IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10503/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 June 2015	**On 9 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MS CYNTHIA NYARKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms A Everett, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge C Newberry dismissing her appeal under the Immigration (European Economic Area) Regulations 2006 against a refusal by the respondent to issue her with a residence card on the basis of her asserted marriage to an EEA national. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal.

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The Reasons for the Grant of Permission

2. On 20 May 2015 First-tier Tribunal Judge Robertson granted permission to appeal for the following reasons:

> "In the grounds of application it is submitted the judge erred in failing to state what weight if any he [gave] the expert report from Professor Woodman and evidence from the Belgium Home Office. It is clear that the appellant's bundle contains a report from Professor Woodman, and this has not been referred to by the judge and the impact of the report on his findings is not clear. It may be that the report cannot establish that the marriage of the appellant is a valid marriage pursuant to **TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**, but the failure to consider its contents is an arguable error of law. Similarly, there is no reference to any evidence, within the determination, from the Belgian Home Office. Again, the evidence may be insufficient to establish that the marriage is a valid marriage [but] again, the ground is arguable. All grounds are arguable."

The Background

3. The background is that the appellant, a national of Ghana, applied for a residence card as the family member of an EEA national (a Belgian national) who was exercising free movement rights in the UK.

4. The application was refused by the Secretary of State on 15 February 2014 on the ground that she had not shown that she was married to her sponsor. On the basis of the documents provided, she was claiming that the marriage had taken place in Ghana by proxy. The burden rested with her to prove that such a marriage was valid, and she had not discharged this burden. She had not shown that the requirements of Ghanaian national law were satisfied.

5. There were also irregularities in the statutory declaration relied upon. Among other things, the statutory declaration stated her spouse was represented at the customary wedding by his parents. But she had not provided any evidence in the form of birth certificates or marriage certificates etc. to show that the persons who represented the spouse at her wedding were related to her spouse as claimed. It was also noted that she had provided a different statutory declaration in the present application from the one she had provided in her failed application of 9 November 2012. The purpose of the statutory declaration was to provide the registrar with information regarding the parties of the marriage in their absence so that he could register the marriage legally under the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. The fact that she had provided an updated statutory declaration was completely self-serving, as the document she now relied upon was not presented to the registrar at the time of the marriage. The document was only created for immigration purposes, and so it cast serious doubt on her credibility and on the credibility of the documents provided.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The appellant's appeal came before Judge Newberry sitting at Taylor House in the First-tier Tribunal on 6 October 2014. Both parties were legally represented. In his subsequent decision, Judge Newberry set out his findings at paragraph [17] onwards.

7. The appellant's case was that the sponsor had been born in Ghana, and had subsequently become a Belgian national. But the sponsor had not produced his birth certificate. So the sponsor had not demonstrated that he was related to his claimed parent in Ghana.

8. Further, the sponsor's signature differed between the marriage certificate, the application form and the Belgian identity card. The judge said that this was something that had been highlighted in the refusal letter, but the sponsor failed to deal with the variation of his signature in his witness statement.

9. The judge proceeded to dismiss the appeal on the ground that the appellant had not discharged the burden of proving that the sponsor's representation as to his nationality was true, and that both parties were in fact related to the declarants in the statutory declaration.

The Error of Law Hearing

10. The appellant's nominated representatives, BWF Solicitors, informed the Upper Tribunal in advance of the hearing before me that they were not instructed to make an appearance.

11. I was satisfied that the appellant herself had been notified in good time by first class post when her appeal in the Upper Tribunal was due to be heard, and so I considered it was appropriate to proceed with the hearing in her absence.

Discussion

12. The expert report of Professor Woodman is directed at the issues raised in the refusal letter with regard to compliance with Ghanaian national law. Professor Woodman does not purport to address the question of whether a customary marriage by proxy is recognised in Belgian law.

13. The appellant's solicitors sought information on this question from the Belgian Migration Office. Unhelpfully, the solicitors did not include in the bundle the four questions which they posed, but only the answers to the questions which they received from the Belgian Migration Office. On my reading of the responses, the asserted marriage by proxy is probably not recognised by Belgian law; and, in any event, the appellant would have needed to have presented the documentary evidence to the Belgian

Embassy in London in order for the foreign act of marriage to be validated by the Belgian authorities. In answer to question 4, the conditions which have to be met for the foreign act of marriage to be valid in Belgian law include:

- the act has to be made by a Ghanaian legitimised authority and the marriage has to be registered, despite the fact under Ghanaian law such registration has been no longer mandatory since 1991
- the proxy has to be made in writing by the parties involved and has to be made prior to the conclusion of the marriage.

14. It is apparent from the documents produced by the appellant that the documents relied upon as proving the proxy marriage were all generated after the marriage was allegedly concluded, and so the requirement for the proxy to be made in writing by the parties involved "prior to the conclusion of the marriage" is plainly not satisfied.

15. I note that in his report Professor Woodman disputes that a Ghanaian proxy marriage has to be registered in order to be valid. Whilst he is no doubt right from a Ghanaian law perspective, he clearly has not been asked to consider the implications of the information obtained from the Belgian authorities as to what is required in a Belgian law context.

16. A possible justification for Judge Newberry not engaging with the report of Professor Woodman, and the information received from the Belgian Migration Office, is that, in his view, the appeal fell to be dismissed at a preliminary stage: the appellant had not discharged the burden of proving one of the key primary facts relied upon, namely that the sponsor was a Ghanaian national and that his parents were present as his representatives at the proxy wedding. So in effect the line taken by the judge was that the claim did not get of the ground, and therefore it was not necessary to consider the application of Ghanaian law (or indeed the application of Belgian law).

17. Nonetheless, the judge ought to have explained why he did not consider it necessary to engage with the report of Professor Woodman, and the judge also ought to have considered the impact of the decision in **<u>Kareem</u> (proxy marriages – EU law) [2014] UKUT 24**.

18. Accordingly, the ground on which I uphold the judge's decision is that his lack of reasoning, or lack of engagement with the two areas of evidence discussed above, does not translate into material error of law.

19. The head note of **<u>TA and Others</u>** reads as follows:

> 'Following the decision in **<u>Kareem</u> (proxy marriages - EU law) [2014] UKUT 24**, the determination of whether there is a marital relationship for the purposes of the Immigration (EEA) Regulations 2006 must always be examined in accordance with the laws of the Member State from which the Union citizen obtains nationality.'

20. The decision reflects the following passage in **Kareem** at paragraph [18]:

> "Therefore, we perceive EU law as requiring the identification of the legal system of 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."

21. The evidence relied upon by the appellant before the First-tier Tribunal did not purport to establish that the appellant's asserted customary marriage by proxy to the sponsor was valid under Belgian law. So no reasonable Tribunal properly directed on the law could have reached any other conclusion than that the appeal against the decision under Regulation 7 should be dismissed.

22. I note that the appellant also appealed against the judge's finding that she had not shown in the alternative that she had a durable relationship with an extended family member, such as to bring herself within the scope of Regulation 8(5).

23. The appellant had not in terms sought a residence card on this basis. The question of a durable relationship was raised by the Secretary of State of her own motion. She said the appellant had provided no evidence that she had resided with the sponsor as a couple at the same address "prior to the date of your customary certificate", which was apparently dated 19 December 2011 (the date is cut off in my copy).

24. At paragraph [22] of his decision, the judge observed that according to the appellant's witness statement she had not moved in with the sponsor until 1 November 2011, which is a little over a month before the date of the certificate, and therefore the two year test was not met.

25. The relevant date for assessing whether the relationship between the parties was a durable one was the date of the appeal hearing, not the date on which the parties had purportedly entered into a customary marriage by proxy.

26. But in the light of the judge's adverse findings on the primary issue before him, I do not consider there was a material error in his finding on the subsidiary issue that the appellant had not shown in the alternative that she was in a durable relationship with her sponsor.

27. Finally, the notice also argues that the judge erred in law in failing to address a claim under Article 8 ECHR. This ground of appeal has no merit: see **Lamichhane [2012] EWCA Civ 260**. The appellant is not facing removal and she was not served with a Section 120 notice.

Conclusion

28. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal by the appellant to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson