Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00126/2014

THE IMMIGRATION ACTS

Heard at Sheldon Court , Birmingham	**Determination Promulgated**
On 4 June 2014	**On 3 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS SHARON BOSSMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr S Awal, Legal Representative, from the Law Clinic.

DETERMINATION AND REASONS

Introduction

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 22 October 2013. However, for ease of reference, the Appellant and Respondent are hereafter referred to as they were before the First-tier

Tribunal. Therefore Mrs Bossman is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. The Appellant is a female citizen of Ghana whose appeal against the decision of the Respondent to refuse to grant her a residence card as the spouse of an EEA national exercising Treaty rights was allowed by of First-tier Tribunal Judge R G Handley (the Judge). She claimed that she and her EEA national Sponsor were married by proxy in Ghana and the Respondent did not accept that it was established on the basis of the documentary evidence that was provided by her that the proxy marriage was a valid marriage under Ghanaian Law because it did not comply with the requirements of the law. The items of evidence provided to establish that it complied with the legal requirements in Ghana were a Marriage Certificate dated 20 May 2013, a statutory declaration dated 10 May 2013 and a letter from the Ghanaian High Commission in London.

3. The Respondent's position, in the reasons for refusal letter dated 4 December 2013, was that although there was no legal requirement to register a customary marriage, if it was registered voluntarily there must be compliance with the provisions of paragraph 3(1) of the PNDC (Provisional National Defence Council) law 112, Customary Marriage and Divorce (Registration) Law 1985, which required a statutory declaration to be provided, such statutory declaration to supply specific information as to the names of the parties, the place of residence at the time of the marriage, and confirmation that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with.

4. Reliance was placed by the Respondent within the RL on **NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 00009**, within which, at paragraph 11, the expert evidence of Mercy Akman was relied on as setting out the criteria which must be met under Ghanaian customary law for a customary marriage to be considered legal, this being:

> "*7. ... It is a type of marriage contracted under the particular tradition and customary practices of a group of people....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...*
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> *8. A particular characteristic of customary marriage which distinguishes it from the system of marriage in Europe and other places is that it is not just a union of "this man" and "this woman". It is the union of "the family of this woman" and "the family of this man". Marriage in the customary context therefore unites families and not merely the individuals.*
>
> *9. It involves payment of a bride price by the bridegroom's family to the bride's family. If the appropriate bride price is not paid, there is no valid marriage, even if parties live as man and woman for many years. The acceptance of drink from the man's family is an indication of the consent of the wife's family to the*

marriage....It is potentially polygamous in nature; a man may decide to marry as many women as his strength and resources can accommodate.

10. There is not always a formal ceremony. Even if there was, the couples do not have to be present at this ceremony for a valid marriage to take place, provided representatives of the two families are present as witnesses to the meeting or event."

5. The conditions essential to validity of a customary marriage are the capacity to marry (that is that the parties are a suitable age, eligibility in terms of the parties being Ghanaian nationals, the status of the parties (that is whether they have been previously married etc)). However, in contrast to paragraph 7 of the evidence of the expert in **NA (Ghana)**, it is stated at p 4 of 10 of the RL that the parties to the marriage must be Ghanaian nationals themselves or demonstrate that one of their parents is a Ghanaian national.

6. The Respondent decided that the documents supplied did not establish that the Appellant's EEA Sponsor was of Ghanaian descent or that they had direct familial links to Ghana, that the statutory declaration supplied did not confirm that a dowry had been paid and did not state the current condition or marital status of the parties as required by the customary Marriage and Divorce (Registration law) 1985, and that no birth certificates were provided to establish the familial relationships between the Appellant and the Sponsor and the persons named in the statutory declaration as the father of the Appellant and the mother of the Sponsor.

