IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005410

First-tier Tribunal No: EU/50822/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4th of February 2025

Before

UPPER TRIBUNAL JUDGE PINDER
DEPUTY UPPER TRIBUNAL JUDGE SMEATON

Between

ELIZABETH OWUSU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, counsel (instructed by Mascot solicitors)
For the Respondent: Mr Wain, senior home office presenting officer

Heard at Field House on 28 January 2025

DECISION AND REASONS

1. The Appellant appeals with the permission of First-tier Tribunal ('FtT) Judge I D Boyes against the decision of FtT Judge Nixon. By her decision promulgated on 5 October 2024 ('the Decision'), Judge Nixon dismissed the Appellant's appeal against the Respondent's refusal of her application under the EU Settlement Scheme ('EUSS').

Background

2. The Appellant is a national of Ghana. She applied for leave under Appendix EU of the Immigration Rules as the spouse of an EEA national, Tamba Dumbar Matrui. In support of her application, she provided a customary marriage certificate dated 19 December 2020 confirming that the marriage took place via proxy in Ghana. The marriage was registered in Ghana on 7 May 2021.

3. The application was refused by the Respondent on 21 August 2024 on the basis that, as the marriage was not legally registered until 7 May 2021, the Appellant was not the spouse of an EEA citizen before the Specified Date of 31 December 2020 ('the Specified Date'). The Respondent further considered that the Appellant could not succeed in an application as a durable partner of a relevant EEA citizen, because she had not been granted a 'relevant document' under the Immigration (EEA) Regulations 2016 prior the Specified Date.

The appeal to the FtT

4. The Appellant appealed against the Refusal Decision to the FtT. Her appeal was heard by Judge Nixon, sitting at Birmingham IAC on 4 October 2024. The Appellant asked for the appeal to be heard on the papers.

5. In the Decision dismissing the appeal, Judge Nixon:

   5.1. considered the Ghana Marriage Act 1985 ('the Act') and concluded that the registration of a customary marriage is compulsory, section 2(2) of that Act says that the failure to register a marriage within a prescribed period is an offence, and accordingly the Appellant had not contracted a lawful marriage according to Ghanian law before the Specified Date;
   5.2. concluded that, as the Appellant was not in possession of a relevant document such as a residence card or registration certificate, and had not cohabited in a relationship akin to marriage prior to the Specified Date, she could not meet the rules as a durable partner.

The appeal to the Upper Tribunal

6. The Appellant appealed on one ground, namely that the FtT erred in concluding that the Appellant was not married by the Specified Date. In support of her appeal, she pointed to four overlapping arguments:

   (1) the date of marriage is given in the marriage certificate as 19 December 2020. The date of registration does not change the date of marriage;
   (2) the Judge acted contrary to the guidance in *Awuku v SSHD* [2017] EWCA Civ 178 which confirms that the principle of *lex loci celebratonis*, i.e. the law of the place of celebration of a marriage, applies in respect of proxy/customary marriages;
   (3) the Judge erred in concluding that, under the Act, registering a customary marriage is mandatory; and
   (4) the Respondent accepted in the Refusal Decision that the Appellnt married her sponsor via proxy on 19 December 2020. The suggestion that it was only recognised once registered is incorrect.

7. Permission to appeal was granted without limitation by Judge I D Boyes on 26 November 2024.

8. The matter was listed for hearing before this Tribunal (Upper Tribunal Judge Pinder and Deputy Upper Tribunal Judge Smeaton) on 28 January 2025.

9. We heard submissions from both representatives. We do not propose to rehearse the submissions made here in full, but will consider what was said during our analysis of the grounds of appeal.

Anonymity order

10. Both parties agreed that the anonymity order in place was not appropriate and it was discharged.

Discussion

11. There is no dispute between the parties that the marriage itself took place on 19 December 2020. There is also no dispute that, if the marriage was valid and effective on that date, the Appellant was a spouse within the meaning of Appendix EU prior to the Specified Date and is entitled to leave under the EUSS. The sole issue in dispute is, accordingly, whether the marriage was valid and effective on 19 December 2020 or only once registered.

12. Mr Karim referred to Part 1, section 1 of the Act which, he says is written in permissive, not mandatory, terms. It provides that a marriage contracted under customary law ‘may’ be registered in accordance with the Act. Consistent with that, he referred to the marriage certificate, which gives the date of marriage as 19 December 2020, and the statutory declarations confirming the same. He submitted that there was nothing on the face of the Act to suggest that a customary marriage only becomes valid and effective once registered and that, even if Judge Nixon was correct, and the failure to register a customary marriage is a criminal offence, that is a distinct matter which does not affect the validity of the marriage. He drew an analogy with birth certificates. The date of registration does not affect the date of birth of a child, notwithstanding that it is illegal not to register the birth.

13. In response, Mr Wain maintained that Judge Nixon had not materially erred in law. He submitted that there was insufficient evidence before the FtT to safely conclude that an unregistered marriage is legally recognised for the purposes of Ghanian law. He did not accept that the Act could be read in the way suggested by Mr Karim. He emphasised that Judge Nixon had not been taken to section 1 of the Act – there being no reference to this in the Appellant’s skeleton argument before the Judge. Mr Wain did not suggest however that the Judge was only provided with section 2 and both these provisions appear in the appeal bundle before the Judge.

14. We have no hesitation in accepting the Appellant’s arguments. The Act is clearly written in permissive, not mandatory terms. The Act does not, on the face of it, say anything to suggest that a customary/proxy marriage is not valid or effective unless and until registered.

15. If the Respondent wished to argue that the Act should be read in some other way, and not in accordance with its clear and obvious meaning, it was incumbent upon her to produce expert evidence in support of that position (applying the approach in *Brownlie v FS Cairo (Nile Plaza) LLC* [20210 UKSC 45 and *Hussein and Another (Status of passports: foreign law)* [2020] UKUT 00250 (IAC)). We do not consider that expert evidence is required to accept the reading of the Act proposed by the Appellant.

16. The fact that the focus in the FtT was on s.2(2) of the Act does not take matters further. As we have already considered above, there is no suggestion that that was the only section of the Act before the Judge. S.2(2) of the Act, upon with the Judge relied, says that the ‘*Minister responsible for Justice may at any time*

prescribe the periods within which the failure to register a customary marriage contracted before or after the commencement of this Act shall be an offence'. The FtT was not taken to any further legislation in this respect to show that such periods had been so prescribed. Nor were we. Even if Judge Nixon were correct, and a failure to register the marriage is a criminal offence (which is not clear from the Act), that says nothing about the validity of the customary marriage. The fact that it may be a criminal offence not to register such a marriage does not, without more, mean that the failure to register the marriage renders it invalid or void. We agree with the analogy drawn between the birth and registration of a child in the United Kingdom.

Conclusion

17. For all those reasons, we are satisfied that the Decision contained a material error of law and must be set aside.

18. The parties agreed that, if the Decision were to be set aside, we should re-make it allowing the Appellant's appeal. We accept that the Appellant was legally married to an EEA national in accordance with Ghanian law as at the Specified Date. Accordingly she met the requirements of Appendix EU.

Notice of Decision

19. The Decision of FtT Judge Nixon dated 4 October 2024 involves the making of an error of law. The Decision is set aside.

20. We re-make the decision by allowing the appeal.

J. SMEATON

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 January 2025