



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

Appeal Number: IA/43949/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 15 December 2015

Promulgated

On 12 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS A A K
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Kotas, Home Office Presenting Officer

For the Respondent: Mr Aslam, Counsel for Bedfords Solicitors, Luton

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The appellant was born on 28 December 1969 and is a citizen of Ghana. She appealed against the decision of the respondent dated 21 October 2014 refusing her application for the issue of a residence card in her favour as the family member of an EEA national who is a qualified person under the Immigration (European Economic Area) Regulations 2006. Her appeal was heard by Judge of the First-tier Tribunal Colyer on 3 June 2015. He allowed the appeal under the Immigration (European Economic Area) Regulations 2006 in a determination promulgated on 2 July 2015. An application for permission to appeal was lodged and permission was

granted by Judge of the First-tier Tribunal Wellesley-Cole on 29 September 2015. The permission states that it is arguable that the First-tier Judge made a material misdirection of law in paragraph 32 by finding that the sponsor has satisfied him as to the qualification under section 3(1) (c) of the Customary Marriage and Divorce (Registration) Law of 1985 as there is no evidence on what basis the decision was reached and no documentary evidence to support that the sponsor is of Ghanaian descent and went on to marry the appellant by proxy. The permission refers to paragraph 38 of the judge's decision, stating that it is arguable that the judge erred in concluding that the appellant has satisfied the burden of proving that the marriage is valid in Germany and therefore should be accepted as valid in the United Kingdom, as there was no indication that any application had been made by the appellant and no proof before the court that the marriage is accepted under German law. The permission then refers to the judge finding that the appellant satisfies the requirements of a "durable relationship" as parties to such a relationship are considered to be extended family members and as such the Secretary of State should be given the opportunity under Regulation 17(4) (EEA Regulations) to apply her discretion. The permission states that the correct course of action is to allow the appeal to a limited extent that it is "otherwise not in accordance with the law" and remit it back to the Secretary of State in order that she may be allowed to consider whether she is willing to exercise her discretion. The case of Ihemedu (Nigeria) [2011] UKUT 00340 (IAC) is referred to in the permission.

3. There is no Rule 24 response.

The Hearing

4. The Presenting Officer submitted that with regard to the customary marriage being recognised under German law, the judge made an error when he stated that all the conditions have been met. He submitted that there was a lack of evidence and a lack of reasoning in the decision. He submitted however, that even if I find this to be an error, there is merit in the third ground on which permission was granted, relating to "durable relationship". He submitted that the only challenge is the result of the judge allowing the appeal outright. He submitted that if I find that there is sufficient evidence for the proxy marriage to be recognised in German law there is no error, but if I agree that there was not sufficient evidence before the First-tier Judge then the appeal should not have been allowed outright.
5. He referred me to the said case of Ihemedu submitting that the correct approach relating to durable relationship would be to remit the case back to the Home Office for the issue of a residence card as an extended family member. He submitted that if I find that that is the way forward, I should allow the appeal to the limited extent that it is otherwise not in accordance with the law and remit it back to the Secretary of State in order that she may be allowed to consider whether she is willing to exercise her discretion in favour of the appellant.

6. Counsel directed me to the appellant's bundle relating to the challenge that there was not sufficient evidence before the judge that the sponsor is of Ghanaian descent, submitting that this is the bundle that was before the First-tier Judge. The respondent states that there was no documentary evidence before the judge to support this and so nothing to show that he was entitled to marry by proxy. Counsel referred me to pages 146 to 151 of the appellant's bundle, in particular to the sponsor's birth certificate showing that he was born in Ghana and his German passport and ID document, both of which refer to him being born in Ghana.
7. Counsel then referred me to the statutory declaration which is referred to in the grounds. The grounds suggest that its terms are not satisfactory. He referred me to pages 152 to 157 of the appellant's bundle which was before the First-tier Judge and which contains legal documents, including the statutory declaration, which is in the required form with the relevant details therein and is signed by the fathers of the appellant and the sponsor.
8. Counsel submitted that on that basis the judge was satisfied that there is a legal marriage and I was referred to the expert report, (mentioned in Ground 2 of the application), by Frau Isabelle Ghobril at page 172 of the appellant's bundle. I was referred to the list of documents therein which includes the appellant's and the sponsor's identity documents, marriage documents, divorce documents and the statutory declaration. Counsel submitted that based on these documents, which are those which were before the First-tier Judge, Frau Ghobril finds that the marriage is genuine. She refers; at page 6 of her report, to the recognition of the marriage conducted in Ghana, according to German law, stating that it could only be opposed by a violation of the German Ordre Public. She then states that there is no information hinting at a forced marriage and so there is no violation of the German Substantive Ordre Public. Her decision is that the marriage would be recognised in Germany.
9. Counsel submitted that the First-tier Judge was therefore entitled to find that the proxy marriage is lawful in accordance with German law.
10. Counsel then went on to deal with the "durable relationship". He referred to the case of Ihemedu and submitted that that case makes it clear that in relation to Regulation 17(4) the appeal only requires to be remitted to the Secretary of State to enable her to exercise her discretion in favour of the appellant if the Secretary of State has not considered it under Regulation 85. He submitted that in this case the Secretary of State has considered it under Regulation 85 and has found that the parties are not in a durable relationship. He submitted that discretion has been exercised so if I find that the parties are in a durable relationship the appeal can be allowed outright. He submitted that the First-tier Judge considered all the evidence before him along with the oral evidence. He found the appellant and the sponsor to be credible and found them to be in a genuine and durable relationship. I was referred to the Presenting Officer's submissions relating to the durable relationship and submitted that it is

not necessary for the appeal to be remitted back to the Secretary of State, as the circumstances are different to those in Ihemedu.

11. I have noted the First-tier permission to appeal and the grounds of application and have carefully considered all the documentation which was before the First-tier Judge.
12. With regard to Ground 1, I am satisfied that the sponsor is of Ghanaian descent based on the birth certificate, passport and ID document in the appellant's bundle. I have also noted the statutory declaration which is in the appellant's bundle and which was before the First-tier Judge and I am satisfied that all the requirements are noted therein and it has been signed by the fathers of the sponsor and the appellant.
13. With regard to Ground 2 I have noted the expert report from Frau Ghobril. She has made a list of the documents before her which are the same as the documents which were before the First-tier Judge. I am satisfied that this marriage would be recognised in Germany and that proxy marriages are valid in Germany if certain conditions have been met and I find that these conditions, in this case, have been met.
14. With regard to "durable relationship" I have noted the argument put forward by Counsel for the appellant. For the case of Ihemedu to apply and for the necessity of returning the case to the Secretary of State for her discretion to be exercised, this should only happen when the Secretary of State has not already exercised her discretion. It is clear from the refusal letter that the respondent exercised her discretion when the claim was originally decided. She found there to be no durable relationship. However based on what is before me and what was before the First-tier Judge I have noted the judge's decision at paragraph 48 in which he states, "On the balance of probabilities I am prepared to accept the oral evidence and statements of the appellant and her sponsor with regard to the time they have lived together as a couple and that it is their intention to continue to live together as husband and wife". The judge found that there is a "durable relationship". He was entitled to this finding.
15. I find that the First-tier Judge was correct in his determination when he allowed the appeal outright under the Immigration (European Economic Area) Regulations 2006. There was sufficient evidence before the First-tier judge for the proxy marriage to be recognised in German law.

DECISION

16. The First-tier Tribunal's decision that the appeal is allowed must stand.
17. Anonymity has been directed.

Signed

Date

Deputy Upper Tribunal Judge Murray