Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: IA/53426/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 24th July 2014	**On: 1st August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Samuel Kwaku Sarfo
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Akohene, Afrifa and Partners Solicitors
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Ghana born on the 2nd February 1974. He has permission to appeal against the decision of the First-tier Tribunal (Judge Troup) dated the 6th May 2014 to dismiss his appeal against the Respondent's decision to refuse to issue him with a residence card as confirmation of his right of residence as the family member (spouse) an EEA national exercising treaty rights in the UK.

2. The Appellant claimed to be married under Ghanaian customary law to Dutch national Mrs Juliana Osei. He submitted to the Respondent evidence

that a customary marriage had taken place, including the extract from the 'Form of Register of Customary Marriages'. There was also a statutory declaration by the fathers of the Appellant and Mrs Osei confirming their attendance at the marriage ceremony.

3. In a refusal letter dated 28th November 2013 the Respondent set out her position on proxy marriages. They could only be valid if recognised in the country where the marriage was celebrated, the marriage must have been properly executed so as to satisfy the requirements of the law of the country in which it took place, and there must be nothing in the law of either party's country of domicile that restricts the freedom to enter into the marriage. The Respondent did not consider that the Appellant had demonstrated that the second provision was met. The letter sets out various provisions of Ghanaian law and concludes that the Appellant has not demonstrated that his marriage was registered in accordance with the provisions of the Customary Marriage and Divorce (Registration) Law 1985. The Respondent goes on to consider whether the couple are in a durable relationship but finding no evidence to demonstrate co-habitation refuses the application on this ground as well.

4. On appeal the First-tier Tribunal dealt with the matter on the papers. It found that the statutory declaration was "crucial" to establishing that the marriage was valid in Ghanaian law. The determination acknowledges the existence of such a document but discounts it, and further documents "certifying" its authenticity, as "self-serving". The Appellant's claim to be married to Mrs Osei is accordingly rejected. The Tribunal goes on at paragraph 11 of the determination as follows:

> "That conclusion is reinforced by the singular absence of evidence from Ms Osei herself either orally or in writing. I am driven to the conclusion that it is highly probable that the claimed marriage is a sham fabricated to enable the Appellant to remain in the United Kingdom".

Finally the Tribunal finds no evidence to show that the two are in a durable relationship and the appeal is dismissed.

5. The grounds of appeal are that the First-tier Tribunal erred in:

    a) Having no regard to the Upper Tribunal decision in NA (customary marriage and divorce) Ghana [2009] UKAIT 00009 in which it was held that the legal requirements to register a customary marriage in Ghana have in effect been optional since 1991 and that any failure in that regard does not affect the validity of the marriage itself.

b) Making a finding that this was a sham marriage when there was no evidential basis for doing so, particularly since the Respondent had never raised the matter herself.

6. Before me Mr Bramble agreed that both these grounds had been made out. The First-tier Tribunal had no regard at all to the guidance in NA and the findings on whether the marriage was lawful in Ghana were therefore flawed. There was no evidential basis for concluding that this marriage was a sham and that paragraph too must be set aside.

7. I entirely agree. I find that the decision does contain those material errors of law identified by the parties.

8. Mr Bramble submitted that none of that assisted the Appellant since he had failed to provide evidence showing that the marriage was considered valid by the Dutch authorities. It will be observed that this was not originally a requirement of the Respondent, who in the letter of 28th November 2013 speaks of the marriage being recognised in the country of domicile of the respective parties. At present that is the UK. The notion that it should be the Dutch authorities who recognise the marriage was introduced by the Upper Tribunal decision in Kareem [2014] UKUT 24, a decision not promulgated until the 16th January 2014.

9. As Mr Akohene realistically had to concede, the Appellant had over five months between the promulgation of Kareem and the determination in his own case in which he could have submitted that evidence. Even if he could be forgiven for not being aware of Kareem the matter was raised expressly by the Respondent in the Rule 24 response of the 23rd June 2014 and yet no evidence had been produced before me. The appeal must therefore be dismissed since there is at present no evidence that the marriage is considered lawful by the Dutch authorities. In respect of whether the parties are in a durable relationship there is insufficient evidence before me upon which to make a finding. The Appellant has therefore failed to discharge the burden of proof and the appeal is dismissed.

Decisions

10. The decision of the First-tier Tribunal contains error of laws and it is set aside.

11. I remake the decision by dismissing the appeal.

12. I make no direction as to anonymity.

Deputy Upper Tribunal Judge Bruce

24th July 2014