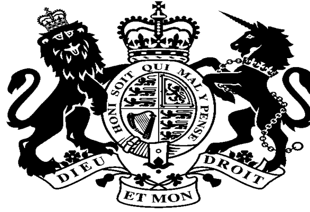

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/09767/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 31 July 2018**

**Decision & Reasons Promulgated**
**On 12 October 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SYMES**

**Between**

**ERNEST AIDOO**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr A Malik (counsel for Danbar Solicitors)
For the Respondent: Mr S Kandola (Home Office Senior Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of Ernest Aidoo, a citizen of Ghana born 22 6 March 1989, against the decision of the First-tier Tribunal of 15 March 2018 dismissing his appeal against the refusal of an EEA residence card, itself brought against the Respondent's refusal of his EEA application on 23 November 2017.

2. The Appellant had applied for a residence card on the basis of his marriage to Maria Andreia Mirrado Monteiro, a Portuguese citizen working in the UK.

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3. The Respondent identified the main considerations when assessing the validity of a marriage: the need for the marriage to be recognised in the country in which it took place, having been properly executed to satisfy the requirements of the law there, and there being nothing in the law of either party's country of domicile to restrict the freedom to marry. Any marriage certificate had to be issued by a competent authority with legal power to create or confirm the facts to which it attested.

4. The application was refused because, having regard to the requirements of Ghanaian law which included a need to show capacity to marry under section 3(1)((c) of the Customary Marriage and Divorce (Registration) Law 1985, it was not established that both parties were entitled to participate in a proxy marriage: no evidence of Ghanaian passports for the Appellant and Sponsor, or their parents, had been put forward. Accordingly, there was no evidence that they had direct familial links to Ghana. There was no evidence proving the family relationship that either party was represented at the customary wedding by their father as claimed, nor that the necessary dowry had been paid. Accordingly, it was not established that the marriage was a valid one and thus the Appellant's claim to be the family member of an EEA national was rejected.

5. Before the First-tier Tribunal the evidence included a marriage, certificate registered on 3 December 2013 records the marriage on 6 September 2014 of the Appellant and Sponsor. It is stamped and signed by a Registrar from Accra. An affidavit from Fred Aidoo, the Appellant's father, recorded that he represented history in all matters concerning this customary marriage; Mario Monteiro confirmed the same vis-á-vis her daughter. Both joined in stating that the marriage was in accordance with the customary laws and usages of Ghana, following the requisite dowry being duly presented to the bride's family and that the customary marriage rites were performed. They accordingly confirmed the contraction of a customary marriage, which had been duly registered.

6. Samuel Boakye-Yiadom, the Second Deputy Judicial Secretary of the judicial service of Ghana certified that the signature of Kodwo Effirm Nunoo was appropriately stamped signed and sealed. McArios A Akanbono, Deputy Director, Legal and Consular Bureau, Ministry of Froreign Affairs and Regional Integration of Ghana, certified that Mr Boakye-Yiadom's signature was genuine.

7. The First-tier Tribunal directed itself to *Awuku* and *Cudjoe* noting that the central question was, given the law of England and Wales recognised proxy marriages so long as they were valid in the place where they were celebrated, whether the marriage was valid in Ghanaian law. The documents before it were copies rather than originals. There was no birth certificate supplied for the father. The "1994 authority" (i.e. *McCabe v McCabe* in the Court of Appeal) relied upon by the Appellant (might no longer be authoritative, given the reference at §11 of *NA Ghana* to the participants in a valid proxy marriage having to be Ghanaian. There was inadequate evidence to establish that the couple had cohabited, and furthermore there were unexplained entries in the bank account for "CHB" which

the Judge presumed referred to the receipt of Child Benefit. This latter factor cast doubt on the genuineness of the relationship as there was no reference to a child being part of the family.

8. There was no satisfactory evidence before the Tribunal that the parties were cohabiting such as to give rise to a viable claim that the Appellant was an extended family member by way of being a partner in a durable relationship.

9. Grounds of appeal argued that the First-tier Tribunal had erred in law in

   (a) Rejecting a document ostensibly validly issued from a competent body representing the Ghanaian government;

   (b) Giving inadequate reasons for rejecting the evidence of cohabitation;

   (c) Wrongly speculating that the Appellant had supplied bank statements that indicated he received Child Benefit, without notice of the point being given to him.

