Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: EA/01888/2019**

THE IMMIGRATION ACTS

Heard at Field House
On 6 March 2020

Decision & Reasons Promulgated
On 19 March 2020

Before

UPPER TRIBUNAL JUDGE FINCH

Between

OPPONG CHRISTIAN

(ANONYMITY ORDER NOT MADE)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L. Simak of counsel, instructed by SLA Solicitors

For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Ghana. He entered into a proxy marriage with a Dutch national in Ghana on 7 December 2018.

2. On 11 March 2019 the Appellant applied for a residence card, as the family member of an EEA national, but his application was refused on 3 April 2019.

3. The Appellant appealed against this decision and First-tier Tribunal Judge O'Hanlon dismissed his appeal in a decision promulgated on 12 September 2019. The Appellant also appealed against this decision and on 9 December 2019 First-tier Tribunal Judge Neville refused to grant him permission to appeal to the Upper Tribunal. However, Upper Tribunal Judge Stephen Smith did grant him permission to appeal on 13 January 2020.

ERROR OF LAW HEARING

4. Counsel for the Appellant relied on her skeleton argument and submitted some case law to support her submissions. In response the Home Office Presenting Officer accepted that First-tier Tribunal Judge O'Hanlon should have followed the decision in *Awuku v Secretary of State for the Home Department* [2017] EWCA Civ 178. He also accepted that those standing as proxies for a couple do not have to be related to them.

ERROR OF LAW DECISION

5. In her refusal letter, the Respondent accepted that, whilst marriages which take place by proxy in the United Kingdom are not lawful, if a proxy marriage took place in another country that type of marriage was lawful, if marriage by proxy is recognised in law in that state and the marriage was performed and registered according to the law of that state. She also accepted that identities of the Appellant and his Dutch partner.

6. However, the Respondent relied on the case of *NA (Customary marriage and divorce – evidence) Ghana* [2009] UKAIT 00009 in which the Upper Tribunal found that "the onus of proving either a customary marriage or dissolution rests on the party making the assertion. It is normally for the appellant to prove that a marriage is valid ". The Upper Tribunal relied on an expert report by a Ghanaian barrister practising in London and in paragraph 11 of its decision it accepted her evidence that "a valid customary marriage could only be validly contracted between two Ghanaian citizens".

7. First-tier Tribunal Judge O'Hanlon also accepted that this was the case and, as the Appellant's partner had become a Dutch citizen on or before 24 September 2018, he found that she had not been a Ghanaian citizen when they underwent a proxy marriage on 7 December 2018.

8. First-tier Tribunal Judge O'Hanlon failed to take into account that there was higher authority on this issue, which can be found in *Awuku v Secretary of State for the Home Department* [2017] EWCA Civ 178. This case concerned a Ghanaian national who had entered into a proxy marriage with a German national and the Court of Appeal accepted that their marriage was lawful under Ghanaian law.

9. In the case of *McCabe v McCabe* [1994] 1 FLR 10 *McCabe v McCabe* [1994] 1 FLR 410; [1994] 1 FCR 257, the Family Division was also held that the proxy marriage of an Irish national to a Ghanaian national was valid despite the Irish husband not being of Ghanaian nationality or origin.

10. As a consequence, I find that First-tier Tribunal Judge O'Hanlon erred in law in paragraph 13 of his decision when he found that "in Ghana a valid customary marriage can only be contracted between two Ghanaian citizens".

11. In paragraph 14 of his decision First-tier Tribunal Judge O'Hanlon also found that in order to establish that his marriage was registered in accordance with the Customary Marriage and Divorce (Registration) Law 1985, the Appellant had to provide a statutory declaration made by the couple's parents or those acting *in loco parentis*. The Appellant did not assert that the Declaration had been made by a parent but relied on the fact that there was a UKBA document *Customary Marriage and Divorce/Proxy Marriages contracted in Ghana* which confirmed that there was no requirement in Ghanaian law for the proxies to be related to the couple being married. Counsel had not been able to locate this document but the Home Office Presenting Officer confirmed that it did exist and that he had produced a copy of it when appearing before Upper Tribunal Judge Martin in appeal number IA/23315/2012. He also accepted that the proxies did not have to be related to those they were standing in for and did not have to be acting *in loco parentis*.

12. In addition, First-tier Tribunal Judge O'Hanlon failed to take into account the letter from the Ghanaian High Commission, dated 12 February 2019, which confirmed that the Appellant's marriage was contracted in accordance with the Customary Marriage and Divorce (Registration) Law 1985 and that the signature of the Second Deputy Judicial Secretary of the Judicial Services of Ghana on the statutory declaration had been confirmed by the Second Deputy Judicial Secretary and the Assistant Director of the Legal & Consular Bureau of the Ministry of Foreign Affairs and Regional Integration.

13. For all of these reasons I also find that First-tier Tribunal Judge O'Hanlon erred in law when he found that the proxy marriage had not been lawfully registered.

14. The refusal letter asserted that the Ghana COI Report of 11 May 2012 illustrated problems that occur with forged and fraudulently obtained official documents in Ghana but did not assert that the marriage certificate of statutory declaration being relied upon were forged or fraudulently obtained. The Home Office Presenting Officer did not seek to rely on any such assertion.

15. As a consequence, I find that there were material errors of law in First-tier Tribunal Judge O'Hanlon's decision.

DECISION

(1) The Appellant's appeal is allowed.

(2) First-tier Tribunal Judge O'Hanlon's decision is set aside.

(3) The appeal is retained in the Upper Tribunal and remade.

RESUMED HEARING

1. For the reasons given above I find that the Appellant is married to a Dutch national as claimed. Therefore, he is a family member of an EEA national for the purposes of Regulation 7 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and is entitled to an extended right of residence in the United Kingdom under Regulation 14 if he can show that his wife is a qualified person.

2. The Appellant submitted that his wife was a qualified person as she was a worker for the purposes of Regulation 5 of the 2016 Regulations. I granted him permission to rely on further evidence submitted for the resumed hearing to show that this was the case. These included a run of payslips which confirmed that she worked for Ashley Cleaning Services Ltd at the time of the refusal to grant him a residence card. This was also confirmed by bank statements showing deposits from Ashley Cleaning Services Ltd.

3. Counsel also explained that the Appellant's wife was at work in Hatton Cross and had not realised that the Tribunal may consider her status after finding that there had been an error of

law in First-tier Tribunal Judge O'Hanlon's decision. The Home Office Presenting Officer did not challenge this assertion.

4. In the decision under challenge it was also the case that the Respondent did not assert that the Appellant's partner was not exercising a Treaty right in the United Kingdom. She had been provided with the Appellant's partner's national insurance number and also details of her employer, the date on which she started her employment and the amount that she earned each month. The Appellant's application form also confirmed that he had submitted pay slips and bank statements to prove that she was working, as claimed.

5. There were copies of these documents in the Bundle sent to the First-tier Tribunal on 17 June 2019. Further bank statements and pay slips were also handed in at the hearing before the Upper Tribunal. I gave the Home Office Presenting Officer copies of these documents and he said that he was content to accept that the Appellant's wife was still working, as claimed, and was therefore exercising a Treaty right and that the Appellant was entitled to a residence card.

6. On the basis of the concession made by the Home Office Presenting Officer and all of the documents before me I find on a balance of probabilities that the Appellant's partner is working in the United Kingdom, as claimed.

7. Taking this and my other findings above, I also find that the Appellant has established that he is entitled to a residence card as the partner of an EEA national exercising a Treaty rights in the United Kingdom.

Decision

1. The Appellant's appeal against the decision, dated 3 April 2019, is allowed.

Nadine Finch

Signed Date 12 March 2020
Upper Tribunal Judge Finch