Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01223/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 September 2017	**On 22 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PEARL ABENA ALBERTA VIALA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Adams of Counsel, instructed by BWF Solicitors
For the Respondent: Mr L Tarlow

DECISION AND REASONS

1. The Appellant is a national of Ghana who was born on 2 June 1976. She married a national of Belgium, of Ghanaian origin, on 2 August 2014. The marriage took place by proxy in Ghana while both the Appellant and her husband were in the United Kingdom.

2. She made an application on 8 July 2015 for a residence card as recognition of her marriage and her right to remain as the spouse of an EEA national.

3. On 20 January 2016 the Secretary of State refused to grant the application following interviews with the Appellant and her husband on 19 January 2016, as a consequence of which the Respondent concluded that the marriage was one of convenience and therefore the Appellant was not the spouse of an EEA national with regard to Regulation 2 of the Immigration (EEA) Regulations 2006 nor a family member within the meaning of Regulation 7.

4. The Appellant appealed against this decision and her appeal came before Judge of the First-tier Tribunal I A Lewis for hearing on 9 September 2016. In a decision promulgated on 16 November 2016 the judge dismissed the appeal. His reasons for so doing are set out at [4] – [6]:

> *"4. It is a feature of this case that the marriage ceremony between the Appellant and Mr Buah – whether of convenience or not – was a customary marriage conducted by proxy in Ghana. As was readily accepted by Ms Narh at the hearing, there was no evidence filed in support of either the application or the appeal as to the recognition of the marriage in Belgium.*
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> *5. Accordingly although the Respondent had relied upon an allegation of 'marriage of convenience', it was common ground before me given the marriage is a proxy marriage, that in light of the decisions in Kareem (Proxy marriages EU law) [2014] UKUT 00024 (IAC) and TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC) the Appellant is not able in any event to establish that she is a 'family member' within the meaning of Regulation 7.*
>
> *6. Necessarily the appeal based on Regulation 7, as being a spouse, must fail and is duly dismissed".*

5. The judge went on to find that in light of the Upper Tribunal decision in Sala (EFMs Right of Appeal) [2016] UKUT 411 (IAC) that it was not open to him to determine any Article 8 issues arising, in light of the fact that if the Appellant were to be treated as an extended family member, there was no jurisdiction to consider any grounds of appeal based on Regulation 8(5).

6. An application for permission to appeal was made. The grounds in essence assert that the judge erred materially in law in failing to consider the case of Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178 which was declaratory and therefore applies retrospectively to the decision of the judge promulgated on 16 November 2016.

7. The grounds further assert that the judge erred in failing to determine whether or not the appeal was a marriage of convenience, bearing in mind that the burden of proof lies upon the Respondent following the decision in Papajorgji (EEA spouse marriage of convenience) Greece [2012] UKUT 00038 (IAC).

8. Permission to appeal was granted by Upper Tribunal Grubb in a decision dated 28 July 2017 in the following terms

> "2. *In concluding the 'proxy marriage' of the Appellant was not shown to be valid, the judge applied the case of Kareem (op cit). That case concluded that the validity of the marriage had to be determined by reference to the EEA national's country of nationality (Belgium). The Court of Appeal has subsequently overruled Kareem in Awuku v Secretary of State [2017] EWCA Civ 178: validity is to be determined by reference to the lex loci celebrationis (Ghana). That was an error of law by the judge although he understandably applied the law as it was thought to be at the time of his decision. The judge made no finding on the alternative point relied upon by the Respondent, namely that the marriage was one of convenience. His error was material".*

9. The Respondent filed a Rule 24 notice on 11 August 2017 which provides as follows at 4:

> *"The Respondent accepts that on the face of the determination there does appear to be a clear error in law but materiality will depend on what, if any, documents were produced showing how the marriage was celebrated in Ghana."*

Hearing

10. At the hearing before me the Appellant was represented by Mr Adams of Counsel, instructed by BWF Solicitors and the Respondent by Mr Tarlow. Neither party had seen the Rule 24 response and I therefore provided them with copies.

11. Having read the Rule 24 response, Mr Tarlow indicated that he would not rely upon this. He accepted that there was a material error of law and that an analysis of the facts needed to be carried out and the judge had failed to do this, particularly in relation to the issue of whether the marriage was one of convenience.

12. Having accepted that there were material errors of law in that the law relating to proxy marriages had materially changed; and the judge failed to make any findings in relation to whether the marriage between the Appellant and her EEA national spouse is one of convenience, he submitted that the appropriate course would be for the appeal to be remitted back to a different First-tier Tribunal Judge for a *de novo* consideration. Mr Adams acceded to this proposed course of action.

Decision

13. I find in light of the grounds of appeal, the grant of permission to appeal and the helpful concession on behalf of the Respondent by Mr Tarlow, that the decision of the First-tier Tribunal Judge contained material errors of law.

14. Firstly, whilst the previous position in terms of the jurisprudence relating to proxy marriages was that as set out in the decision in Kareem (op cit), which provided that the validity of the marriage had to be assessed in relation to the nationality of the member state of the party, it is now clear from the subsequent decision of the Court

of Appeal in Awuku (op cit) that this is not correct and the assessment has to be considered from the perspective of the host member state, i.e. the United Kingdom.

15. Secondly, given the judge's finding in relation to the first issue, which is now vitiated by material error of law, he did not find it necessary to go on to consider whether there was a marriage of convenience. That matter remains outstanding for consideration based on the evidence at a remitted *de novo* hearing.

Notice of Decision

16. I therefore find a material error of law in the decision of First tier Tribunal Judge Lewis and I remit the appeal for a hearing *de novo* before the First-tier Tribunal.

I make the following directions:

DIRECTIONS

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(1) the appeal is to be listed for two hours with a Twi interpreter;

(2) none of the findings of fact of the First-tier Tribunal are preserved;

(3) it would assist the First-tier Tribunal in respect of its consideration of the appeal if the Home Office were to set out their position in relation to proxy marriages that take place in Ghana; and

(4) that position to be served in writing on the Tribunal and on the Appellant's representatives ten working days prior to the listing of the next hearing.

No anonymity direction is made.

Signed *Rebecca Chapman* Date 21 September 2017

Deputy Upper Tribunal Judge Chapman