7. The Judge accepted that the statutory declaration provided "...does not meet all the necessary requirements of the Ghanaian law but it was produced to the Ghanaian Authorities as a necessary step to the registration of a customary marriage. The Authorities in Ghana accepted it and issued a certificate to the effect that the customary marriage had been registered. This is also confirmed in a letter of 11 December 2013 from the Ghana High Commission." He also found that there was "little or no evidence to suggest that the Marriage Certificate was a false or fraudulent document." On the basis of these findings, the Judge allowed the appeal.

8. The Respondent applied for permission to appeal on the basis that Judge erred in law in failing to resolve material matters because he did not engage with the issues raised in the RL, in which it was stated that the Appellant had to prove that the customary marriage was registered in accordance with the provisions of the law in Ghana; that it was not established that her EEA Sponsor was of Ghanaian descent; that the signatures in the husband and wife field of the marriage certificate did not match those in the passport application form; and that the content of the statutory declaration did not comply with the requirements of the law.

9. Permission was granted by First-tier Tribunal Judge Landes on the basis that it was arguable that adequate reasons had not been given for the Judge's finding that the Appellant's marriage to the Sponsor was performed according to the customary laws and was to be treated as valid

in the UK. This was because his reasoning at paragraph 20 of the determination did not adequately explain his ultimate conclusions at paragraph 21 of the determination. Judge Landes also drew the attention of the parties to **Kareem [2014] UKUT 24**.

10. The Appellant submitted a Rule 24 response in which it is stated that the Judge did not err in law, that the Respondent's reliance on the case of **NA (Ghana)** was untenable because Mercy Akman, the expert who gave evidence in that case as to whether a proxy marriage could be entered into by non-Ghanaian nationals, had revised her opinion in **Alexander Amoako v SSHD** promulgated by the Upper Tribunal on 21 June 2013, clarifying that customary marriages were available between non-Ghanaian citizens. It was further submitted that this position was supported by **McCabe v McCabe [1994] 1 FLR 410**, in which the Court of Appeal held that a customary marriage between a Ghanaian national and a non-Ghanaian national was valid.

11. For the purpose of the hearing before me, I had the documentary evidence which was before the First-tier Tribunal, as well as an additional bundle from the Appellant, pp numbered A – J and 1 – 161 (AB2) although the only evidence referred to within that bundle for the purposes of deciding whether or not the Judge had materially erred in law comprised duplicates of the documents before the First-tier Tribunal.

Submissions on behalf of the Respondent

12. Mr Smart essentially relied on the grounds of application but clarified the Respondent's position on whether or not proxy marriages could take place between non-Ghanaian nationals. He submitted that the RL did not accurately reflect the position of the Respondent in one area. At p 4 of 10, it was stated that "...both parties to the marriage must be either Ghanaian citizens themselves, or be able to demonstrate that their parents are Ghanaian citizens, in order for the marriage under customary law to be considered legal." This was the position taken in **Amoako** but was not the position taken in **NA (Ghana)**, which was relied on in the RL and reliance on **NA (Ghana)** is maintained. He submitted that the Country of Origin Information Service Report on Ghana dated 11 May 2012 (COIS report) at paragraph 30 confirmed that the Constitution of Ghana (1992), at part 8(1)) confirmed that "...a citizen of Ghana shall cease forthwith to be a citizen of Ghana if, on attaining the age of twenty-one years, he, by a voluntary act, other than marriage, acquired or retains the citizenship of a country other than Ghana..."

13. Mr Smart submitted that the guidance relied on in **Amoako** was prepared by an officer within the policy department and the current instructions rely on **NA (Ghana)**. The expert had changed her evidence in **Amoako** from that which she gave in **NA (Ghana)** but that evidence is not accepted by the Respondent; **Amoako** is not a starred decision and cannot be relied on in evidence.

14. He submitted that as the evidence adduced did not establish that the Appellant and the EEA national were validly married under the applicable

laws in Ghana, the correct approach was that set out in **Kareem**. It was for the Appellant to establish that her proxy marriage was accepted as lawful in the country of origin of her EEA national Sponsor, that is establish that it was accepted by the Dutch authorities, pursuant to headnote G of **Kareem**, the detailed reasoning for which was set out at paragraphs 41 – 67 of that determination.

Submissions on behalf of the Appellant

15. Mr Awal relied on his skeleton argument, submitting that he relied on the decision of the High Court in **McCabe v McCabe [1994] 1 FLR 410**, in which a customary marriage was recognised between a Ghanaian citizen and an Irish citizen and this conclusion differed from that in **Kareem**; the latter only applied if it was found that the proxy marriage was not conducted in accordance with Ghanaian law. The Appellant's marriage to her EEA Sponsor complied with all the requirements of the law and was endorsed by the Ghanaian High Commission. If it had not been valid, it would not have been endorsed by the Ghanaian High Commission. Therefore **Kareem** did not apply and the grant of permission to appeal was not in accordance with the law. He submitted that it was stated within the statutory declaration that the customary marriage had been performed in accordance with the rites of customary marriages.

16. Mr Awal further submitted that Mercy Akman, who had given evidence before the tribunal in **NA (Ghana)**, had changed her evidence and confirmed that a valid proxy marriage could still be conducted between a Ghanaian citizen and a non-Ghanaian citizen, and the Appellant came under the auspices of **Amoako**. He submitted that the marriage certificate was signed by those standing in proxy for the Appellant and the Sponsor and law in Ghana enables the proxy to sign all documents on behalf of the parties to the marriage as provided by section 3(2) of the Customary Marriage and Divorce Act 1985.

17. In reply, Mr Smart stated that **McCabe and McCabe** did not apply because no issue was before the Court as to whether both parties had to Ghanaian nationals for a proxy marriage to be valid; this issue was not raised, they were not required to, and did not, make a finding on this point. This issue only became apparent in **NA (Ghana)**.

18. This concluded the submissions. Both representatives agreed that if I found that the Judge had materially erred in law such that his decision must be set aside, I had sufficient material before me on which to remake the decision.

Did the Judge materially error in law?

19. At the hearing before the Judge, neither party referred to or relied on A**moake.** However, the extracts from the COIS report had been provided, and this apparent conflicts between the position in **NA (Ghana)** and the COIS report, and the RL at p 5 of 10 were not resolved by the Judge. The

Judge also did not address the apparent conflict arising from the confirmation from the Ghana High Commission that the proxy marriage was validly registered, despite the failure of the Statutory Declaration to contain the information that the legal provisions require.

20. The Appellant's evidence was that although there is no need to register a proxy marriage, hers had in fact been registered voluntarily pursuant to the provisions of the PNDC (Provisional National Defence Council) law 263, Ghana customary and Divorce (Registration) (Amendment) Law 1991. This being the case, **McCabe v McCabe** did not apply, which considered the evidence to be adduced to prove that a customary marriage *which was not registered* had in fact taken place. Further, in that case, the Court was not asked to consider whether the customary marriage could validly be contracted between a Ghanaian and a non-Ghanaian national and therefore it was not an issue considered by the Court and, as submitted by Mr Smart, the Court was not required to make a finding on it. I therefore find that **McCabe v McCabe** cannot assist the Appellant.

21. The essential reasoning of the Judge was that whilst the statutory declaration did not contain all the information that is required by the law in Ghana for the purposes of the voluntary registration of a customary marriage in Ghana, it was accepted as valid by the Ghanaian authorities in Ghana because it was on the basis of this declaration that the marriage was registered, and the documents were accepted by the Ghana High Commission as being valid. However, in paragraph 14 of **Kareem**, it is stated:

> *"Whilst considering the issue of evidence of marriage, we remind ourselves that the proof of the law of another country is by evidence, including proof of private international law of that other country. Such evidence will not only have to identify relevant legal provisions in the other country but identify how they apply in practice. A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail. "*

22. It is usual, when one is considering the genuineness of a document, to provide a detailed report setting out the features of a genuine document and how it is that the documents presented compare with such documents. This evidence must be adduced to the Tribunal which has to determine the genuineness or otherwise of the document. For example when ID documents are disputed, it is necessary to obtain a report from an expert who has considerable experience for the purposes of detecting non-genuine documents and for the contents of such documents to be provided to the Tribunal.

