



**Upper Tribunal
Immigration and Asylum Chamber
IA/28506/2012**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 15 July 2013**

**Promulgated
On 17 July 2013**

Before

Upper Tribunal Judge Kekić

Between

Theophilus Acheampong

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation

For the Appellant: Ms N Manyarara, Counsel

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This case comes before the Upper Tribunal following the grant of permission to appeal by Upper Tribunal Judge Chalkley on 13 May 2013 against the determination of First-tier Tribunal Judge R J N B Morris promulgated on 25 March 2013. The appellant, a Ghanaian national, sought to appeal the decision of the respondent to refuse

to issue him a residence card as the spouse of an EEA national. Judge Morris was not satisfied that the appellant had been free to marry the sponsor nor that they had a durable relationship and, accordingly, she dismissed the appeal.

2. The appellant was born on 24 March 1978. It is not know when he entered the UK and no evidence of lawful entry has been adduced. He made his application for a residence card on 2102. It is maintained he married Nana Afua Fosuhemaah, a Dutch national of Ghanaian origin, by proxy in Ghana on 24 March 2012.

The Hearing

3. The appeal came before me on 15 July 2013. The appellant did not attend the hearing as he was awaiting an emergency appendectomy but the sponsor was in attendance. An application for an adjournment made prior to the hearing on the basis of the appellant's hospitalisation was refused on the basis that the error of law issue could be resolved in his absence.
4. I heard submissions from the parties as to whether or not the First-tier Tribunal had made errors of law.
5. Ms Manyarara relied on her skeleton argument which sought to bring some clarity to the grounds. She also relied upon the Tribunal decision of NA (customary marriage and divorce - evidence) Ghana [2009] UKAIT. She submitted that the judge's approach to the statutory declaration (which was prepared after the registration of the marriage) had been flawed because, contrary to what was said in paragraph 9(1) of the determination, a declaration *had* been submitted although she accepted this might be a typographical error as the judge had then proceeded to consider the declaration. She submitted that the judge had confused the names of the fathers of the appellant's first and second wives and on that basis mistakenly found that the declaration was unreliable because it contained the wrong name. She submitted that, in any event, registration of the marriage was optional and so the matter of the declaration was academic to the issue of a valid marriage even though the marriage had been registered in this case (which is how the declaration came to be issued).
6. Ms Manyarara submitted that in questioning the validity of the marriage certificate, the judge had gone too far; this was not a matter raised by the respondent in refusal where only the declaration had been questioned. She submitted that the judge had failed to properly assess the evidence; specifically the two statutory declarations. That had led to the confusion identified. Further, in paragraph 15 of the determination the judge had used the wrong

standard of proof by rejecting the attestation of the declarations. She had been wrong to require endorsements on the authenticated documents.

7. It was submitted that evidence of cohabitation had been submitted in the form of oral evidence and one Virgin media bill. The sponsor had not adduced additional evidence but it had been available. She submitted that despite the requirement under Ghanaian law for cohabitation to prove consummation of the marriage thereby making it valid, there was no similar requirement under Regulation 7, as clarified by PM (EEA spouse - 'residing with') Turkey [2011] UKUT 89 (IAC. The only finding on the oral evidence was as contained at paragraph 17. Ms Manyarara did not seek to make additional arguments in respect of Reg 8(5). She submitted that the dissolution of the marriage was only relevant to that Regulation. The grounds set out the sponsor's position as to his faith and polygamous marriages but in any event, these were permitted under customary law. The judge had erred in considering Appendix FM as this was not applicable in this case. The grounds referred to a typing error as regards the date in the document regarding the dissolution of the marriage; this had now been corrected but as that evidence was not before the judge, no submissions were to be made in that respect.
8. In response, Mr Tufan raised a preliminary point about admissibility of the application. He submitted the application for permission had been made out of time and this had not been dealt with in the grant. At this point I examined the file. The permission to appeal application was indeed marked out of time by the Tribunal. The endorsement on the file, presumably seen by First-tier Tribunal Judge Chohan who initially refused permission, was that the application should have been received by 5 April but had been received on 8 April. However the application form confirmed that the determination had been received late on 28 March. Good Friday fell on 29 March and 1 April was Easter Monday so I calculate that the five working day period ended on 8 April which was the date the application was received. As far as I could see, therefore, the application was not made late and Mr Tufan accepted this.
9. Mr Tufan submitted that if the evidence of the expert as set out in NA was to be relied on, then the Tribunal also had to consider that part of her evidence which maintained that the customary marriage could only validly take place between two Ghanaian nationals. He submitted that the sponsor was a Dutch national and therefore the marriage could not be valid. He also raised issues about whether such a marriage would be accepted as valid in her home country which it needed to be if she was to rely on it in the UK. He maintained that he had documentary evidence to confirm that registration of the marriage was necessary but did not seek to

pursue that point as the evidence had not been placed before the judge (I note in fact that some evidence had been submitted by the previous presenting officer and I refer to that later in this determination; at paragraph 23). He accepted there had been confusion over the names of the fathers in the declaration but submitted that was not material as it was just one point of many taken by the judge.

10. With regard to the submissions made as to the wrong standard of proof being applied, he submitted that there was nothing in the determination which suggested that the balance of probabilities had not been applied properly. He submitted it was plain from the determination that the Tanveer Ahmed principles had been applied. He submitted that with regard to the name of the Notary Public, one did not know whether the name Ose was correct or whether it should have been Osei or indeed something else. The judge was entitled to reject the documents for the reasons she gave.
11. Mr Tufan further submitted that there was a requirement of cohabitation for customary marriages to be valid, as indicated by the expert. Only one document to show cohabitation had been submitted and the judge was entitled to reject the oral evidence where no more documentary evidence had been adduced. He referred to TK Burundi [2009] EWCA Civ 40 which held that "An immigration judge was entitled to reject an applicant's assertion unsupported by readily available independent evidence." He submitted that there was no error of law and the determination was sound.
12. Ms Manyarara briefly responded and relied on paragraphs 10 and 15 of her skeleton which she submitted addressed all the issues raised by the respondent when refusing the application. She complained that new issues had now been raised. In any event, she stated that she had just asked the sponsor about her nationality and had been told that she was a dual Dutch and Ghanaian national.
13. That completed the submissions. At the conclusion of the hearing I reserved my determination. The parties were agreed that if errors of law were found, a further hearing would be required and that it should take place at Field House.

Findings and conclusions

14. I would note at the outset that the Tribunal files shows that the Presenting Officer raised the issue of the dissolution of the marriage as an issue at the commencement of the hearing before Judge Morris. There was therefore more than just the one issue which Counsel maintains was before the judge for determination. Ms

Manyarara also represented the appellant on that occasion and should have a note of this.

15. Permission was granted solely on the basis that “a Panel of the Tribunal is about to consider the whole question of customary and proxy marriages”. That appeal (which I understand is to address the situation in Nigeria) has been adjourned and is due to be heard in mid August. The grounds put forward by the appellant’s representative have not been engaged with and it is difficult to know whether or not the Upper Tribunal Judge considered they disclosed an arguable error of law. Notwithstanding the above, I have considered the grounds and the submissions made and reach the following conclusions.
16. Four arguments are made. These are that the judge failed to consider all the material evidence, that she misdirected herself as to the current position of Ghanaian law regarding customary marriage and divorce, that she made irrational credibility findings against the appellant and, lastly, that she failed to adequately consider article 8 in respect of her (sic) right to private life. I deal with each of these points in turn and I am grateful to Ms Manyarara for the clarification provided in her skeleton argument. I consider that the third complaint is linked to the first. This will be made clearer by my reasoning below.
17. Both parties submitted fresh evidence that had not been placed before the judge. I made it clear that I would not consider this and that it would become relevant only if errors of law were found. The documents remain on the Tribunal file. I have not looked at them and they do not form part of my reasoning.
18. It was clarified in submissions that the evidence the judge is alleged not to have properly considered consisted of two declarations; both appear in the respondent’s bundle. The first is a document from a district court in Ghana dated 2 April 2012 which confirms the dissolution of the marriage between the appellant and his first wife, Gloria. In this document the names of the fathers of the appellant and his ex-wife are given as Akwasi Acheampong and Nana Owusu Acheampong respectively. The second is the declaration of 12 June 2012 in respect of the second marriage; the appellant’s father is named as Akwasi Acheampong and the sponsor’s father as Nana Akua Fosuhemaah. I would point out that contrary to what is asserted in paragraph 5 (3) of the grounds, the respective mothers did not contribute to the declaration in any way.
19. At paragraph 13(iii) of the determination the judge finds that the credibility of the appellant and sponsor is damaged because differing names are given for the father of the sponsor on the

documents. Mr Tufan quite properly accepted that the judge had erred in this respect as claimed. Plainly she has. She appears to have failed to appreciate that the document relating to the dissolution of the appellant's first marriage to Gloria bore Gloria's father's name; there would have been no reason for it to refer to the father of the woman the appellant would later marry. That is plainly an error on her part. However it is not the only, and indeed not even the primary, reason she gave for finding the evidence of the dissolution to be unreliable and for rejecting it.

20. Judge Morris also criticises the evidence because the document, whilst referring to an affidavit, does not attach that affidavit and does not even indicate its contents. In addition, she found that the order of 2 April 2012 *predated* the filing of the appellant's application for dissolution. In her view, not surprisingly, this undermined its reliability as evidence of the dissolution. It is maintained in the grounds that the date of filing the application was a typing error which has been corrected. That may well be so, but that is a post hearing event and no evidence of same was therefore before the judge. Oral evidence was given which suggested this explanation but even if that were accepted at face value, I cannot see it would have advanced the case to any large extent because the application for dissolution and the dissolution itself took place *after* the appellant's second marriage. The appellant's evidence, as emphasised in the grounds, is that he would not enter into a polygamous marriage because he is a Christian. The documentary evidence shows, however, that he did just that, contrary to what he claimed and to what is maintained in the grounds at paragraph 6 (2). In conclusion, therefore, whilst the judge did confuse the identities of the appellant's two fathers-in-law, the other observations made in respect of the evidence of the dissolution are valid and sufficient to enable the findings as a whole to stand.
21. It is also argued that the judge misdirected herself as to Ghanaian law regarding customary marriage and divorce. The last point made in the preceding paragraph touches upon this argument with respect to polygamous marriages and the appellant's own position on same. It is maintained that the law allows for polygamous marriages and that the appellant did not say that he would not be able to enter into such a marriage but that he would not wish to enter into it on account of his faith. With regard to the first complaint, I was not referred to any evidence which supports this stance. I also note that the claim made in the skeleton argument that the appellant was free to marry to his second spouse because his first marriage had been dissolved, is not an accurate representation of the facts, even on the appellant's evidence as the dissolution occurred after the second marriage. The order is clearly dated 2 April 2012, endorsed with a June 2012 date on the back (as

seen in court from the original document) and reaffirmed in the attestation document. It cannot, therefore, be said that that is also an error. Moreover according to Judge Morris' Record of Proceedings, the appellant confirmed that the date of 2 April 2012 was correct. I note that this court document conflicts with the appellant's marital status as recorded on the current marriage certificate where the section asking for other existing marriage is marked as 'nil'.

22. With respect to the second complaint, I cannot see that this is more than semantics. As far as I can see, the appellant saying he would not enter into a polygamous marriage because of his religion is the same as saying he would not wish to do so. However I note from the Record of Proceedings that what the appellant is recorded as having said when he was asked whether he was allowed to have more than one wife was "Yes but I am a Christian so not allowed to". The judge's observation, as recorded in her determination, is clearly supported by that evidence.
23. There is also a complaint that the judge was wrong to have maintained that the declaration did not set out the place of residence of the parties when it in fact did. The judge had before her a page setting out part 1 of the Customary Marriage and Divorce (Registration) Law 1985 (CMDRA), submitted by the respondent at that hearing. That makes it plain that there is an obligation under law to register customary marriages. It may well be that unregistered marriages are still recognised by friends, family and the community as claimed by the expert but nevertheless there is a legal obligation to register them. I have carefully looked at the declaration and can see no reference to the place of residence of the appellant and sponsor in it. I accept that the UK is recorded on the certificate of marriage however according to the extract of the CMDRA before the judge, that information "shall" be contained in the statutory declaration "accompanying" the application for registration of marriage (section 3(1)). It is the evidence of the appellant, as confirmed by Counsel, that the marriage was registered however plainly the correct procedures were not complied with. These matters were put to the parties at the previous hearing but remained unresolved. It should also be noted that all the sections pertaining to the registration of the marriage on the certificate remain blank.
24. The judge is also criticised for the reasons she gave for rejecting the attestation of the declaration. It has to be said that it is not clear from the documents as to where the attestation took place and which authority issued it. The document itself is headed the Ghanaian Judicial Authority in Accra but the appellant's evidence was that it had been done by the High Commission in London. The

judge was entitled to note that the last name given for the notary public by the attesting authority did not accord with that on the declaration. She also found that the stamp of the Ghanaian High Commission or other issuing authority did not appear on the attested marriage certificate. She is criticised for this in submissions and in the grounds and it is also maintained that she had placed a higher standard of proof on the appellant in so doing. This is, however, a relevant matter as that stamp can be seen on the declaration. On that basis she was entitled to question why it did not also appear on the certificate. If, as would seem, the authorities endorse the document(s) being attested, then endorsements should appear on *all* such documents. It may be seen from the Record of Proceedings that this was a matter raised in oral evidence with the appellant.

25. Criticism is also made of the judge's findings as regards cohabitation. Whilst cohabitation is not required under the Regulations, it is required for the validity of a customary marriage according to the evidence of the expert. The grounds assert that documentary evidence had been adduced to confirm same but the only documentary evidence before the judge was from Virgin Media bill. The judge was entitled to find that the appellant and sponsor could easily have adduced more evidence but chose not to do so. In that context the oral evidence alone was not sufficient to allow her to make a positive finding.
26. There is nothing in the determination which points to a high standard of proof being applied. There are references in the determination to the standard of probabilities and I see nothing to suggest that any other standard was applied. The approach to the documentary evidence shows a proper application of the Tanveer Ahmed principles.
27. The judge considered Article 8. As she found there was no reliable evidence to show that the appellant and sponsor lived together or had any kind of relationship, she found family life was not engaged. She accepted there was private life on account of his long residence but no details of his date of arrival here or of the nature of the private life he claims to have established have been put forward. No witness statements were adduced and no oral evidence was called as to private life other than with the sponsor. The judge was obliged to consider Article 8 as it was raised in Counsel's submissions and her skeleton argument. In view of her findings it was open to her to find it was not engaged.
28. Ms Manyarara argued that matters such as the declaration and the dissolution of the marriage were irrelevant as it did not matter if the appellant was divorced from his first wife or if the marriage was

registered/declaration properly prepared. I would agree with her had it not been the appellant's evidence that he *did* terminate his marriage before remarrying and that the marriage *was* properly registered. Given the claim he has put forward, it was open to the judge to find that it was undermined by his own documentary evidence. In that sense it is relevant as it raises doubts on the reliability of the evidence and the claim as a whole. Read as a whole, the judge's findings are sound. She was entitled to find as she did. The determination does not show any error of law.

Decision

29. The Tribunal made no error of law. The decision to dismiss the appeal is upheld.

Dr R Kekić
Judge of the Upper Tribunal
July 2013

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