Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22666/2014
IA/25409/2014
IA/25418/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 27 May 2015	**On 4 June 2015**

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HELINA ASARE
(AND TWO CHILD DEPENDENTS)
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Office
For the Respondent: In person

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. We find that no particular issues arise on the facts of this case that might infringe the respondents' protected human rights if the details were to become known publicly. For this reason no anonymity direction is made.

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DECISION AND REASONS

Background

1. For the sake of continuity this decision will refer to the parties as they were before the First-tier Tribunal albeit that the Secretary of State is technically the appellant in this particular appeal. The Secretary of State was granted permission to appeal against the decision of First-tier Tribunal Judge Young to allow the appellant's appeal in a decision that was promulgated on 18 February 2015. The appellant appealed against the Secretary of State's decision to revoke her residence card because she no longer met the requirements for residence as the family member of an EEA national under The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006").

2. The appellant is a citizen of Ghana whose date of birth is 02 July 1977. She has two dependent children, Chelsea Nana Ama Adobea (DOB: 06/07/04) and Charlie Ahianyo Boateng (DOB: 18/05/07). Charlie is a Ghanian citizen. In a recent letter to the Tribunal dated 02 May 2015 the appellant said that Chelsea has now been registered as a British citizen and she asked to withdraw the appeal. Although the appellant did not attach a copy of the registration certificate we are satisfied that she has given notice of the withdrawal of the appeal in so far as it relates to Chelsea and we are satisfied that we can treat that part of the appeal as withdrawn under rule 17 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

3. The appellant's date of entry to the UK is unclear from the evidence currently before the Tribunal. On 30 June 2007 she contracted a Ghanaian customary marriage with Harrison Cornelius Ahianyo who is a German citizen. On 21 October 2011 the Secretary of State issued the appellant and her two dependent children with residence cards recognising their rights of residence as family members of an EEA national who was exercising his rights of free movement in the UK. Mr Ahianyo later contacted the Secretary of State to inform her that the marriage had broken down and provided copies of various documents from Ghana as evidence of a divorce. In light of this evidence the Secretary of State wrote to the appellant on 21 September 2012 and 03 February 2013 to say that she was reviewing whether she qualified for a residence document and requested further evidence. The appellant says that she did not receive the correspondence. On 29 April 2014 the Secretary of State made a decision to revoke her residence card on the ground that she no longer had a right of residence under the EEA Regulations 2006.

4. First-tier Tribunal Judge Young was satisfied that the appellant met the requirements of regulation 10(5) of the EEA Regulations 2006 and allowed the appeal. Permission to appeal was granted on the basis that it was arguable that the First-tier judge erred in law because the judge failed to make clear findings as to whether the appellant was divorced and whether the marriage was therefore "terminated" for the purpose of regulation 10(5) of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006").

5. The matter came before us to determine whether the First-tier Tribunal erred in law.

Submissions

6. On behalf of the Secretary of State Mr Melvin submitted that the First-tier Tribunal made a material error of law in failing to come to any clear findings as to whether the marriage had been properly terminated. In order to retain a right of residence under regulation 10(5) the appellant needed to show that there had been a valid divorce. The judge made conflicting findings. In paragraphs 33 and 34 of the decision the judge expressed doubts about whether the proper divorce procedure had been followed yet in paragraph 44 the judge appeared to accept that a divorce had taken place but gave no reasons for this finding. He submitted that the judge made conflicting findings in relation to the divorce. However, when pressed on whether the Secretary of State accepted the documents relating to the divorce in Ghana, given that they formed the reasons for revoking the appellant's existing residence card, Mr Melvin was unable to give a clear answer himself. He said that there were documents from Ghana to suggest a divorce and the decision was made on that basis.

7. In response the appellant said that she relied on the points she made in her letter dated 02 May 2015. She said that she didn't know why the Secretary of State was now questioning the evidence relating to the divorce when those documents seem to have been accepted when the decision was made in 2014. The Secretary of State acted on those documents then but now seemed to be questioning whether a divorce took place. The appellant said that the judge was entitled to make the decision. The appellant said it was for the Tribunal to decide whether there had been a proper divorce or not. She said that she didn't receive the initial letters asking for further evidence that were sent prior to the decision to revoke her residence card. The first she knew of it was when she received the decision.

8. In response Mr Melvin said that there needed to be a finding on whether there had been a valid divorce because the paperwork showed that the appellant was represented at the divorce by various family members. She seemed to be adopting the position that best suited her. He asked us to treat the evidence the appellant gave with caution given the letters and evidence to show that her family members supported the divorce.

Conclusions

9. We are satisfied that the decision of the First-tier Tribunal involved the making of a material error of law. Whilst the decision was otherwise carefully written there is a contradiction in the judge's findings as to whether there had been a valid divorce. In paragraph 33 the judge expressed doubts about whether the appropriate procedure had taken place given the dates on the documents. At the hearing the appellant also questioned the reliability of the documents given that the statutory declaration purported to be signed by members of her family. She said

that no one from her side of the family was present or had authority to represent her when the marriage was dissolved (paragraph 33). In paragraph 44 the judge found that the appellant met the requirements of regulation 10(5). The judge treated the marriage as "terminated" for the purpose of the regulation but failed to give any reasons why in light of earlier doubts that had been expressed about the evidence.

10. In paragraph 49 of the decision the judge made quite clear that it was not necessary to consider "the efficacy of the divorce" given the finding that she met the requirements for retained right of residence under regulation 10(5). However, it was a prerequisite for the judge to make a clear finding as to whether there had been a valid divorce before it could properly be concluded that the appellant retained a right of residence as a result of the termination of her marriage. It seems quite clear from the wording of paragraph 49 that the judge specifically avoided making such a finding. For these reasons we find that the failure to make clear findings as to whether the marriage had been terminated through divorce for the purpose of regulation 10(5) amounted to a material error of law and we set aside the decision.

11. We consider that it is possible to remake the decision on the evidence that is already before the Tribunal. The evidence relating to the divorce was relied upon by the Secretary of State to underpin the original decision to revoke the appellant's residence card. The evidence included a statutory declaration dated 05 July 2012, which purported to be signed by members of Mr Ahianyo's family as well as members of the appellant's family. The statutory declaration is accompanied by an attestation by the First Deputy Judicial Secretary of the High Court in Ghana dated 06 July 2012. There is also a document entitled Notice of Dissolution of Customary Marriage (Second Schedule) dated 15 June 2012.

12. An extract from the Customary Marriage and Divorce (Registration) Law 1985 was provided to the First-tier Tribunal. The Notice of Dissolution of Customary Marriage relied on by the Secretary of State states that the marriage was dissolved under this law. Section 7 states that the parties notifying the Registrar should make a statutory declaration, which should be supported by their parents or a person standing in *loco parentis*. On receipt of the notification the Registrar would record the dissolution of the marriage and then prepare a notice under the Second Schedule of the law. The procedure for dissolution of a customary marriage clearly provides for a statutory declaration to be made by both parties to the marriage, which is supported by their parents. It is only after the statutory declaration is provided to the Registrar that a Notice of Dissolution of Customary Marriage is issued.

13. In this case the Notice of Dissolution of Customary Marriage pre-dates the statutory declaration, which casts doubt on whether the correct procedure was followed. We find that the fact that the statutory declaration was not made by both parties to the marriage in combination with the appellant's evidence that, as far as she is aware, none of her family members represented her in the divorce proceedings, is sufficient to cast serious doubt on the reliability of these documents as evidence to show that a

valid divorce took place in Ghana in 2012. For these reasons we conclude that the Secretary of State has failed to discharge the burden of proof. In *Samsam (EEA revocation & retained rights) Syria* [2011] UKUT 00165 the Tribunal confirmed that where the Secretary of State revokes a residence card before the expiry of its validity it falls to her to discharge the burden of proof. The Secretary of State failed to produce sufficiently reliable evidence to show that the appellant ceased to be a family member of an EEA national in order to justify revocation of her residence card. The Secretary of State's decision was therefore not in accordance with the EEA Regulations 2006.

14. The effect of this decision is that the Secretary of State must now consider whether to reinstate the original residence cards in relation to the appellant and her daughter or make a further decision in relation to the validity. We have found that there was insufficiently reliable evidence to show that the appellant ceased to be a family member of an EEA national but the Secretary of State might want to seek further evidence to be satisfied that the EEA sponsor is still exercising his rights of free movement in the UK, either through further evidence from the appellant, or if she is unable to do so, through the Secretary of State's own enquiries with HMRC. In the alternative, the Secretary of State may want to take note of the fact that the appellant now states that her daughter has been registered as a British citizen, which might potentially give rise to derived rights of residence.

DECISION

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The First-tier Tribunal decision involved the making of an error on a point of law.

We set aside the decision.

We re-make the decision and allow the original appeal.

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The appeal is withdrawn.

Signed  Date 02 June 2015

Upper Tribunal Judge Canavan

FEE DECISION
*Note: this is **not** part of the determination*

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award. We have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. We have decided to make a whole fee award because we have found that the residence cards were wrongly revoked and in those circumstances it should not have been necessary for the appellant to appeal.

Signed  Date 02 June 2015

Upper Tribunal Judge Canavan