Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51687/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 August 2014	**On 9 October 2014**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LINDA NUAMAH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Bramble
For the Respondent: In person

DETERMINATION AND REASONS

1. Linda Nuamah is a citizen of Ghana born in 1973. She appeals against a decision of the Secretary of State made on 16 November 2013 to refuse to issue a residence card as confirmation of a right of residence as a family member of Mr Augustus Ofosu-Ochere, a Dutch national exercising treaty rights in the UK.

2. The application was considered under Regulation 7 and 8(5) of the Immigration (European Economic Area) Regulations 2006.

3. Although in proceedings before me the Secretary of State is the Appellant, for convenience I will refer to the parties as they were before the First-tier Tribunal, thus Linda Nuamah is the Appellant and the Secretary of State is the Respondent.

4. In refusing the application the Respondent for various reasons given in the refusal letter was not satisfied that the customary marriage by proxy of the Appellant and Mr Ofosu-Ochere on 15 April 2012 was registered in accordance with the Ghanaian Customary Marriage and Divorce (Registration) Law 1985.

5. The Respondent also concluded that she had not established that she is in a durable relationship (*per* Regulation 8).

6. She appealed.

7. Following a hearing at Richmond on 17 March 2014 Judge of the First-tier Tribunal M R Oliver allowed the appeal.

8. His reasoning is at paragraph [10] where he states:

> *'The Respondent has assumed in the refusal that once an Appellant chooses to register her marriage, a practice that is voluntary, the registration must comply with local law in order for an application such as the instant application for a registration card to succeed. Under* ***NA (Customary marriages and divorces - evidence) Ghana [2009] UKAIT 00009)*** *this is to ask the wrong question. What is required is not compliance with the local law but sufficient further evidence to show that the marriage, not the registration, was valid under local law. I have nothing to suggest that the marriage, carried out by proxy, was not valid and nothing to suggest that this is a marriage of convenience. The evidence of cohabitation goes back to the joint bank account in March 2012 and the tenancy agreement from July 2012. Although the cross-examination was not extensive the husband emerged as a credible witness. I find that the proxy marriage was valid under local law. Even if I were wrong in that I am satisfied that the parties are in a durable relationship. I find both parties to be honest and accept the evidence that they have already tried unsuccessfully to have a child together.'*

9. The Respondent sought permission to appeal which was granted by a judge on 24 June 2014.

10. At the error of law hearing before me the Appellant attended with Mr Ofosu-Ochere. I noted a letter (7 August 2014) from Dias, Solicitors stating that although they continued to act they would not be attending the hearing. I sought to explain to the Appellant why she had been invited to attend and what the issues were. They were happy to proceed.

11. Mr Bramble in brief submissions adopted the grounds seeking permission. The First-tier Tribunal Judge had looked at the position of the marriage in

terms of the law of Ghana. In determining the validity of the marriage the judge should have first established whether this type of customary marriage by proxy was recognised in the EEA state of the Sponsor, namely, the Netherlands. As for the conclusion that the parties are in a durable relationship the judge had failed to identify the evidence relied on and offer adequate reasons for that finding. The Appellant had nothing to add.

12. I agreed with Mr Bramble.

13. In paragraph 11 of its determination the Tribunal in **Kareem (Proxy marriages - EU law) [2014] UKUT 00024 (IAC),** which was promulgated in January 2014, recognised that the question of whether a person is married is a matter governed by the national laws of the individual Member States.

14. Moving forward to paragraph 16, the Tribunal once again observed that:

> *'... where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of the nationality and not the host Member State ...'*

15. The reasoning continues in paragraph 18:

> *'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.'*

16. That such was the position was made clear in **TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**. The headnote reads:

> *'Following the decision in **Kareem** ... 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.'

17. In the case of the Union citizen Mr Ofosu-Ochere is a national of the Netherlands. The judge failed to engage in any consideration of the applicable legal provisions in Mr Ofusu-Ochere's homeland and consequently, in my conclusion the determination is flawed by an error on a point of law.

18. The judge did go on to look at whether in the alternative the parties had shown that they were in a durable relationship. His comments on that issue at [10] are extremely brief stating merely that he '*found both parties to be honest and accept the evidence that they have already tried unsuccessfully to have a child together'*.

19. I agreed with Mr Bramble's submission that the judge failed to give adequate reasons for reaching his conclusion that there was a durable relationship and that such also amounted to an error of law.

20. I set aside the determination. In the letter from Dias, Solicitors it was stated that in the event of the Upper Tribunal finding an error of law 'the case should be remitted back to the First-tier Tribunal for Hearing' and that remittal would allow the Appellant to obtain further evidence on the validity of the marriage under Dutch law.

21. Mr Bramble opposed that proposed course of action. I agreed.

22. The Senior President's Practice Statement (25 September 2012) (at 7.1) states that where the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside this decision and, if it does so, must either remit the case to the First-tier Tribunal or proceed to remake the decision.

23. It continues at 7.2:

'The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

24. Also, '7.3 *Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.'*

25. In this case there has been no deprivation of a fair hearing nor is fact finding a significant issue.

26. In addition I noted the Direction to Parties which stated:

> '2. *The parties shall prepare for the forthcoming hearing on the basis that if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to remake the decision, can be considered at that hearing.'*

27. The Appellant made no adjournment request. I concluded, accordingly, that the appropriate course was to proceed to remake the decision at the hearing.

28. Having explained my decision to the Appellant she did not wish to give evidence. Mr Bramble simply stated that in the absence of any evidence as to the relevant Dutch law in respect of such a marriage the appeal had to fail on that aspect of the appeal. He left the issue of durable relationship to me. The Appellant told me they were not able to present any evidence about the position under Dutch law. In respect of a durable relationship they simply sought to rely on the bundle submitted for the hearing before the First-tier Tribunal.

29. Having no evidence before me that Dutch law recognises the Appellant's marriage as a valid marriage, and the burden of proving the fact that it is a valid marriage is on the Appellant, I find that the Appellant and Mr Ofosu-Ochere are not to be treated as being married for the purposes of the 2006 Regulations and, therefore, that she cannot establish that she is a family member for the purposes of Regulation 7 of these Regulations.

30. However, I must also consider Regulation 8 of the 2006 Regulations which regulates those persons who can be considered to be 'extended family members' of EEA nationals. Pursuant to Regulation 8(5)

> *'A person satisfies the conditions in this paragraph if the person is the partner of an EEA national and can prove to the decision maker that he is in a durable relationship with the EEA national.'*

31. 'Durable relationship' is not defined in the Regulations, and whether a person is in a durable relationship is a matter to be determined on a case-by-case basis.

32. The Respondent in the refusal letter stated that a joint tenancy agreement dated 30 July 2012 and photographs had been provided. However, that

evidence merely showed that they lived in the same residence and could simply be tenants rather than in a durable relationship.

33. I have perused the Appellant's bundle (28 March 2014). It includes statements by the Appellant and Mr Ofusu-Ochere. These are in brief, similar terms to the effect that the parties continue to live together and plan to do so for the rest of their lives. Both state that the Appellant was previously pregnant but that she miscarried. They are trying for a family.

34. As for the documentary evidence, as the Respondent noted there is a tenancy agreement in joint names dated July 2012 for an address at 53 Talland Avenue, Milton Keynes, the address where they are still living. I agree with the Respondent that such in itself does not necessarily show that they are cohabiting but could be merely tenants. However, there is other evidence in support, particularly, bank statements from Barclays, namely an Everyday Saver account from March 2012 (thus, prior to the date of the customary marriage certificate) to March 2014 and a current account from October 2012 to March 2014. Both show the address and are in joint names. I find those to be compelling, long term evidence of a durable relationship. There are other documents showing the names of the Appellant and Mr Ofusu-Ochere at the address albeit not in joint names, as there are utility and other bills. I note, further, council tax notices in joint names. Also, photographs showing the couple together. In addition, medical letters (September 2013) indicating that the Appellant suffered the loss of a pregnancy.

35. There was no suggestion that I should not rely on the contents of these documents. On the evidence before me, looked at cumulatively, I conclude that the relationship between the Appellant and Mr Ofosu-Ochere is genuine and subsisting and it may be that they have undertaken a marriage ceremony albeit one not shown that it was recognised as a valid marriage in the Netherlands.

36. They have shown that they are in a durable relationship for the purpose of Regulation 8(5) and thus that she is an 'extended family member' for the purposes of the EEA Regulations.

37. Regulation 17(4) of the Regulations provides a discretion to the Secretary of State to issue a residence card to an 'extended family member'. In the Appellant's case the Secretary of State has not yet considered the exercise of such discretion. It is not open to me to consider the exercise of such discretion absent the Secretary of State first doing so. In such circumstances I am constrained to allow the Appellant's appeal on the basis that the Respondent's decision was not in accordance with the law.

Decision

The decision of the First-tier Tribunal contains an error on a point of law and is set aside.

The decision is remade as follows: the appeal is allowed to the extent that the application for an EEA residence card remains outstanding before the Secretary of State.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway