Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50064/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 June 2014	**On 18 June 2014**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

JANET ABRAFI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Akohene, Solicitor
For the Respondent: Ms S L Ong, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Ghana. She appealed to a judge of the First-tier Tribunal against the respondent's decision of 13 November 2013 refusing her application for a residence card which she sought on the basis

of marriage to an EEA national exercising treaty rights in the United Kingdom.

2. The appellant claimed to be the wife of Isaac Kwadwo Amponsah, a Belgian national, and to have married him by proxy in Ghana.

3. The respondent noted that she had provided a copy of her husband's Belgian ID card, her Ghanaian passport, employment evidence for her husband including his bank statements and a bank letter, a letter from the Ghana High Commission, two statutory declarations, a Ghanaian customary marriage certificate and photographs.

4. The Ghanaian customary marriage certificate stated that she had married her husband in Ghana on 28 February 2013 by proxy, and that the marriage was registered with the district registrar on 7 March 2013. It was noted by the respondent that there was no mandatory requirement under Ghanaian law to register a customary marriage within a certain timeframe, and there was no legal obligation indeed to register the marriage at all. The respondent was of the view however that since the appellant had provided a Ghanaian customary marriage certificate she had shown that she had voluntarily registered her marriage and the burden of proof was therefore on her to show that the registration was done in accordance with the Customary Marriage and Divorce (Registration) Law 1985. This included a requirement that the registration of the marriage be accompanied by a statutory declaration which must state the names of the parties to the marriage, the places of residence of the parties at the time of the marriage and that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with.

5. The respondent also noted from the decision of NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 00009 that there are additional criteria which require to be satisfied before a proxy marriage contracted under Ghanaian customary law might be considered legal. Various paragraphs of that decision were noted.

6. The respondent went on to note section 3(1)(c) of the Customary Marriage and Divorce (Registration) Law 1985 which required to be shown that the parties had capacity to marry and that the parties (which covered the spouses parents or extended family) consented and that dowry had been received in some form applicable to the customs of the tribes. It was necessary to show that both parties to the marriage must be either Ghanaian citizens themselves or able to demonstrate that their parents were Ghanaian citizens in order for the marriage under customary law to be considered legal. The point was made that the appellant had submitted no evidence to prove she was of Ghanaian descent other than her passport and no evidence had been provided to prove that her spouse was of Ghanaian descent. She also noted evidence from the Ghana COI Report of 11 May 2012 that birth certificates registered over a year after

an individual's birth are not reliable evidence of relationships and so registration, including late registration, might often be accomplished on demand with little or no supporting documentation required. Ghanaian legislation made it clear that registration of birth was required to be done within 21 days of the birth taking place.

7. The respondent did not consider that the appellant had satisfied the requirements of showing both parties to the marriage were either Ghanaian nationals or had direct familial links to Ghana that even if they had been able to do so that the customary marriage certificate was not accepted as being validly registered in accordance with the 1985 Act, since, having set out the terms of the declaration, it was noted that no evidence had been provided in the form of birth certificates or marriage certificates that her claimed father was related to her as claimed and likewise with respect to her spouse's claimed father, and a letter that had been provided purporting to be from the Ghanaian High Commission in London stating that the marriage was registered in accordance with Ghanaian law could not be verified because the telephone number provided on the letter providing that information was not answered when it was called and when the number was cross-checked with the Ghanaian High Commission in London website it was found that the number did not exist and therefore the genuineness of the letter was not accepted.

8. The respondent went on to consider whether the provisions of Regulation 8(5) of the EEA Regulations had been satisfied on the basis of the couple being unmarried partners, but to assess whether the relationship was durable the respondent would expect the appellant to demonstrate that she had been living together with her EEA national sponsor for at least two years. No evidence had been provided to show that they resided together as a couple at the same address prior to the date of the customary marriage certificate nor had they provided any evidence that they knew each other or had met prior to the date of the customary marriage certificate being issued abroad. It was not accepted that she had been in a durable relationship with her claimed husband for a two year period. She had provided no evidence of cohabitation with him and no joint evidence in the form of bills etc. The only photographs provided appeared to have been taken over a period of a few days. Accordingly it was concluded that the terms of Regulation 8(5) were not met. The matter was also considered in respect of Article 8 of the European Convention on Human Rights but it was concluded that a separate application had to be made in this regard.

9. The judge did not accept that the appellant had produced evidence to show that she was married to her EU sponsor as claimed. She had produced a Ghanaian passport as evidence of her descent but her sponsor had not done so. A translated copy of a birth certificate bearing his name and stated as being from the Republic of Ghana had been submitted as evidence of his descent and was also produced as evidence of his relationship to the person cited on the statutory declaration of 4 March

2013 indicating the individuals who acted on the sponsor's and the appellant's behalf at their marriage in Ghana. The appellant had produced a birth certificate which the judge again considered appeared to have been produced for the same purposes. He considered these documents in the round and in accordance with the Tanveer Ahmed guidelines. He noted they appeared all to have been attested by a registrar but there was no information or explanation as to why the appellant's birth was registered so long after it took place. This was also true of the sponsor. He also noted that the certification stamps on both of them were of very poor quality and barely readable and found them ultimately to be of no evidential value and to provide little support or corroboration for the appellant's claims to identity, relationships and nationality.

10. He said that whilst registration was optional, the parties had voluntarily registered their marriage and he was not satisfied given his earlier findings and in the absence of evidence about the sponsor to the contrary that both parties were Ghanaian nationals or had direct familial links to Ghana as required. He observed and in effect adopted the concerns of the respondent about the letters from the Ghanaian High Commission in London. He also noted with regard to the marriage certificate that it said that the appellant was a spinster rather than being divorced as she claimed she was at the time of the marriage and she had provided no explanation as to why her status would be indicated in that way. Again he regarded this to be a document of poor quality.

11. He went on to consider the situation in respect of Regulation 8(5) and concluded that if the couple had been cohabiting for the period of time they claimed to have done subsequent to their marriage they would have been able to provide far more detailed evidence of their lives together than one payslip and one letter from Npower, neither of which in any event was in joint names. He regarded the photographs produced as being of very poor quality and that there was no supporting evidence as to when and where they were taken or even whether they clearly related to the appellant and the sponsor. He was not satisfied, given the history, circumstances and documentation produced that the appellant had provided sufficient evidence to show that she was in a durable relationship with her sponsor and therefore did not consider that she had made out the requirements of the Regulations.

12. He went on to consider the matter under Article 8 of the European Convention on Human Rights and concluded that, bearing in mind the best interests of the child, refusal would not be a disproportionate breach of the appellant's family or private life. He therefore dismissed the appeal on all grounds.

13. The appellant sought and was granted permission to appeal on the basis that it was arguable that the judge should have ordered the production of the original documents given his concerns that the documents were of poor quality generally and the certification stamps on both were of very

poor quality and barely readable. It was also argued in the grounds that the judge had not understood the law and capacity of parties to contract a valid customary marriage relative to the their Ghanaian descent, noting that registration of marriages in Ghana was now optional, and that the judge had also erred on the issue of "durable relationship".

14. At the hearing Mr Akohene identified three specific issues which he said showed errors of law in the judge's decision. The first was a failure to understand properly the issues about the marriage contract in Ghana. He argued that the judge had simply followed what had been said by the Secretary of State in her decision letter. The respondent had accepted at page 4 of the decision letter that registration of a marriage was no longer compulsory. It would confirm the marriage rather than validating it. The respondent had quoted from NA in the decision letter but had omitted paragraph 8 where it was made clear that a marriage could be concluded where a couple agreed to marry and the woman's parents or family agreed to the marriage and the man made a present or presents in cash or kind as required by the appropriate custom to her parents or family. There were no documents nor certificates and in many cases no ceremony. The Regulations required no more than that she be a family member by marriage and there was no further definition. She was therefore married according to custom and the registration was not material. The contract was evidenced by the statutory declaration. The judge therefore misunderstood Ghanaian customary law.

15. But even if one looked at the registration certificate, what had been decided by the Tribunal in CB (validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080 applied. There had been no allegation or evidence by the respondent that the marriage certificate was fraudulent so in the absence of such matters the rules of private international law were required to be observed and it was clear from that decision that the United Kingdom would recognise the validity of proxy marriages for immigration purposes provided the proxy marriage was legal in the country in which the marriage was celebrated. It would then be a matter for the registrar and that was in any event irrelevant to the question of whether the couple were married.

16. The second point was the reference at paragraph 9 to Tanveer Ahmed. If the judge was relying on Tanveer Ahmed then he would need to have the original documents and they had been kept by the Secretary of State. If the judge had needed to see them he could have requested them from the appellant who would then have sought them from the Secretary of State.

17. The third point of challenge was that concerning the durable relationship issue. The matter had been dealt with on the papers but one would expect a judge to hear evidence from both parties if making a finding about a durable relationship. If the judge had considered matters differently he might have come to a different outcome.

18. A final point was whether both needed to be Ghanaian. It was clear from the document referred to in an unreported decision which Mr Akohene had produced that both being Ghanaian was not a requirement: it needed only one of them to be.

19. In her submissions Ms Ong argued that though registration might be optional, if there were no registration the marriage would need to be proved as a customary marriage by other means but where it had been registered there were certain requirements to be complied with, and the Secretary of State was entitled to take issue if there was not compliance. There was the point which the judge had referred to about the certificate stating that the appellant was a spinster rather than being divorced as she claimed she was at the time of the marriage. There were also concerns about other evidence provided as set out at paragraph 9 of the determination and referred to at page 5 of the refusal letter concerning the reliability of Ghanaian birth certificates dated so many years after the birth. The Ghanaian COIR addressed points about poor quality documents and there were other concerns. This was relevant because of the birth certificates' reference to parents and the need to prove the people named on the statutory declaration were able to do so. There were concerns about that evidence. It was the case in fact that the respondent did not have the original documents on file but it was not clear whether anything turned on that.

20. Ms Ong also relied upon what had been said by the Upper Tribunal in Kareem (Proxy marriages – EU Law) Nigeria [2014] UKUT 24 (IAC) which among other things said that the starting point would be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality, and no evidence had been provided about Belgian law with regard to this. The judge had been entitled to conclude as he did and the evidence was insufficient to meet the standard of proof.

21. By way of reply Mr Akohene argued that the issue of the birth certificates was irrelevant. The appellant had produced a Ghanaian passport and that was the time to take issue with the Ghanaian nationality point. It was clear from the documentary evidence that both parties to the marriage did not need to be Ghanaian.

22. The appellant maintained that the originals of the documents were with the Home Office. If the judge was not looking at copies he could not make a proper Tanveer Ahmed finding. As to what constituted a valid marriage, registration was simply confirmation. The United Kingdom had to apply the principles of private international law and could not find fault in another country's processes. If the respondent thought there was a discrepancy or defect in the process then that could only be challenged in the Ghanaian High Court.

23. With regard to Kareem, it was clear from paragraph 68(b) that this was a two stage process. It would usually be sufficient where a marriage certificate issued by a competent authority was produced. There was nothing in this case to challenge there being a competent authority and no allegation of deception or fraud. It must be accepted that the registrar had taken it on him or herself to decide that a marriage had taken place. Paragraph 68(d) provided that where there was no marriage certificate or doubts then the marital relationship could be proved by other evidence and that was the second stage which required a judge to decide whether a marriage had been contracted. At paragraph 68(g) was the and/or point and that made it an alternative whether or not there was independent and reliable evidence about the recognition of the marriage under the laws of the EEA country where it was clear that there was independent reliable evidence from the country where the marriage took place. That took one back to the starting point. Clearly paragraph 17 was the panel's preference, but the Tribunal was also referred to paragraph 19 which provided for other possibilities. The appeal should be allowed.

24. I reserved my determination.

25. I think it is right to begin assessment of the judgment in this case with the decision of the Upper Tribunal in Kareem which I think had been promulgated and reported before the judge decided this case but was not put before him and indeed was not referred to in the grounds or the grounds of permission. In my view it is entirely clear from Kareem that rather than being an alternative a fundamental point is the matter summarised at paragraph 17:

> "Where the marital relationship is disputed, the question of whether there is a marital relationship is to be examined in accordance with the laws of the Member State from which the Union citizen obtains nationality and from which therefore that citizen derives free movement rights."

This was the first issue considered by the Tribunal in that case. As early as paragraph 5 it is noted that within the Secretary of State's reasoning there is an assumption that for the purposes of EU law a Member State can use its own legal order to determine whether or not a person is married to another. The Tribunal went on to say at paragraph 6 that it had found no legal basis in EU law for such an assumption and went on to note the legal basis for its view, summarised at paragraph 11, that in EU law the question of whether a person is in a marital relationship is governed by the national laws of the Member States. The Tribunal went on at paragraph 13 to infer that usually a marriage certificate issued by a competent authority will be sufficient evidence that a marriage has been contracted, but the Tribunal went on to make clear later in that paragraph that such principles do not help to determine whether a person is a spouse because it will depend on identifying the authority with legal power to create or confirm

that a marriage has been contracted. The reasoning for this is clear, as set out at paragraph 18. There it is said:

> "Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system in which a marriage is said to have been contracted in such a way as to ensure that the Union citizen's marital status is not at risk of being differently determined by different Member States. Given the intrinsic link between nationality of a Member State and free movement rights, we conclude that the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted."

26. It is abundantly clear that that was not the case in the instant appeal. There is no indication as to what Belgian law has to say about a proxy marriage, and accordingly this basic requirement of the decision in Kareem has not been satisfied. It is entirely unclear what Belgian law's response is to the question of whether there is a marital relationship in this case.

27. As a consequence the appeal must be dismissed.

28. As regards the other matters, insofar it is necessary to address them at this point, I agree broadly with the submissions of Ms Ong that where the marriage as in this case has been registered, and accepting that there is no requirement to do so, and there are requirements to be complied with, issue can properly be taken with any difficulties in the evidence. I consider that the judge was entitled to be concerned by the matters set out at paragraph 9. I do not consider that matters could have been resolved with regard to the bulk of his concerns in that paragraph by consideration of the original documents. There was no explanation or information as to why the births of the appellant and sponsor were registered so long after they took place, and I note the concerns that the judge noted also in the background evidence about the quality of such evidence where there has been such a gap. That was the particular concern in that paragraph, but there is also a concern in the marriage certificate stating that the appellant is a spinster rather than being divorced as she claimed she was at the time of the marriage, and there are also the concerns noted at paragraph 10 about the letter submitted from the Ghanaian High Commission in London. These matters in my view justified the judge in concluding as he did.

29. I also consider that he was entitled to be concerned as he was in respect of Regulation 8(5) concerning the documentation produced purporting to show that the couple were in a durable relationship. The findings of the judge in that regard at paragraph 13 are sound. Accordingly I conclude that no material error of law in his determination has been identified, and chiefly on the basis of the reasoning set out in Kareem but also on the basis of his own reasoning quite apart from that, I conclude that the determination is sound and no error of law in it has been identified. The appeal is dismissed.

Signed Date 12.06.2014

Upper Tribunal Judge Allen