Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34255/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 23rd September 2014	**On: 24th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

ANGELA OWUSU-ANSAH
(NO ANONYMITY DIRECTION)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms Tetteh, Counsel instructed by Gharweg Advice Centre
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Ghana date of birth 11th January 1963. She has permission to appeal against the decision of the First-tier Tribunal (Judge North) to dismiss her appeal against a decision to refuse to issue a residence card in accordance with the Immigration (EEA) Regulations 2006.

2. The basis of the Appellant's application had been her relationship with James Kwame Oppong, a Dutch national. She submitted that she was in a durable relationship with Mr Opping, and in the alternative that they were married according to Ghanaian customary law.

3. The Respondent did not consider there to be sufficient evidence to show that the couple were in a durable relationship. In respect of the Ghanaian customary marriage the Appellant had not shown her marriage to comply with the requirements of the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. In particular the statutory declaration provided did not state the places of residence at the time of marriage of either the Appellant or Sponsor.

4. On appeal the First-tier Tribunal agreed with the Respondent. The statutory declaration supplied did not expressly give the places of residence of the parties to the marriage. It did not therefore comply with the formalities required by section 3 (1) of the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. The Tribunal had regard to the country guidance case of NA (Customary Marriage and Divorce –Evidence) Ghana [2009] UKAIT 00009 had found, contrary to the submissions on behalf of the Appellant, nothing therein to state that the registration of marriages under the Act is optional. There was not sufficient evidence to warrant a finding that the couple were in a durable relationship. In a determination dated the 23rd December 2013 the appeal was therefore dismissed.

5. The grounds of appeal submit that the First-tier Tribunal erred in the following respects:

   i) NA does state that registration is optional and the determination is wrong to state that the guidance therein had no application to this case;

   ii) NA in fact makes clear that customary marriages are valid without registration;

   iii) There was a failure to take relevant evidence into account, namely the letter from the Marriage Registry in Accra which stated that the marriage certificate was "duly issued, authentic and genuine": this led to a failure to recognise the marriage as valid in Ghana and to apply CB (Validity of Marriage – proxy marriage) Brazil [2008] UKAIT 00080. The Tribunal further failed to note that the places of residence of the parties to the marriage were identified on the face of the certificate itself.

   iv) Complaint is further made that the determination refers to regulation 8 whereas it should have read regulation 7, and states that the Appellant was unrepresented when in fact she

was not.

Error of Law

6. Following a hearing on the 12th May 2014 I made the following findings on the determination of the First-tier Tribunal. The Respondent was that day represented by Mr Jarvis, Senior Home Office Presenting Officer.

> "Paragraph 6 of the determination addresses the decision in NA as follows: "on my reading of that decision it relates to the lawful dissolution of marriage and that the registrations of dissolutions is optional. So much is a completely different matter to the formalities required for the celebration of a valid marriage". Before me Mr Jarvis agreed that the First-tier Tribunal has here erred in applying an unduly restrictive reading of NA. Much of the evidence in NA, and indeed the findings, also relate to the registration of marriage. That decision sets out the expert evidence given by Mercy Akman, a barrister qualified in the UK and Ghana, about the validity of customary marriage. Having set out the formalities required for a customary marriage Ms Akman addressed the question of statutory registration [at paragraph 13 of the decision]:
>
> > "12. Customary Marriage and Divorce (Registration) Law 1985 (P.N.D.C.L. 112) provided for mandatory registration of customary marriages and divorces after 1985, but was this law was amended in 1991 by the Customary Marriage and Divorce (Registration) Amendment Law 1991 (P.N.D.C.L. 263) to make the registration of marriages and divorces optional. This is the current position of the law. The parties to a customary marriage may choose to register the marriage at any time after the marriage with the Registrar of Marriages and Divorce but this is not mandatory and records show that registration of marriages have declined over the years. Whereas in 2004 1172 marriages were registered, only 677 were registered in 2007. If the marriage is registered, the couple are issued with a certificate and the notification is entered on the register."
>
> The Upper Tribunal approve that evidence at paragraph 24, confirming that the registration of customary marriage in Ghana has been optional since 1991; even when registration was mandatory, failure to do so did not invalidate the marriage. Ms Akman, and the Tribunal, recommend that where the validity of a marriage is in doubt, other evidence, such as confirmation from the Ghanaian authorities, can be

sought.

In this case the Appellant sought to rely on confirmation of the validity of her marriage from the Marriage Registry in Accra. It does not appear that the First-tier Tribunal took this evidence into account.

I am satisfied for the reasons set out above that the First-tier Tribunal erred in finding that this customary marriage needed to comply with the formalities in respect of registration before it could be considered valid. It is clear from NA that a customary marriage in Ghana can be valid even if it is not registered at all. There was other evidence confirming the validity of the marriage and there was a failure to take this evidence into account. That evidence is sufficient to discharge the burden of proof and show this marriage to be valid in Ghana"

7. Notwithstanding his concession that NA had been too narrowly read, the HOPO on the 12th May 2014, Mr Jarvis, submitted that any error was not material since the Appellant could not, on the evidence before the First-tier Tribunal, have discharged the burden of proof set out in Kareem (Proxy Marriages –EU law) [2014] UKUT 00024 (IAC). The Appellant had provided no evidence that her marriage would be regarded as lawful in the Netherlands. Ms Tetteh not unreasonably protested that this had never been the Respondent's case before the First-tier Tribunal. Kareem had been promulgated in the hiatus between leave being granted to the Upper Tribunal and the May hearing and the Respondent had not raised it as an issue until now. I therefore adjourned the proceedings to give the Appellant an opportunity to produce the relevant evidence before the matter was re-made.

The Re-Making

8. On the 23rd July 2014 the matter came back before me. By that time the Appellant had obtained an opinion from a Dutch lawyer, a Mr O.K Hyiaman, Co-ordinator of 'Law Stichting Scientia Potentia Est'. Mr Hyiaman states that in principle the Netherlands will recognise any monogamous marriage contracted abroad which is recognised by the country in which it takes place. In respect of customary marriages this can be established by requesting that the marriage certificate is "legalised" by a competent authority such as the Dutch embassy in the country in question. In a 2003 case the Dutch Court of Appeal held that the existence of a customary marriage in Ghana could be demonstrated and accepted by reliance on the 'Form of Register of Customary Marriages', used in Ghana to register such unions. The citation of this case is given as ECLI: NL: GHSGR: 2003: AO5800 case

number 603-R-03. There are a number of other Court of Appeal decisions to the same effect, and Ms Tetteh had obtained a translation of one of these. She pointed out that the Appellant had always had the 'Form of Register of Customary Marriages' – this might be considered acceptable by the Dutch Court of Appeal, but not apparently by the Respondent. Mrs Kenny, who represented the Respondent that day, confirmed that to be the case. She relied on Kareem (Proxy marriages - EU law) [2014] UKUT 24 and TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC) as authority for the proposition that the Tribunal had held that customary marriages are not in fact recognized by Dutch law. I indicated that this is not what either of these decisions say. All they say is that the burden of proof is on appellants to establish that their marriages are so recognized, and simply pointing to the Dutch Civil Code, without any further elaboration or expert opinion on how the code is interpreted, is insufficient. I nevertheless agreed to the joint request of the parties that the matter be further adjourned to enable the 'best evidence' to be produced, namely "legalization" of the Appellant's marriage certificate by the Dutch embassy in Accra. I was told that the original was in the Home Office file and that the Respondent would need a week to retrieve it and give it to the Appellant. She would then need further time to send it to Ghana and get it back.

9. On the 17th September 2014 I received an email from Lorna Kenny, a Senior Presenting Officer at Angel Square. The gist of it is as follows:

> "despite the best efforts of all concerned, including searches at the file's last known location and intended destination, attempts to trace the file have provides unsuccessful and the file has not therefore been made available to me to date. We acknowledge that this constitutes a failure to comply with directions and imposes an inability on the Appellant to progress her case in so much as this document is concerned".

10. The case resumed on the 23rd September 2014. Ms Isherwood indicated with apologies that the Respondent had still not managed to locate the file. I heard submissions from both parties.

11. The problem with the evidence in Kareem, and indeed TA, was that the Tribunal had nothing before it except isolated extracts from the Dutch Civil Code. Of this the Kareem Tribunal said the following:

> "The appellant's evidence includes extracts from the Dutch Civil Code. Although this is presented as evidence, there is no indication as to whether the version provided is up to date. Furthermore, we have been given no assistance as to how it should be interpreted or as to whether the appellant's marriage ceremony would be regarded as a lawful marriage

under the Dutch Civil Code".

12. In this case I have the contemporary and expert opinion of a lawyer who indicates that the Dutch Civil Code is interpreted in the manner summarised above at paragraph 8. The Respondent has been in possession of that opinion since July and had not introduced any evidence to rebut the assertions made by Mr O.K Hyiaman, nor have any alternative authorities from the Dutch courts been produced. The Appellant cannot produce the 'best evidence' discussed at the hearing in July. On balance I am satisfied that she has discharged the burden of proof and she has shown that her marriage is recognised by the Dutch authorities. I re-make the decision in the appeal by allowing it.

Decisions

13. The determination of the First-tier Tribunal contains an error of law and the decision is set aside.

14. The appeal is allowed.

Deputy Upper Tribunal Judge Bruce
13th October 2014