



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

Appeal Number: EA/02820/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 22 April 2021 via Skype**

**Decision & Reasons Promulgated
On 11 May 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MISS GIFTLING AGYEMANG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Ferguson Direct Access

For the Respondent: Miss S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals against a decision made by the respondent on 31 May 2019 to refuse to issue her with a document confirming her right of permanent residence as the family member of an EEA national exercising treaty rights in the United Kingdom. Her appeal against that decision was dismissed by First-tier Tribunal Judge K R Moore, for the reasons set out in a decision promulgated on 31 October 2019. For the reasons set out in my decision of 10 December 2020, a copy of which is annexed, that decision was set aside and a direction made for the matter to be reheard.

1. The appellant's case is that she is lawfully married to Adjetey Samuel Sowah and has been since 1 December 2010. That marriage was conducted, by proxy, in Ghana and according to customary law.
2. The respondent does not, however, accept that this marriage was lawful as evidence obtained during a visit to the appellant's home address on 20 June 2017 indicated that she had been married to Michael Adu on 29 August 2010, and had not been divorced prior to her marriage to Mr Sowah on 1 December 2010; and, as a result, the marriage was not valid and so she was not the family member of Mr Sowah.
3. Following the visit in 2017, the respondent had refused the appellant's then pending application for a permanent residence card. That resulted in an appeal (EA/06426/2017) which was then dismissed for the reasons set out in a decision promulgated on 29 June 2018. In that appeal the appellant said that the marriage to Mr Adu was not a legal marriage as the pastor who had performed it, said he had not had the authority to conduct it. Neither Mr Adu nor Mr Sowah attended the hearing.
4. In her decision, the judge found that the appellant's evidence that the marriage to Michael Adu was not valid not to be credible, noting [64] that she had not checked any registers of marriage or with the church where it was conducted; or whether the church where it was conducted was registered to perform marriages. Taking the evidence as a whole, the judge was not satisfied that the marriage to Mr Sowah was valid as he found the appellant was not free to marry at that point.
5. At the appeal before FtTJ Moore, the appellant said that the church service was simply a blessing, and that in any event, she had found out two weeks later that Mr Adu had a wife, Lydia, in the Netherlands and so had not in any event been free to marry. She also sought to adduce the certificate of marriage between Mr Adu and his wife, Lydia, from 2003 as well as the divorce certificate from 2015 by which that marriage was dissolved. The judge refused to admit the late evidence of Mr Adu's divorce [5] and [6] evidence of Mr Adu's marriage in 2003.
6. The judge considered [24] that the issue was whether the appellant was, as at 1 December 2010, free to marry, noting [25] that although the respondent had initially accepted the marriage to Mr Sowah as valid, she now claims that the appellant was already married to Mr Adu, and was thus not free to marry Mr Sowah. He found [28] that the appellant had not given credible evidence, nor was he satisfied that she had been free to marry Mr Sowah and " had failed to provide reliable evidence that the marriage between Michael Adu and another woman came to an end before 28 August 2010 when she married him".

As a preliminary matter Miss Cunha submitted that it would be possible for the Upper Tribunal to go behind the earlier decision of Judge Connor, promulgated on 29 June 2018, who found that contrary to the evidence submitted in the form of a report from the Immigration Officer who attended in 2017, Samuel

Sowah and Michael Adu are one and the same person. Although noting that he had not heard evidence from either Mr Sowah or Mr Adu, he noted that he had seen a copy of indefinite leave to remain given to Mr Adu and accepted the appellant's submission that if that was so he would not need to be working in the name of Samuel Sowah and found that they were not the same person [61]. He notes also, "the Immigration Officer's statement sets out that the Immigration Officer noted the picture on the wedding DVD was not the same as the picture of Samuel Sowah. I am therefore unclear how it was concluded that they were the same person."

That is a finding of fact reached by a judge. I am not satisfied that there is any reason to go behind that finding there being no new evidence in support of the Secretary of State's case that Michael Adu and Mr Sowah are one and the same person. The submission that because the judge had not set out what weight to attach to the report of the officers is a reason to go behind it is insufficient. That would not have been a sustainable ground of appeal given that it is evident that the judge had taken the report into account and for good reasons had not accepted the evidence on that point. Further, Mr Sowah gave evidence before the First-tier Tribunal Judge Moore and before me. In conclusion there is insufficient material before me to suggest that the test in **Ladd v Marshall** could be met. There is no new evidence and thus there is nothing that could not have been before the First-tier Tribunal; second, there is nothing that it could be said would be probative.

After some discussion I heard evidence from both Miss Agyemang and Mr Sowah, both of whom gave evidence through an interpreter. I then heard submissions from both representatives.

In addition, I had before me the following documents:-

Appellant's bundle.

Respondent's bundle.

Appellant's supplementary bundle.

Skeleton argument from Miss Ferguson.

The Law

So far as they are relevant the EEA Regulations provide:

'7.— "Family member"

(1) In these Regulations, "family member" means, in relation to a person ("A")—

(a) A's spouse or civil partner;

(b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are

...

15.— Right of permanent residence

(1) The following persons acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

...'

Although the EEA Regulations have been revoked with effect from 31st December 2020, they are preserved for the purposes of this appeal.

As both parties accept, the sole issue in this case is whether the appellant was validly married to Mr Adu. If she were not, then she was free to marry Mr Sowah, and, as his family member who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years, has acquired the right of permanent residence and is therefore entitled to document confirming that.

It is not in dispute that Mr Sowah is an EEA national, or that he has been residing in the United Kingdom for the required period, nor is it said he has not been exercising Treaty Rights. Further, it is not argued that the marriage, if valid, is one of convenience.

It is for the appellant to show that her marriage is valid. The basis of the Secretary of State's case is that it is not solely because she was not free to marry due to a prior marriage to Mr Adu. If of course Mr Adu and Mr Sowah are one and the same person, even going by different names, albeit that the marriage might have been irregular, it is difficult to see how it would be invalid. To that extent the argument does not assist the Secretary of State. It is not disputed that the appellant underwent some sort of ceremony of marriage to Michael Adu. It is not in dispute either that a DVD of that was produced or that the cover of the DVD had photographs of those who had attended the wedding. In the circumstances the Secretary of State was entitled, *prima facie*, to conclude that the marriage might be invalid.

But there is no documentary evidence as to who performed the ceremony, where it was performed, whether the person who conducted or the premises where it was conducted, was licensed; any marriage certificate or any other indicators that the marriage was valid according to the law of England and Wales. While I note Miss Cunha's submission that the marriage could have taken place elsewhere, I consider that to be speculative, and it was not an issue canvassed during cross-examination. The reality is that the unchallenged evidence extracted from the Register of Marriages and divorces with the assistance of Miss Ferguson, who provided screenshots, is that there is no record of Michael Adu taking part in a marriage indeed in the United Kingdom or, for that matter, a record of the appellant partaking in a marriage in the United Kingdom.

The Secretary of State submits that that is not a sufficient basis on which I could conclude that there was no valid marriage to Michael Adu. Whilst at first glance that to me would be a surprising submission, I have found that the evidence of neither the appellant nor her husband was credible or compelling. On the contrary, it was evasive, discursive and on numerous occasions they simply failed to answer direct questions put to them by Miss Cunha and by me seeking clarification.

Whilst I accept, as Miss Ferguson submitted, there may be some difficulty regarding the technicalities of whether a marriage was valid or not and that is not a concept easy to translate let alone to be answered by somebody who is not a lawyer. But that does not explain the appellant's inability to explain whether it was days or months after the "marriage" to Michael Adu that the DVD was produced nor is it at all clear why Michael Adu would have married the appellant despite being, on her account, already married to a wife then present in the Netherlands or why she would have kept a DVD of such an event nor is it clear when she realised that the marriage was not valid as she must have done if she agreed to marry Mr Sowah.

Mr Sowah was not a satisfactory witness. He was evasive. For example, when asked where he was when the marriage took place he mentioned meeting his wife in Ghana, then that he later came to the United Kingdom, he had found out what happened to Mr Adu and only after continual questioning and irrelevant answers did he say that he had returned to Ghana for the marriage to take place by proxy with his wife, who has remained in the United Kingdom. Again, it was only after prolonged questioning that he explained that he had gone to Ghana because he wanted the marriage to be properly registered so that she would have the protection of being validly married in Ghana when he was asked why they had got not married in the United Kingdom. He was equivocal when asked whether he knew whether the marriage to Michael Adu was valid or not.

I bear in mind that there may be many reasons why witnesses do not tell the truth but in this case no real explanation has been given for the appellant undergoing an "marriage" to Michael Adu which broke down in a matter of weeks when it turned out he was married to a woman resident in the Netherlands, nor why he would have done so in a ceremony which was not valid in the United Kingdom.

I need, however, only decide whether that "marriage" was valid. Even accounting for the fact that I find that the appellants have not told me the truth, the reality is that the official Register of Marriages shows no marriage conducted in the United Kingdom between Michael Adu and anyone else or, for that matter, between the appellant and anybody else. Given also the lack of evidence as to when and where the marriage took place, it being unlikely given the legislation in place at the time that a marriage valid according to the law in England and Wales could have taken place without notice to the Home Office, I conclude that the appellant was not married to Michael Adu.

I consider that significant weight can and should be attached to the absence of any trace of a marriage in official records. I find it wholly unlikely that there could, in the circumstances, have been a valid marriage between Mr Adu and the appellant, absent any indication that marriage took place outside the United Kingdom.

In the circumstances, it is unnecessary for me to consider whether or not Michael Adu was married at the time of the purported marriage but no submissions have been made to me regarding the documents which had been produced showing that he was married previously and that he was subsequently divorced.

It has not been suggested to me that the proxy marriage between the appellant and Mr Sowah is invalid for any other reason and accordingly, I am satisfied that they are lawfully married according to the law of England and Wales.

There being no submission that this is a marriage of convenience or that Mr Sowah is not an EEA national exercising treaty rights, I conclude that, given the duration of the marriage which took place in 2010 and the length of time that the appellant has lived in the United Kingdom with Mr Sowah, that she meets the requirements of the EEA Regulations and I therefore allow the appeal on that basis.

Notice of Decision

- 1 The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- 2 I remake the decision by allowing the appeal under the EEA Regulations.

No anonymity direction is made.

Signed

Date 29 April 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION



IAC-AH-SAR-V1

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

Appeal Number: EA/02820/2019

THE IMMIGRATION ACTS

**Decided under Rule 34 Without a Hearing
At Field House
On 10 December 2020**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**GIFTLING AGYEMANG
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge K R Moore, promulgated on 31 October 2019, dismissing her appeal under the Immigration (European Economic Area) Regulations 2016 against a decision of the respondent to refuse to issue her with a card confirming her permanent right of residence.
2. The appellant's case is that she is lawfully married to Adjetey Samuel Sowah and has been since 1 December 2010. That marriage was conducted, by proxy, in Ghana and according to customary law.

3. The respondent does not, however, accept that this marriage was lawful as evidence obtained during a visit to the appellant's home address on 20 June 2017 indicated that she had been married to Michael Adu on 29 August 2010, and had not been divorced prior to her marriage to Mr Sowah on 1 December 2010; and, as a result, the marriage was not valid and so she was not the family member of Mr Sowah.
4. Following the visit in 2017, the respondent had refused the appellant's then pending application for a permanent residence card. That resulted in an appeal (EA/06426/2017) which was then dismissed for the reasons set out in a decision promulgated on 29 June 2018. In that appeal the appellant said that the marriage to Mr Adu was not a legal marriage as the pastor who had performed it, said he had not had the authority to conduct it. Neither Mr Adu nor Mr Sowah attended the hearing.
5. In her decision, the judge found that the appellant's evidence that the marriage to Michael Adu was not valid not to be credible, noting [64] that she had not checked any registers of marriage or with the church where it was conducted; or whether the church where it was conducted was registered to perform marriages. Taking the evidence as a whole, the judge was not satisfied that the marriage to Mr Sowah was valid as he found the appellant was not free to marry at that point.
6. At the appeal before FtJ Moore, the appellant said that the church service was simply a blessing, and that in any event, she had found out two weeks later that Mr Adu had a wife, Lydia, in the Netherlands and so had not in any event been free to marry. She also sought to adduce the certificate of marriage between Mr Adu and his wife, Lydia, from 2003 as well as the divorce certificate from 2015 by which that marriage was dissolved. The judge refused to admit the late evidence of Mr Adu's divorce [5] and [6] evidence of Mr Adu's marriage in 2003.
7. The judge considered [24] that the issue was whether the appellant was, as at 1 December 2010, free to marry, noting [25] that although the respondent had initially accepted the marriage to Mr Sowah as valid, she now claims that the appellant was already married to Mr Adu, and was thus not free to marry Mr Sowah. He found [28] that the appellant had not given credible evidence, nor was he satisfied that she had been free to marry Mr Sowah and " had failed to provide reliable evidence that the marriage between Michael Adu and another woman came to an end before 28 August 2010 when she married him".
8. The appellant sought permission to appeal on the grounds the judge had erred in not permitting her to adduce evidence showing that Mr Adu was in fact married at the time of the church blessing on 29 August 2010, and thus, she had been free to marry Mr Sowah.
9. On 1 April 2020, FtJ Osborne granted permission to appeal.