10. Permission to appeal was granted by the First-tier Tribunal on 21 May 2018, on the basis that the grounds of appeal were arguable. *NA Ghana* had not necessarily ruled that only Ghanaians could contract proxy marriages; furthermore it was arguable that relevant supporting evidence was wrongly discounted by reference to it being "extremely limited" which appeared inconsistent with the civil standard of proof, and that the inference drawn from the bank statements was unfair in the context of an appeal that was being determined without a hearing.

11. Mr Malik submitted that the chain of documentation from Ghana was ostensibly genuine and sufficient to establish the contents therein: it was not open to the First-tier Tribunal to doubt the view of the competent authorities there as to the marriage's validity. There was no clear reasoning as to why the burden of proof on the Respondent to establish that these documents were not genuine had been discharged. The matter of Child Benefit had been raised without notice, and on instructions, Mr Malik confirmed that the Appellant had explained that this referred to a bank transfer from a friend rather than recording the receipt of public funds as a parent. Finally, there was wrongful reference to the EEA Regulations 2006, when the 2016 Regulations were the governing instrument.

12. Mr Kandola replied that the decision was a lawful one in which the Judge had appropriately directed themselves to all relevant considerations.

13. The representatives were agreed that in the event I identified a material error of law, I should proceed to determine the appeal without a further hearing.

**Findings and reasons**

14. I note that in fact the appeal was brought under The Immigration (European Economic Area) Regulations 2016, not their predecessors in 2006. Thus there was ostensibly no right of appeal available against the decision that the Appellant was not an extended family member. However nothing turns on this feature of the

case, as on my findings below the Appellant is entitled to succeed on his primary case of "close family" (rather than "extended family") membership.

15. The Upper Tribunal ruled in *Cudjoe (Proxy marriages: burden of proof) Ghana* [2016] UKUT 180 (IAC):

> "1. It will be for an appellant to prove that their proxy marriage was in accordance with the laws of the country in which it took place, and that both parties were free to marry. The burden of proof may be discharged by production of a marriage certificate issued by a competent authority of the country in which the marriage took place, and reliance upon the statutory presumption of validity consequent to such production. The reliability of marriage certificates and issuance by a competent authority are matters for an appellant to prove.
>
> 2. The means of proving that a proxy marriage was contracted according to the laws of the country in which it took place is not limited to the production of a marriage certificate, as is recognised in *Kareem (Proxy marriages - EU law)* [2014] UKUT 24 (IAC).
>
> 3. In cases where a divorce has taken place prior to the proxy marriage and there is an issue as to whether the parties were free to marry, it is for an appellant to show that the dissolution of the previous marriage was in accordance with the laws of the country in which it occurred."

16. Section 3(1) of the PNDC (Provisional National Defence Council) Law 112, specifically the Customary Marriage and Divorce (Registration) Law 1985, provides the legal basis for the validity of customary marriages. Part 1 headed *registration of customary marriage* states that:-

> "3. (1) The application for registration of the marriage shall be accompanied by a statutory declaration stating the following: -
>
> (a) the names of the parties to the marriage;
>
> (b) the places of residence of the parties at the time of the marriage;
>
> (c) that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with.
>
> (2) The statutory declaration shall be supported by parents of the spouses or persons standing in loco parentis to the spouses expect where there are no such persons living at the time of application for registration."

17. In *NA Ghana* [2009] UKAIT 00009 §11, the expert evidence of Mercy Akman was cited as relevant to the criteria which must be met under Ghanaian customary law for a customary marriage to be considered legal, thus:

> "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...
>
> 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."

18. *NA Ghana* at 15.5.2 sets out an extract then extant on the UK BIA website which stated:

> "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 state of an applicant is important. Statutory declarations made by a parent or other family elder of either party to an unregistered customary marriage should only be accepted where they complete a chain of otherwise first class documentary evidence of a claim to citizenship."

19. *McCabe v McCabe* [1994] 1 FLR 410, a decision of the (English and Welsh) Court of Appeal, was determined on the basis that the customary proxy marriage of an Irish national to a Ghanaian national was valid, despite the Irish husband not being of Ghanaian nationality or origin.

20. *NA Ghana* turned on the evidence that was necessary to demonstrate the *dissolution* of a customary marriage. When recording the relevant evidence regarding the registration and dissolution of marriages, upon which the parties did not materially differ, the Tribunal noted that "The onus of proving either a customary marriage or dissolution rests on the party making the assertion"; and concluded that oral evidence *might* suffice to establish the validity of a marriage's dissolution, albeit that a party would be expected to produce the best evidence reasonably available to them. The evidence from Mercy Akman where she stated that only Ghanaian nationals could be party to these relationships was incidental to their conclusions. The Tribunal itemises the more significant aspects of the evidence before it §24, observing that the material relied on by either side was to the same effect - but this aspect of her account does not feature amongst that evidence, and nor was it necessary for the Tribunal to subject the proposition to

any analysis. In *Awusu* [2017] EWCA Civ 178, the appeal of Mr Awusu was allowed outright, notwithstanding that he, a Ghanaian national, was married by proxy in Ghana to a German national.

21. It seems to me that the First-tier Tribunal materially erred in law in its very brief determination of the issues before it. The principal basis for its decision was the assumption that only Ghanaian nationals could be party to proxy marriages. However, the absoluteness of that proposition is cast into doubt by both *Awusu* and *McCabe*. It is also inconsistent with the fact that in this particular case there is a chain of documents which on their face attest to the compliance of the marriage with the formalities identified in the legislation. It seems to me that the First-tier Tribunal needed to confront the precise material that was before it in the course of its conclusions.

22. The phrase "The views of Judges change, as laws do, as time passes" §9 is an unduly scant rejection of reasoning of the Court of Appeal of England and Wales on a closely related issue. The reference to the documents being copies rather than originals is not followed through; however it would appear that the original documents had been available to the Secretary of State, and no suggestion was made that they should have been provided for the appeal hearing. So that line of reasoning adds nothing to the overall decision.

23. I accordingly find that there is a material error of law in the decision below. The First-tier Tribunal failed to provide adequate reasons for its conclusions, and failed to take account of relevant considerations before coming to those conclusions, given the range and depth of material before it.

24. In line with the parties' preferred resolution of the appeal I now proceed to determine the matter finally.

25. I do not consider that the Home Office criticisms of the evidence supplied by the Appellant and Sponsor have force. The Court of Appeal has twice issued judgments which are consistent with non-Ghanaian nationals, and indeed individuals with no identified Ghanaian heritage, participating in valid proxy marriages. I acknowledge that neither decision turned on this issue, but I consider the outcome of those cases to be nevertheless telling. Before me the Secretary of State has not identified any legislative authority that would stand in the way of proxy marriages of this nature.

26. The burden of proof to establish the validity of his marriage lies on the Appellant, and mere inadequacies in the Home Office critique of his case are not sufficient to carry the day for him. Nevertheless, he has provided affirmative evidence in support of his case. The statutory declaration before me states the parties to the marriage, their places of residence, and that the essential conditions for the marriage's validity have been satisfied. Those are the essential requirements for registration of a marriage to proceed under Section 3 of the legislation in question.

27. There is a certified chain of evidence ostensibly issued by competent authorities in Ghana which confirms that the officials who confirmed the registration of the marriage were acting appropriately in line with their duties. The only reasonable inference to be drawn from that chain of evidence is that the marriage was considered apt for valid registration by the original Registrar. The Home Office themselves acknowledge that a chain of satisfactory documents can evidence the validity of a marriage, as does the decision of *Cudjoe* cited above.

28. It seems to me that in this particular case the evidence chain suffices to discharge the burden of proof on the Appellant, on balance of probabilities, to establish his marriage is a valid one. It can readily be appreciated that there will be cases where there is some overt feature of the evidence that casts doubt on some aspect of the procedures leading to the marriage, or upon the entitlement of one party to marry. The latter possibility is acknowledged at (3) of the headnote in *Cudjoe*. However, absent some express evidence casting doubt on a marriage's validity it seems to me that a chain of evidence such as that present in the instant appeal suffices to establish the Appellant's case.

29. I accordingly find that the Appellant is the family member of a qualified person and that he is entitled to the residence card originally sought. His appeal is allowed.

Decision:

The decision of the First-tier Tribunal is set aside.

The appeal to the Upper Tribunal is allowed.

Signed: Date: 13 August 2018

Deputy Upper Tribunal Judge Symes