Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01774/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 August 2014	**On 26 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS CHRISTELLE DEUDJUI DJEUKEUSSI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr G Harrison, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision by the Secretary of State to refuse to issue her with a residence card as confirmation of her right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights here. The First-

tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Cameroon, whose date of birth was 5 June 1986. On 12 December 2013 the Secretary of State gave detailed reasons (running to eleven pages) for refusing her application for a residence card made on 4 February 2013.

3. Firstly, an applicant must provide sufficient evidence to demonstrate their EEA family member is exercising treaty rights in the United Kingdom as defined in Regulation 6 of the Regulations 2006. The Secretary of State had undertaken various checks to verify her sponsor's claimed employment, but had been unable to confirm his employment on the evidence provided.

4. Secondly, it was her responsibility to submit documents demonstrating that she was the family member of an EEA national as claimed. She said that she was a direct family member of her sponsor under Regulation 7, as a consequence of having contracted a marriage to the sponsor in Ghana. As evidence of her marriage to an EEA national, she submitted a Ghanaian customary marriage certificate, but stated that she was married to her EEA national spouse in Ghana on 9 November 2012 by proxy, and that the marriage was registered with the district registrar on 26 November 2012. She had not shown that her marriage had been registered in accordance with Section 31 or 32 of the PNDC law 112, Customary Marriage and Divorce (Registration) Law, 1995, Part 1 Registration of Customary Marriages. The statutory declaration relied on did not comply with various requirements of Section 3, and therefore the marriage certificate was not valid. A customary marriage certificate without a valid statutory declaration was not recognisable proof that a legally accepted proxy marriage occurred in Ghana.

5. The Ghana COI Report of 11 May 2012 illustrated problems that occurred with forged and fraudulently obtained official documents. She had not provided birth certificates which satisfactorily demonstrated that either she or her husband was of Ghanaian descent. The first scheduled customary marriage certificate that had been submitted with the application contained a field entitled "signature or thumbprint of husband" and a field entitled "signature or thumbprint of wife". Upon careful examination of those fields, the signature in the husband field did not match that on her husband's passport.

The Decision of the First-tier Tribunal

6. The appellant asked for her appeal to be determined on the papers, and it came before Judge Cresswell sitting at Newport on 7 May 2014 as a paper appeal. The judge had before him the contents of the respondent's bundle and a small bundle filed by the appellant's solicitors. This consisted of a witness statement from the appellant and some documents. In her witness statement she said she had chosen to have her appeal determined on the papers due to the costs involved in opting for an oral hearing and in instructing Counsel to attend the hearing. Her husband's parents were Ghanaians by birth. There was a letter of attestation from the Ghana High

Commission attesting to the authenticity of all the documents that had come from Ghana, including the marriage certificate and the statutory declaration.

7. In his subsequent determination, he directed himself at paragraph 10 that the appellant had a right of appeal in accordance with Regulation 6 of the 2006 Regulations only if she produced an EEA family permit or other proof that she was related as claimed to the EEA national. At paragraph 12, he set out the guidance given by the Upper Tribunal in **Kareem (Proxy marriages – EU law) [2014] UKUT 0024 (IAC)**.

8. The judge set out his findings in sub-paragraphs (i) to (x) of paragraph 15. The appellant had provided no evidence to support the claim that her EEA Belgian national sponsor was the son of Ghanaian parents. The appellant had not shown that her EEA sponsor was genuinely in employment or in some other way a qualified person. He could place no weight upon the marriage documents for reasons which he would go on to explain, citing **Tanveer Ahmed**. The signature of the husband on the Ghanaian marriage certificate differed from that in his passport. There was no evidence to show that the sponsors of the marriage were related to or even known to the appellant and the EEA sponsor. The appellant had submitted a letter from a person at Ghana's judicial service which had a security feature (a hologram) in a poor state, which appeared to be a sticker of the sort which a child could scratch onto paper and not to form an integral part of the paper itself.

9. To sum up, the judge said at sub-paragraph (viii), the appellant had not shown that she was married at all to the EEA citizen, had not shown she followed the necessary steps for a lawful customary marriage in Ghana and had not shown that the judge could rely upon the registration certificate.

10. In sub-paragraph (ix) the judge cited the following proposition from **Kareem**:

> "It should be assumed that, without independent reliable evidence about the recognition of the marriage under the laws of the EEA country and/or the country where the marriage took place, the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because this will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight."

11. The judge continued:

> "Here, I have detailed the difficulties upon the face of the documents submitted and the other evidential difficulties and have been asked to paw over legal materials in a paper determination when the appellant could have been in no doubt from the refusal letter that independent reliable evidence was required. The appeal bundle makes no reference at all to **Kareem**."

12. The judge went on to hold in paragraph 15(x) and in paragraph 16 that as the appellant had failed to show that she was a family member of or related to an EEA spouse, she had no right of appeal in accordance with Regulation 2006. He summarised his decision at paragraph 17 as follows:

> "There is no right of appeal by reason of the appellant's failure to produce proof that she is related as claimed to the EEA national."

The Grant of Permission to Appeal

13. On 23 June 2014 Judge Osborne granted the appellant permission to appeal on the sole ground that the judge had erred in finding that the appellant did not have a right of appeal:

> "The First-tier Tribunal Judge made findings within the determination which, if sustainable, would have been capable of forming the basis of the appeal being dismissed, but I find that to say that she had no right of appeal is an arguable error of law and accordingly permission to appeal is granted."

The Rule 24 Response

14. On 1 July 2014 Asli Celik-Oglu of the Specialist Appeals Team settled a detailed Rule 24 response opposing the appellant's appeal. In summary, the First-tier Tribunal Judge had directed himself appropriately with his self-direction at paragraph 10. Further, having considered all available evidence, it was reasonable and open to the judge to find that the appellant had failed to discharge the burden of proving that it was either a customary marriage that was lawful in Ghana or in Belgium, or that she was the family member or relative of an EEA national. The grounds raised no material arguable errors of law and were a mere disagreement with a negative outcome of the appeal. The judge rightly raised concerns about the quality of the appellant's evidence in his findings, and made all the findings he could based upon a thorough evaluation of the small bundle of documents relied on by the appellant, with cogent reasons to support those findings.

The Hearing in the Upper Tribunal

15. In advance of the hearing before me, there was received at Field House on 31 July 2014 from the appellant's legal representatives, Universal Immigration Chambers, a five page document headed "Grounds of application for permission to appeal to the Upper Tribunal". In this document, the representative sought permission to appeal due to "adverse or irrational findings or lack of findings on core issues".

16. On the day of the hearing there was received at Field House an unsigned letter from the appellant's representatives stating as follows:

> "We have just received notification from our above named client regarding her health conditions. She might not be able to attend the hearing because of her bad health condition.

We respectfully invite the court to adjourn this hearing and to give us a new direction."

17. The notice of hearing was sent to the appellant and to her representatives by first class post on 30 June 2014. The notice informed the appellant and her representatives that if a party or his representative did not attend the hearing, the Tribunal might determine the appeal in the absence of that party.

18. Given that the appellant had previously eschewed the option of giving oral evidence in support of her appeal, and given that the issues to be resolved did not require the appellant's attendance, I proceeded with the hearing. I was not satisfied that the appeal could not otherwise be justly determined. Indeed, not only was I of the view that it was not in accordance with the overriding objective to adjourn the hearing, but I was also not satisfied that a proper adjournment application had been made.

19. I asked Mr Harrison to address me on the point on which the appellant had been granted permission to appeal, and also on the additional grounds recently raised by Universal Immigration Chambers.

Discussion

20. In the notice of decision which accompanied the refusal letter, the appellant was informed that she was entitled to appeal against the decision under Section 82 of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the Immigration (European Economic Area) Regulations 2006. She was informed that the appeal must be made on one or more of the following grounds, which include the ground that the decision breaches rights which she had as a member of an EEA national's family under community treaties in relation to entry to or residence in the United Kingdom.

21. Regulation 26(1) provides that subject to the following paragraphs of this Regulation, a person may appeal under these Regulations against an EEA decision.

22. Regulation 26(3) provides that if a person claims to be a family member … or relative of an EEA national he may not appeal under these Regulations unless he produces –

    (a) a valid national identity card issued by an EEA state or a passport; and

    (b) either –

        (i) an EEA family permit;

        (ii) proof that he is the family member or relative of an EEA national …

23. The problem with the judge's approach is that in cases where Regulation 26(3)(a) is satisfied, as here, the question arising under Regulation 26 (3)(b)(ii) is the same question as that which arises under Regulation 7 or 8. In short, it is necessary to determine the appeal under Regulation 7 or 8 on its merits before non-compliance with Regulation 26(3)(b)(ii) can be established. Since this is the necessary and logical

procedure where proof of family membership is in issue, it follows that a finding on the merits must precede a finding under Regulation 26(3)(b)(ii). It is only because the appellant has failed to show that she is not the direct or extended family member of an EEA national, and thus her appeal falls to be dismissed on the merits, that the judicial decision maker is in the position to make a finding under Regulation 26(3)(b)(ii). So I conclude that the appropriate course in such cases is for the appeal to be dismissed on the merits, and not on the ground that retrospectively the appellant did not have a right of appeal in the first place.

24. I am fortified in this conclusion by consideration of the 2002 Act. Section 84(1) provides an appeal under Section 82(1) against an immigration decision must be brought on one or more of the following grounds, which grounds include:

> "(d) That the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the community treaties in respect of entry to or residence in the United Kingdom"

While Regulation 26, which is secondary legislation, requires the appellant to satisfy certain evidential requirements in order to show a right of appeal, the satisfaction of such evidential requirements is not a prerequisite of the appellant exercising a right of appeal under the statute.

25. However, I do not consider that the judge's error is material to the outcome, as the appellant has not been deprived of a fair hearing and the judge's findings of fact lead inexorably to the conclusion that the appeal should be dismissed.

26. The thrust of the recent document submitted by the appellant's legal representatives is that the judge's findings on the merits are not sustainable. But the Rule 24 response, of which the recent document makes no mention, effectively refutes this line of argument. The judge has given adequate reasons for finding that the appellant has not discharged the burden of proving that she contracted a valid marriage by proxy to her sponsor that is recognised either by Ghanaian law or by Belgian law. Moreover, as the judge found, the appellant has not discharged the burden of proving that the marriage was validly registered.

27. The original application for permission to appeal to the Upper Tribunal was settled by Counsel, who argued that the judge had also erred in law in not addressing an alternative claim under Article 8. Judge Osborne did not grant permission to appeal on this ground, and there is no suggestion in the witness statement of the appellant, relied on before the First-tier Tribunal, that she is advancing an Article 8 claim in the alternative.

28. The appellant was last admitted to the United Kingdom on 27 October 2009 with valid entry clearance as a student, expiring on 31 December 2011. She acknowledges that she is an overstayer in her witness statement. So, on the face of it, the appellant does not have a viable private life claim under Rule 276ADE, and (in the light of the judge's sustainable findings of fact under the Regulations 2006), she has no family

life claim under Appendix FM. On the evidence available, the appellant does not meet the threshold test approved in **Gulshan**, and so there was no error in the judge not asking himself the question whether the interference consequential upon the refusal of a residence card is proportionate.

Decision

The decision of the First-tier Tribunal did not contain an error of law such that it should be set aside. So the decision stands, and the appellant's appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson