Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03205/2019

THE IMMIGRATION ACTS

Heard at Edinburgh	**Decision & Reasons Promulgated**
On 10 December 2021	**On 15 March 2022**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

GABRIEL DARKO ACHIESU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Winter, instructed by Maguire Solicitors.
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer.

DECISION AND REASON

1. The appellant is a national of Ghana. He applied for a residence card under the Immigration (European Economic Area) Regulations 2016. The basis of his application was that he was validly married to Ruby Yaa Ocansey, a German national exercising Treaty rights in the United Kingdom, and that following the dissolution of that marriage, he had retained a right of residence. The application was refused by the Secretary of State on 7 June 2019, because the Secretary of State was not satisfied that the appellant's marriage to Ms Ocansey was valid. The appellant appealed to the First-tier Tribunal against that decision. The grounds of appeal were, in full, as follows:

> "The decisionmaker has erred when making the decision. Evidence had been sent confirming the marriage as well as a divorce."

2. The appeal was heard by Judge Kempton. She heard oral evidence from the appellant and took into account documentary evidence adduced before her. She examined the authorities relating to Ghanaian customary marriage, and its recognition in other countries. She noted that, during the subsistence of the relationship with Ms Ocansey, the appellant had been refused a residence card as her husband, but had been content to be regarded as her partner. She nevertheless considered the matter anew. She concluded that the requisite requirements for a Ghanaian customary marriage had not been met, and that, accordingly, there was never any valid marriage between the appellant and Ms Ocansey. In dismissing the appeal she added the following:

> "27. In addition, the appellant has not proved that he meets the requirements of Regulation 10 (5)(d)(i) as there is no evidence of his residence, or that of his partner in the UK for the requisite periods."

3. The appellant sought permission to appeal to this Tribunal. Permission was refused by the First-tier Tribunal, but it was renewed to this Tribunal. There are three grounds of challenge. Grounds 1 and 2 relate to the marriage. Ground 3 asserts that the appellant has now obtained evidence that he could meet the other requirements of the Rules and asserts that either there was an error of law within the meaning of E v SSHD [2004] QB 1044, or that the Tribunal should depart from its general principles and allow the appellant now to adduce evidence of meeting the other requirements of the Regulations.

4. Judge Grubb granted permission to appeal on the issue of whether the appellant's marriage was valid. He remarked as follows:

> "The difficulty for the appellant is that he failed to provide any documentation to support the other requirements of the regulations, in particular regulation 10(5)(d)(i) (see [27]). It cannot be said to be an error of law – based on a mistake of fact – for the judge to reach a finding against the appellant in the absence of the evidence even if it is now produced. Ground 3 is unarguable. In those circumstances, it is difficult to see how the appeal could have been allowed even if the judge had not erred in law (and indeed made a positive finding in the appellant's favour) on the issue of the validity of his marriage. It would not usually be appropriate to grant permission where the error (had it not occurred) could not have resulted in a favourable decision for the appellant. However, here, any future application – relying on the additional evidence – will have to be made in the light of the adverse finding of the F-tT on the validity of the marriage. That, if it was an error, would be unfair. In those circumstances, I consider it right to grant permission so that the validity of the marriage issue can be resolved and, potentially, that may allow the appellant (if an error if established) to lead evidence relevant to the other issues under the Regulations. For these reasons, permission to appeal is granted."

5. At the hearing before us, Mr Diwnycz told us that he had considered the evidence relating to the marriage, and had reached the conclusion that the appellant's marriage to Ms Ocansey was indeed valid. We are content to adopt his view. It follows that the grounds of appeal relating to the validity of the marriage succeed: the Secretary of State, and the First-tier Tribunal, erred in concluding that the marriage was not valid.

6. We heard brief submissions from Mr Winter on Ground 3. He acknowledged that he was in some difficulty.

7. The formal position is that, under s 12 of the Tribunals, Courts & Enforcement Act 2007, having found an error of law in the decision of the First-tier Tribunal, the Upper Tribunal "may (but need not) set aside the decision of the First-tier Tribunal". That is clearly a matter for the discretion of the Tribunal, and it is widely accepted at least that if the outcome of the appeal would have been necessarily the same even without the error, the discretion to set aside the decision should not be exercised. In the present case, in order to succeed in his application, the appellant needed to show that he met all the requirements of the Regulations not merely that relating to his marriage. Not only did he make no attempt to satisfy the other requirements, but his appeal against the Secretary of State's decision raised only the issue of his marriage. Before the First-tier Tribunal the position was that the appeal would have fallen to be dismissed, without even any mention of the marriage.

8. For that reason, there is in this case no proper ground for setting aside the decision of the First-tier Tribunal. The appellant's appeal stands as dismissed.

9. Despite the fact that the appeal is dismissed, however, this judgment records and adopts the Senior Presenting Officer's conclusion on behalf of the Secretary of State that the appellant's marriage on 29 April 2011 to Ruby Yaa Ocansey was a valid marriage, recognised in English law, and subsisted until its dissolution on 15 November 2018. This decision, dismissing the appellant's appeal on other grounds, constitutes the Upper Tribunal's decision that the marriage was valid.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 7 March 2022