10. On 13 July 2020, Upper Tribunal Judge Pitt gave directions which that she had reached the provisional view, that it would in this case be appropriate to determine whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so whether that decision should be set aside the questions without a hearing. She also set out a timetable within which any submissions or objections were to be served
11. The appellant made further submissions on 22 July 2020. The respondent replied on 4 August 2020.
12. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. In deciding to make a decision without a hearing, I have borne in mind Rule 34 and the judgment of Fordham J in JCWI v President of the Upper Tribunal [2020] EWHC 3103 as well as the order made in that case. Rule 34(2) requires me to have regard to the views of the parties. Given that no objection to this course of action has been raised, and bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where no objection to a decision being made in the absence of a hearing that it would be right to do so.
13. Contrary to what is averred by the respondent in her Rule 24 Response of 4 August 2020, the grounds are not simply a disagreement, nor are the findings at paragraph 27 of the decision sustainable.
14. As Ms Ferguson submitted, the judge misunderstood the nature of the documents the appellant sought to adduce. They were evidence not that *she* had divorced Mr Adu before the marriage to Mr Sowah but that *Mr Adu* had been married at the time of the purported marriage to her and *he* had not been divorced until 2015. That evidence goes to the core of whether the appellant was free to marry Mr Sowah as it indicates that any marriage of the appellant to Mr Adu was void and she was therefore free to marry Mr Sowah.
15. The confusion as to the nature of the evidence appears both at [4] and [5] and played a significant part in the judge's analysis of why he excluded it. I consider that, accordingly, his decision on that point is flawed and involved the making of an error of law.
16. The judge also made no express finding about Mr Adu's marriage to Lydia, save that at [27] he says that

“While I would not necessarily dispute this claim [that Michael Adu and Lydia were married in 2005], more pertinently, there is no reliable evidence before me demonstrating that this marriage had been dissolved, or that Michael Adu was divorced from Lydia, before 28th August 2010 when the appellant entered into a marriage ceremony with Michael Adu”

17. With respect to the judge, that rather misses the point. Because, if Mr Adu had not been free to marry, then his marriage to the appellant was invalid in any event which would mean that the appellant was free to marry Mr Sowah. In which case, the appeal ought to have been allowed.
18. For these reasons, the decision involved the making of an error of law as claimed and I set it aside. I consider that in all the circumstances of this case, the appropriate course of action is for the decision to be remade in the Upper Tribunal and the parties are to prepare accordingly.
19. I observe that in this case, it is the respondent who is claiming that the marriage is not valid, and does so on the basis that the appellant was, as the time of the marriage, not free so to do. Yet, beyond a video of the ceremony, the existence of which is not in dispute, there is no certificate of marriage or any other evidence to show that what took place was a valid marriage. No details are given of where the marriage was said to have been performed, or by whom, or who the witnesses were. Still less is there evidence of who conducted the ceremony, whether he was licensed to do so or whether the building in which it took place was licensed. That said, it appears unlikely that the appellant would have forgotten where the ceremony took place.

Notice of Decision & Directions

- 1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
- 2 The appeal will be remade in the Upper Tribunal on a date to be fixed

DIRECTIONS

1. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal can and should be held remotely, by Skype for Business on a date to be fixed within the period 31 January 2021 to 15 March 2021
2. No later than 7 days after these directions are sent by the Upper Tribunal:
 - (a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and
 - (b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:
 - (i) contact/join-in details, were the hearing is to take place remotely by the means currently proposed; and
 - (ii) in that event, dates to avoid in the period specified.

3. The Tribunal will then give further directions, which will either be:
 - (i) to list the date and time of the remote hearing, confirming the join-in details etc and directing the electronic filing and service of documents in connection with the hearing; or
 - (ii) to give directions with respect to a face-to-face hearing.
 - (iii) give a timetable within which skeleton arguments are to be raised.
4. Any additional material must be served on the Upper Tribunal at least 10 working days before the hearing.

Signed

Date 10 December 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul