



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25996/2012

THE IMMIGRATION ACTS

Determined at Field House
on the papers

Determination Promulgated
on 11 November 2013

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR OBED MINKAH
(No Anonymity Direction Made)

Respondent

Representation: Neither party was represented.

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Ghana who was born on 18 March 1986. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Boyes ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 29 October 2012 to refuse to issue him with a residence card as confirmation of a right of residence as the spouse of an EEA national exercising treaty rights in the UK under the provisions of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. On 15 May 2012 the claimant applied on the basis of his claimed proxy marriage in Ghana on 28 November 2011 to his wife and sponsor, a Portuguese citizen. The Secretary of State refused his application. The main reason was;

"It is noted that after close examination of this first schedule certificate the purple "wet ink" stamps are found to be underneath the black background demarcation lines of the certificate. In light of this the following is stated in this regard; the purported wet ink stamp has been printed prior to the background print being generated on the certificate. The document is not a colour photocopy as the signatures are input in wet ink. The document may therefore not be an original document. In view of this we do not accept that the marriage was registered with the correct authorities."
3. The application was also refused because the Secretary of State considered that under Ghanaian law the marriage was invalid because it had not been registered within three months. Furthermore, the claimant and his partner had not provided information as to where they were living at the time of the marriage. The marriage certificate was not lawfully issued and the claimed relationship had not been established.
4. The claimant appealed and asked that the appeal be determined on the papers which is what the FTTJ did in a determination promulgated on 24 January 2013. He concluded that the Secretary of State had asserted that the marriage certificate was a forgery and the burden of proof was on her to prove this. She had not done so. Furthermore, she had misdirected herself on the law relating to customary marriages in Ghana. He allowed the appeal. The Secretary of State made an application for permission to appeal which was refused by a judge in the First-Tier Tribunal. However, on renewal to the Upper Tribunal, permission to appeal was granted on 6 March 2013.
5. In response to the grant of permission to appeal the claimant's representatives filed a Rule 24 response dated 4 April 2013. This was accompanied by a copy of a formal "Return of Document Request" made by the claimant's representatives to the Secretary of State asking for the original marriage certificate be returned so that it could be submitted to the Ghanaian High Commission in the UK for its authenticity to be confirmed. I can find no indication that the Secretary of State has ever responded to this request.
6. The Secretary of State's appeal to the Upper Tribunal was referred to Deputy Upper Tribunal Judge Juss ("the DUTJ") who, in a determination allocated and considered on 28 March 2013 found that the FTTJ made an error of law. He set aside the FTTJ's decision and re-made it by dismissing the claimant's appeal. Although his determination is dated 4 May 2013 he does not appear to have seen the claimant's Rule 24 response dated 4 April 2013.
7. The claimant's representatives applied to the Upper Tribunal for the decision of the DUTJ to be set aside under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The main reason was that the Upper Tribunal Judge

who granted permission to appeal had directed that the claimant's representatives file and serve a written response no later than 6 April 2013. He also directed that the case should be placed in a paper list for hearing after 20 April 2013.

8. On 30 May 2013 Upper Tribunal Judge Spencer Issued a Notice of the Proposal to Set Aside the Decision of the Upper Tribunal under Rule 43 which was sent to the parties the following day. The main reason was that the DUTJ had determined the appeal prematurely and without seeing the claimant's Rule 24 response dated 4 April 2013.
9. The claimant's representatives responded agreeing that the decision of the DUTJ should be set aside. The Secretary of State did not respond. On 2 September 2013 Upper Tribunal Judge Spencer set aside the determination of the DUTJ. He directed that the appeal should be determined without a hearing and that any submissions from the Secretary of State should be received by the Upper Tribunal no later than 23 September 2013. I can find no such submissions.
10. In the circumstances my task is to determine on the papers whether the FTTJ erred in law and if so whether I should set aside and remake his decision.
11. Whilst the Secretary of State avoided a direct allegation that the marriage certificate was a forgery I find that the wording used which I have set out in paragraph 2 was in substance an allegation that the claimant had submitted and relied on a document which was forged or not genuine. This was the conclusion reached by the FTTJ in paragraph 26. It was a conclusion open to him on the evidence. That being so the FTTJ correctly stated that it was for the Secretary of State to establish this to the standard of the balance of probabilities. The FTTJ relied on and referred to RP (proof of forgery) Nigeria [2006] UKAIT 00086 quoting the head note prepared by the author of the determination which states; "An allegation of forgery needs to be proved by evidence and by the person making it. The procedure under s108 of the 2002 Act remains available to respondents. A bare allegation of forgery or an assertion by an Entry Clearance Officer that he believed the document to be forged can in these circumstances carry no weight. The Tribunal treats a document as forged only on the basis of clear evidence before it. KS (Allegations by respondent: proof required?) Pakistan [2005] UKAIT 00171 should not be read as implying the contrary." I note that whilst the Secretary of State avoided the use of the word forgery in the reasons for refusal letter there was no such reluctance on her part when seeking permission to appeal to the Upper Tribunal.
12. The FTTJ was entitled to rely on the fact that the Secretary of State had not submitted any form of verification report. These are usually referred to as Document Verification Reports. Whilst the FTTJ said that the Secretary of State had failed to produce the original marriage certificate it is clear that he did not claim that the Tribunal would have any "Forensic expertise in identifying forgeries" (paragraph 26) and concluded that it was not necessary to adjourn

and order that the Secretary of State produce the original marriage certificate in order to justly and fairly determine the appeal.

13. In paragraph 29 of the determination the FTTJ also referred to the Secretary of State's Instructions in particular paragraph 15.5.2 which states; "Since it is possible for Ghanaians living outside Ghana to obtain the proper certificates, certificates of marriage or divorce, authenticated by the Ghanaian High Commission, should be requested in all cases where the marital status of an applicant is important." The Secretary of State could have sought this authentication and her failure to do so was a matter on which the FTTJ was entitled to rely. Although it is not relevant to the question of whether the FTTJ made an error of law I note that the Secretary of State has failed to respond to the claimant's post decision request that the original marriage certificate be returned so that an application can be made to the Ghanaian High Commission for it to be authenticated. I find that the judge did not err in law in coming to the conclusion that the Secretary of State had not established that the marriage certificate was either forged or not genuine.
14. I find that the judge erred in law by failing to consider in the alternative whether the appellant and his partner were in a durable relationship. This was raised in paragraph 8 of the grounds of appeal to the First-Tier Tribunal but not addressed by the FTTJ. Whilst it was not raised by the Secretary of State in her grounds of appeal it was an obvious error of which notice was given to the representatives in the notice of the proposal to set aside the decision of the DUTJ dated 13 May 2030.
15. Because of this error of law I set aside the decision of the FTTJ which I now remake.
16. I adopt the reasons given by the FTTJ for coming to the conclusion that the Secretary of State has not established that the marriage certificate was either forged or not genuine. I reach the same conclusion. This conclusion was not flawed by any error of law and I adopt it.
17. However, I reach a different conclusion from the FTTJ in relation to whether the marriage was valid according to Ghanaian law and should be treated as a valid marriage for the purpose of the claimant's application. NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 00009 is an authority which, in the absence of later persuasive evidence I should follow. The expert evidence before the Tribunal was that;

"The most common form of marriage in Ghana is the customary marriage. It is a type of marriage contracted under the particular tradition and customary practices of a group of people. Indeed until the introduction of civil marriages by the British in Ghana, then Gold Coast, the only form of marriage was the customary marriage. These days, civil or ordinance marriages and customary marriages co-exist and both are legally recognised. It is up to the parties to choose which form of marriage they desire. A valid customary marriage can only be validly contracted

between two Ghanaian citizens and both parties must have capacity to marry. This means that there should be no violation of any rule of tribal relationship. These rules differ from tribe to tribe. Thus, whilst in some traditions, a man cannot marry his cousin, other traditions accommodate cross-cousin marriages.

18. I find that the Tribunal in NA accepted this expert evidence before summarising their conclusions in paragraph 24 where they said that: "A customary marriage is a lawful form of marriage in Ghana which must be carried out under the relevant particular tradition and customary practices."
19. Whilst the claimant is a Ghanaian citizen his partner is not. She is Portuguese. In these circumstances the claimant fails to establish that he has entered into a valid marriage or, as a result, that he should be recognised as the family member of an EEA national.
20. The claimant also submitted that he was an extended family member of his partner, an EEA national, in accordance with the provisions of Regulation 8 of the 2006 Regulations. In order to succeed he needs to establish to the standard of the balance of probabilities that they are in a durable relationship. The claimant might have been able to show this had he and his partner supplied clear and detailed evidence about their relationship and asked for an oral hearing to give evidence and be cross-examined. I find that there is an almost total lack of relevant evidence. Neither the claimant's application nor his witness statement provide any help or relevant information. There is no material which even begins to establish that they are in a durable relationship.
21. The original grounds of appeal to the First-Tier Tribunal do no more than mention Article 8 human rights grounds in one sentence; "The decision not to grant a residence card to A interferes with his human rights contrary to Article 8 of the ECHR." The FTTJ did not address any Article 8 grounds. Having failed to establish that he and his partner entered into a valid marriage or to provide any useful information about their relationship I find that the appellant and his partner have failed to show that even to the low threshold required interference with their private or family lives would have consequences of such gravity as potentially to engage the operation of Article 8.
22. I have not been asked to make an anonymity direction and see no good reason to do so. Having set aside the decision of the FTTJ I remake it and dismiss the claimant's appeal both under the 2006 Regulations and on Article 8 human rights grounds.

Signed
Upper Tribunal Judge Moulden

Date 6 November 2013