory declaration forming part of the evidence states that the customary marriage contracted on 23 February 2013 was done in accordance with the Ghanaian customary law and usage, (c) although the respondent stated that the appellant failed to provide the passport he entered the United Kingdom with the appellant is nevertheless entitled to a right of residence on the basis of the family relationship alone. That right is not subject to a requirement of lawful residence - see **Metock [2008] EUECJ C-127/08**. On the basis that the marriage was valid in the country in which it took place it should be recognised as valid everywhere else in the world. As per the case of **CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080** a proxy marriage should be recognised in English law as long as it is recognised in the country in which it was contracted.
3. The appeal was determined on the papers in the First-tier Tribunal. The appeal was dismissed very shortly on the basis that in light of the case of **Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC)** and because Ms Gyamfi is a Dutch national the judge had to be satisfied that the proxy marriage is valid under Dutch law. There was no such evidence before the judge and therefore he dismissed the appeal. The judge also recorded that the grounds of appeal did not raise Article 8 and commented that it was significant that the appellant had chosen to have the appeal determined on the papers. If he had attended a hearing any evidence would have been tested by cross-examination and the Tribunal would have wanted to know why, if the appellant and Ms Gyamfi were in a genuine relationship, they had not chosen to marry in the United Kingdom.
4. The appellant sought leave to appeal on the basis that the judge's fact-finding exercise was materially flawed. The appellant had the right to either opt for a paper appeal or an oral hearing. The judge failed to take a structured approach to the requisite fact-finding exercise. He should have found whether the appellant's partner was a qualified person within the meaning of Regulation 6 of the EEA Regulations and then proceeded to

make findings specific to the validity or otherwise of the appellant's proxy marriage. If those findings were adverse then arguably he should have considered whether the appellant was in a durable relationship with an EEA national exercising treaty rights and thereby entitled to a residence card. Furthermore two letters provided by the Ghana High Commission confirmed the authenticity of the documents provided and should have led to a finding as per the case of **CB** namely that a proxy marriage should be recognised in English law as long as it is recognised in the country in which it was contracted.

The Hearing before Me

5. Permission to appeal was granted and the matter came before me on an error of law hearing. I heard submissions from both parties. The appellant's representative produced a large bundle of documents numbered 1-137 which included witness statements of the appellant and Ms Gyamfi and a skeleton argument. These were said to be relevant and should be taken into account with the other documentation produced if I found that the First-tier Tribunal Judge had erred materially in law in dismissing the appeal for the reasons given.
6. In essence Mr Awal relied on the skeleton argument and submitted that because the marriage certificate was issued by a competent authority according to the registration laws of the country where the marriage took place this provided sufficient proof of the marital relationship. The appellant is a person who is the spouse of an EEA national who is a qualified person in the United Kingdom and can therefore derive rights of free movement and residence as per the Regulations. It was not therefore necessary to go on to consider **Kareem** because there is a valid marriage certificate and there is no doubt that the certificate has been issued by a competent authority.
7. Mr Duffy submitted that at best the judge erred in failing to deal with the appeal in a structured manner but he had in any event arrived at the correct result so that any mistake was not material. Had the appellant provided all the correct documentation the Secretary of State may have taken a different view as to both the marriage and whether the appellant and Ms Gyamfi are in a durable relationship.

My Deliberations

8. It cannot be seriously in issue that it is for the appellant to prove that his marriage to Ms Gyamfi is valid. Although reference is made throughout the documentation before me that the appellant has submitted to the Secretary of State a Ghanaian customary marriage certificate I have not identified that document in the papers before me. However, it is accepted by the respondent as set out in the Reasons for Refusal Letter (at the bottom of page 2) that such a certificate has been submitted and this states that the appellant was married to "your EEA national spouse in Ghana" on 23 February 2013 by proxy and that the marriage was

registered with the District Registrar on 10 May 2013. As to that registration document I have identified that in the papers before me.

9. The respondent states in the Reasons for Refusal Letter that this type of marriage (proxy) was governed by PNDC (Provisional National Defence Council) Law 112, Customary Marriage and Divorce (Registration) Law 1985 which was amended in 1991 to remove the mandatory requirement to register the customary marriage within a certain timeframe. Further it is accepted by the respondent that as the appellant provided a Ghanaian customary marriage certificate he has demonstrated that he voluntarily registered the marriage but goes on to say that the burden of proof is on him to demonstrate that the registration was done in accordance with the Customary Marriage and Divorce (Registration) Law 1985. Part 1 registration of customary marriage states that:-

“3. (1) The application for registration of the marriage shall be accompanied by a statutory declaration stating the following: -

- (a) the names of the parties to the marriage;
- (b) the places of residence of the parties at the time of the marriage;
- (c) that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with.

(2) The statutory declaration shall be supported by parents of the spouses or persons standing in loco parentis to the spouses except where there are no such persons living at the time of application for registration.”

10. It is therefore of importance to establish as per 3(1)(c) that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with. The case of **NA (Customary marriage and divorce - evidence) Ghana [2009] UKAIT 00009** is in the bundle at pages 113 and following. Paragraph 11 refers to the expert opinion prepared by Mercy Akman. That opinion appears to have been accepted by the Tribunal and states as follows:-

“5. The most common form of marriage in Ghana is the customary marriage. It is a type of marriage contracted under the particular tradition and customary practices of a group of people. Indeed until the introduction of civil marriages by the British in Ghana, then Gold Coast, the only form of marriage was the customary marriage. These days, civil or ordinance marriages and customary marriages co-exist and both are legally recognised. It is up to the parties to choose which form of marriage they desire. A valid customary marriage can only be validly contracted

between two Ghanaian citizens and both parties must have capacity to marry. This means that there should be no violation of any rule of tribal relationship. These rules differ from tribe to tribe. Thus, whilst in some traditions, a man cannot marry his cousin, other traditions accommodate cross-cousin marriages.

6. A particular characteristic of customary marriage which distinguishes it from the system of marriage in Europe and other places is that it is not just a union of 'this man' and 'this woman'. It is the union of 'the family of this woman' and 'the family of this man'. Marriage in the customary context therefore unites families and not merely the individuals.
7. It involves payment of a bride price by the bridegroom's family to the bride's family. If the appropriate bride price is not paid, there is no valid marriage, even if parties live as man and woman for many years. The acceptance of drink from the man's family is an indication of the consent of the wife's family to the marriage. In the Akan system which is the area from where the appellant hails, the bride price may take the form of drinks, cash, cloth and in the old days, gold dust. It is potentially polygamous in nature; a man may decide to marry as many women as his strength and resources can accommodate.
8. [Describes four types of customary marriage.]
9. [What happens when the woman is pregnant and unmarried.]
10. There is not always a formal ceremony. Even if there was, the couples do not have to be present at this ceremony for a valid marriage to take place, provided representatives of the two families are present as witnesses to the meeting or event."
11. At this point I note that in an Upper Tribunal decision IA/23315/2012 reference is made to a further expert report from Mercy Akman who gave evidence in **NA** that having carried out additional research and upon reflection she wished to clarify and revise her opinion to say that customary marriages are available between non-Ghanaian citizens. The Upper Tribunal Judge in that case then stated that she had concerns about the expert opinion because it was not sourced or evidence based which cast doubt in her view over not only that expert report but the evidence before the Tribunal in **NA**. Having taken note of that observation there was no further evidence on that aspect before either the First-tier Tribunal Judge in this appeal or before me.
12. It may be seen therefore that the statutory declaration is a very important document, always assuming that the expert's report states the law accurately. The statutory declaration provided to the respondent and which appears at 51 in the bundle gives certain detail. One declarant refers to being the father of the appellant and the other an "uncle" of Ms

Gyamfi. At paragraph 5 it is said that all the “needed rites pertaining to the validity of (the marriage) were performed in the presence of elders from the two families and after the approval of it” without any further detail being given.

13. Payment of a bride price, according to the expert, is a necessary element in establishing a valid marriage and if not paid means that the marriage is not valid. To state merely that all the rites have been performed is not in my finding good enough to establish that the requirements have been met, particularly as nothing has been said about the bride price.
14. There is also scant proof of the relationship between those making the statutory declaration and the appellant and Ms Gyamfi. That proof could have been provided by production of, for instance, birth or marriage certificates.
15. It is for these reasons I am not satisfied that the appellant has proven on the balance of probabilities that he has entered into a valid marriage in accordance with the applicable customary laws.
16. However, matters do not end there because the appellant claims in the alternative that he is an extended family member of Ms Gyamfi in accordance with Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006 which states:-

“(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.”
17. It is not in issue that in such a situation the EEA national has to exercise treaty rights as a qualified person in accordance with Regulation 6. In addition although there does not appear to be a definition of durable relationship the Secretary of State would expect the appellant to demonstrate that he has been living together with Ms Gyamfi for at least two years. Equally, it is said it is reasonable to expect that they both intend to live together permanently, that any previous relationship or marriage each of them may have had has broken down and that the parties are not related by birth. Although the respondent will not normally accept that there is a durable relationship where these criteria are not met each case is considered on its merits.
18. The respondent stated in the Reasons for Refusal Letter that no documentation had been provided to suggest that the appellant and Ms Gyamfi are in a durable relationship. Even if the appellant were to be found to be in one he would only be entitled to a residence card as an extended family member if it were considered appropriate to issue the card. This would be as per Regulation 17(4):-

“(4) The Secretary of State *may* issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application” -- (my emphasis)

[There are then various conditions].

19. The extent of the evidence as to there being a durable relationship between the appellant and Ms Gyamfi is provided by their witness statements dated 18 April 2014 which are in almost identical form and are extremely brief. In addition there are a few documents such as two payslips from around the date of application (the photocopies are poor), a TV licensing letter to Ms Gyamfi at her stated address, a letter referring to automatic enrolment in a pension scheme and a letter from Boots (the chemists) to the appellant at the same address given as for Ms Gyamfi. In the form that they are and in the absence of any further evidence, oral or otherwise, these documents fall woefully short of allowing me to find on the balance of probabilities that the appellant and Ms Gyamfi are in any kind of relationship, let alone a durable one. The statements provided are of no help and it was not intended that the appellant or Ms Gyamfi would give evidence before me. Furthermore, with the lack of evidence provided I am not able to conclude either that Ms Gyamfi is in fact a qualified person for the purpose of the Regulations. There is simply not good enough evidence for me to conclude that she is.

Conclusions

20. Within EU law it is essential that member states facilitate the free movement and residence rights of union citizens and their spouses. However, for the reasons set out above I am not satisfied that the appellant has shown that he is in a marital relationship with a qualified person and therefore he cannot benefit from EU free movement and residence rights on that basis. Neither have I found that the appellant is in a durable relationship with Ms Gyamfi such that the Secretary of State is required to exercise her discretion as to whether she should issue a residence card to the appellant as per Regulation 17(4).

Decision

21. The First-tier Tribunal Judge erred in failing to make findings as to whether the marriage certificate was issued by a competent authority. On the basis that he did not so find he should have gone on to consider whether the appellant is in a durable relationship with Ms Gyamfi and whether she is exercising treaty rights in the UK. The errors are material and the decision is set aside for lack of reasoning.
22. For different reasons and as set out above the appellant has not shown that he is entitled to that which he is seeking, namely a residence card as confirmation of a right to reside in the United Kingdom. Therefore for different reasons the appeal is dismissed under the EEA Regulations.

23. An anonymity direction has not been made in this appeal thus far. I was not addressed on the matter but in all the circumstances I see no need for a direction and do not make one.

Signed

Date

Upper Tribunal Judge Pinkerton