



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

Appeal Number: IA/04370/2014
Oral judgement

THE IMMIGRATION ACTS

Heard at Field House

On 26 June 2014

Determination

Promulgated

On 03 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

MS NANA ABENA ASIRIFI

Appellant

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: Mr E Anyene, Counsel instructed by Michael & Co Legal Services

DECISION AND REASONS

1. The respondent (whom I shall refer to in this decision as the appellant as she was during the proceedings before the First-tier Tribunal), is citizen of Ghana and her date of birth is 9 September 1969. She made an application for a residence card pursuant to the Immigration (European

Economic Area) Regulations 2006 (hereinafter referred to as the 2006 Regulations) on the basis of her marriage to a Portuguese national, Mr Rui Oscar Ivo Rangel Alberto (the sponsor). The appellant had produced a marriage certificate dated 19 April 2012 in order to establish that she and the EEA sponsor had married by proxy in Ghana on 16 February 2012.

2. The application was refused on 23 December 2013 because (according to the Secretary of State), the marriage was not recognised in Ghanaian law, the relationship between the appellant and the EEA sponsor was not durable and there was insufficient evidence that the EEA sponsor was exercising treaty rights.
3. The appellant appealed against the decision of the Secretary of State on the basis that the marriage and registration were properly conducted in accordance with the laws of Ghana. The matter was determined on the papers at the request of the appellant by First-tier Tribunal Judge A M Baker who went on to allow the appeal because the respondent “was trying to set the bar at a higher level than is legitimate under current case law and legislation”.
4. The Judge at [9] found as follows:

“I find that the material facts relevant to this appeal are as follows. Firstly I can place no reliance on the submitted purported statement of the appellant dated 4/3/2014 as it is substantially drafted as being on behalf of her sponsor and therefore is in part utterly illogical, as in paragraph 7 for example. That said, I have carefully read the whole of the appellant’s substantial bundle as well as that of the respondent and have come to the conclusion that for reasons unknown, the respondent indeed does appear to be trying to set the bar at a higher level than is legitimate under current case law and legislation. I am persuaded by the submissions on the appellant’s behalf and the documentation provided in support of that, for the purposes of Ghanaian law, the parties hereto have contracted a valid and genuine marriage. I can find no legitimate flaw in the paperwork as is claimed by the respondent, nor any statutory or other justification for her raising the points of concern mentioned above which are, frankly, beyond her legitimate remit. Accordingly, not only do I accept the marriage is valid, but the corollary is that the appellant is so entitled to the residence card sought, so the appeal is allowed under Regulation 7 without need for consideration of Regulations 6 and 8(5).”

5. Permission to appeal against the decision was granted to the Secretary of State by Judge Chambers in a decision of 7 May 2014. Thus the matter came before me.

The Grounds Seeking Leave to Appeal and Oral Submissions

6. The grounds seeking permission to appeal argue that the decision is not in accordance with **Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24**. The Judge should have considered whether or not the marriage was valid in Portugal and the Judge erred in finding that there was no need to consider Regulation 6 of the 2006 Regulations.
7. I heard oral submissions from both representatives. Mr Anyene argued that in his view the Judge had made a typographical error in relation to Regulation 6 at [9]. In his view it was obvious that the First-tier Tribunal had found that the sponsor was a qualified person. In relation to the marriage, there was only a need to consider whether the marriage was recognised in the EEA country should the marriage be doubted as valid in Ghana, but in this case the Judge went on to find that the certificate was genuine. Mr Whitwell made oral submissions in the context of the grounds of appeal.

Conclusions

8. In my view the Judge materially erred. It was obvious from the Reasons for Refusal Letter that whether or not the sponsor was a qualified person was an issue and I do not accept that the Judge made a typographical error at [9] when he concluded that there was no need to consider Regulation 6. It was incumbent on the Judge to make a clear reasoned finding relating to whether the appellant was a qualified person. I do not accept that it is implicit in the determination that the Judge found that the sponsor was a qualified person. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and remake the decision under Section 12(2)(b)(ii) of the 2007 Act.
9. The parties agreed that I could remake the decision and that there would be no need for a rehearing. Mr Anyene qualified this submitting that should I find that the evidence in relation to Regulation 6 is insufficient, the appellant should be given a further opportunity to provide evidence on this issue. It is my view that the appellant has had a considerable period of time to adduce further and better evidence relating to his appeal. I have taken into account the directions issued by the Upper Tribunal on 15 May 2014. The appellant did not produce any further for the hearing before me. There is no good reason for me to give him a further opportunity to provide evidence. To do so would be contrary to the overriding objective (Rule 2 of The Tribunal Procedure (Upper Tribunal) Rules 2008),
10. There is no evidence that the marriage is recognised in Portuguese law. There is no evidence relating to this issue before the First-tier Tribunal and there has been no attempt to produce further evidence before the Upper Tribunal. The appeal must be dismissed for this reason as the appellant has failed to discharge the burden of proof in accordance with **Kareem**.

11. However, in my view the first consideration should be whether or not the sponsor was exercising treaty rights in the UK. I asked Mr Anyene to refer me to the evidence on which the appellant relied to establish that the sponsor was a qualified person. He referred me to page 77 of the appellant's bundle which is an undated letter from AS Trading Ltd. to the Home Office. The letter is a response to the assertion made by the decision maker in the Reasons for Refusal Letter that they had attempted to contact AS Trading Ltd without success. I note that the appellant also submitted two payslips relating to the sponsor's employment.
12. It was asserted by the Secretary of State that a Companies House search did not establish that the address given on the letter from AS Trading Ltd. was the registered address. Written submissions were before the First-tier Tribunal in which it was asserted that there may be a good reason why the telephone call made by UKBA to AS Trading was not answered. Whilst that may be the case in my view there is insufficient evidence to establish that the sponsor was exercising treaty rights at the date of the decision or the hearing. There is no evidence from the sponsor on this issue and there is no reference to the sponsor's employment in the appellant's witness statement. There is no persuasive evidence that he was exercising treaty rights
13. The appeal must be dismissed because the appellant cannot establish that the sponsor was exercising treaty rights regardless of the **Kareem** point or whether or not the relationship is durable. In any event, I do not accept that the evidence establishes that the relationship is durable. The evidence of the appellant and the sponsor living together and the durability of their relationship is insubstantial and it is not persuasive. There is no evidence from the sponsor relating to the issue and there is no evidence from friends or family of the couple which relates to the issue of durability. I have taken into account the documents relating to the proxy marriage in Ghana at pages 70 to 76 of the appellant's bundle. However, considering the evidence as a whole I find that these documents are not reliable in the context of **Tanveer Ahmed v SSHD (Pakistan) [2002] UKAIT 00439**.
14. The appeal is dismissed because the appellant cannot establish that the EEA sponsor is a qualified person under Regulation 6. In any event, if the sponsor had been found to be qualified, the appeal is dismissed under Regulation 7 in accordance with **Kareem** and under Regulation 8 on the basis that the relationship between the appellant and the EEA sponsor is not durable.

Signed Joanna McWilliam

Date 1 July 2014

Deputy Upper Tribunal Judge McWilliam