23. In the case of the Appellant, it was not asserted by the Respondent that the Appellant's statutory declaration was forged; merely that it was unreliable for the purposes of voluntary registration of a proxy marriage because it did not contain the information that it must contain pursuant to Ghanaian Law, this being that the dowry was paid and the marriage status of the parties prior to marriage. This issue was not addressed by the

Judge; he only considered whether the marriage certificate was a 'false' or 'fraudulent' document. The letter from the Ghana High Commission does not address this issue; it does not seek to establish what the legal requirements are as to the statutory declaration to be submitted in support of the application to register a customary marriage; it is merely stated that "The competent authorities in Ghana have confirmed that the marriage was properly registered in accordance with the Customary Marriage and Divorce (Registration) law 1985." However, it is not stated within the letter from the Deputy Director Legal & Consular Bureau, Ministry of Foreign Affairs & Regional Integration, provided with the Statutory Declaration, why it is possible to ignore the mandatory requirements as to the issues which need to be addressed in a statutory declaration before a customary marriage can be voluntarily registered. For the purposes of paragraph 14 of **Kareem**, the letter from the Ghana High Commission cannot be regarded as an expert opinion confirming that the practice of ignoring the statutory requirements for the voluntary registration of proxy marriages is acceptable. The Judge therefore gave insufficient reasons for his decision that the marriage certificate and the statutory declaration, having been confirmed by the Ghana High Commission, were sufficient for him to find that the Appellant's proxy marriage was valid for the purposes of Ghanaian law. I therefore set aside his decision.

Remaking the decision

24. As to the remaking of the decision, I find as follows:

25. Mr Smart clarified the position of the Respondent in that a proxy marriage between a Ghanaian citizen and a non-Ghanaian citizen pursuant to **NA (Ghana)** was not valid. He provided both me and Mr Awal with a note of the position of the Respondent at the hearing but I mislaid my copy and he provided me with a further copy of the note on request. This confirms the position he stated at the hearing.

26. **Amoako** is not a starred decision and therefore does not set down principles of general application. The expert evidence of Ms Akman was not before me and, in any event, it appeared that the Judge in **Amoako** would not have been minded to accept it had it not been for the policy of the Respondent at the time to accept proxy marriages between those who were Ghanaian nationals by descent. That policy no longer applies as made clear by Mr Smart. Therefore **NA (Ghana)** applies and the marriage must be between Ghanaian nationals; this is confirmed by the extracts from the COIS report. Mr Smart's evidence that the EEA national was no longer a Ghanaian national was not challenged and it follows therefore that there cannot be a valid proxy marriage between the Appellant and her EEA national partner.

27. What bearing does the letter dated 11 December 2013 from the Ghanaian High Commission have on the validity of the marriage? For the reasons set out in paragraph 23 above, I find that the contents of the letter are insufficient to confirm that there has been a valid proxy marriage between the Appellant does not and her EEA national partner.

28. In view of this, the provisions of **Kareem** apply; there is doubt as to the validity of the marriage and it is therefore necessary for the Appellant to show that the marriage is accepted as valid by the Dutch authorities and no such evidence was before me.

29. I find therefore that the Appellant has not established that she was validly married by proxy to her EEA national partner and she is not entitled to a residence card as the family member of an EEA national exercising Treaty rights.

30. The right to a residence card on the basis of a durable relationship and under Article 8 ECHR was not raised before the Judge and he therefore made no findings of fact on it, in view of which, these grounds were not raised before me.

Decision

31. The determination of Judge Handley contains material errors of law. I therefore set aside his decision. I remake the decision to dismiss the Appellant's appeal.

32. The appeal of the Respondent is allowed.

33. I note that an anonymity direction was not made and on the facts of this case, I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Manjinder Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore no fee award is made.

Signed Dated

M Robertson
Sitting as Deputy Judge of the Upper Tribunal