Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/04180/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 July 2014	**On 22 July 2014**

Before
UPPER TRIBUNAL JUDGE DAWSON
DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR KWABENA ASARE MINTHA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr J Plowright, instructed by Adam Barnard Solicitors.
For the respondent: Mr P Duffy, Senior Presenting Officer

DECISION AND NOTICE OF WITHDRAWAL OF APPEAL

1. The appellant appeals to the Upper Tribunal against the determination of First-tier Tribunal Judge Kempton dated 23 April 2014, dismissing his appeal against the decision of the

respondent dated 21 February 2014 refusing his application for a residence card as confirmation of his right to reside in the United Kingdom as the spouse of an EEA national under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. The appellant is a national of Ghana born on 19 June 1984. His case is that he is the spouse of his sponsor, a national of Belgium, who is exercising her Treaty rights in the United Kingdom. The appellant's case is that his sponsor and he entered into a proxy marriage under Ghanaian law. The appeal was determined by Judge Kempton on the papers at the request of the appellant.

3. Permission to appeal was granted by First-tier Tribunal Judge levins, who stated that it was arguable that Judge Kempton fell into material error of law because she did not make a clear finding on the appellant's case as put by the appellant, in that Judge Kempton made no finding whether or not the Ghanaian customary marriage met the requirements of Ghanaian law, or whether or not it would be recognised in the United Kingdom.

4. Judge Kempton, in dismissing the appellant's appeal, made the following findings.

    i. Judge Kempton was not satisfied that a genuine marriage has been contracted between the appellant and his sponsor. The appellant had been put on notice that the documents produced by him were not accepted as genuine by the respondent. The appellant had been advised that in the circumstances the respondent had considered the application on the alternative basis of whether the appellant was in a durable relationship with his sponsor. The appellant had not taken the opportunity to address that second part of the refusal letter and had provided no evidence whatsoever of any relationship between him and his sponsor. It was incumbent on the appellant to prove that there is a genuine relationship or a genuine marriage. He had clearly not done so. It was disingenuous for the appellant to hide behind the stock rhetoric frequently employed in cases such as this where there has been a proxy marriage. If the appellant and his sponsor were in a genuine relationship, they would not have needed to enter into a proxy marriage. They could simply have married in the UK. The proxy marriage was clearly nothing more than a means to an end, namely to facilitate the issue fraudulently of a residence card by using the particulars of an EEA national, who may or may not know about the whole sham. Judge Kempton was not prepared to accept

that the documents produced were genuine given her view of the circumstances in which this marriage had arisen.

ii. As regards the expense in having an oral hearing, Judge Kempton considered that there was no need to instruct counsel in a case before the First-tier Tribunal, that the appellant could have represented himself, and that the appellant and the sponsor could have attended the hearing and given oral evidence as to "why they married in such a bizarre manner if they are indeed a couple". Judge Kempton considered that the fact that they were not prepared to subject themselves to having their evidence tested in court and had provided no evidence of their relationship confirmed that the claimed proxy marriage is "nothing other than a device to obtain a residence permit".

iii. Judge Kempton did not consider Article 8 of the ECHR having found that found that there was no information to demonstrate that there is any family or private life in the United Kingdom.

5. In the present appeal against the decision of Judge Kempton, the appellant contends as follows.

i. In finding that both parties to the proxy marriage need to be Ghanaians in order to enter into such a marriage, Judge Kempton overlooked the respondent's concession that a proxy marriage will be valid if it satisfies the Ghanaian Customary Marriage and Divorce (Registration) Act 1985 as amended in 1981 (the "Ghanaian legislation"), and the expert evidence of Ms Mercy Akman in **NA (customary marriage and divorce-evidence) Ghana [2009] UKAIT 0009** ("**NA**"), who stated that the only requirement is that one of the parties should be a Ghanaian by origin or descent.

ii. Judge Kempton disregarded the letter from the Registrar of Accra High Court confirming the authenticity of the statutory declaration which the respondent claimed was invalid, and a letter from the Registrar of the Accra Metropolitan Assembly to confirm the validity of the marriage certificate issued to the appellant which the respondent further alleged was fictitious.

iii. The appellant was entitled to elect to have his appeal heard under rule 15 of the Immigration and Asylum Tribunal (Procedure) Rules 2005, and Judge Kempton had "absolute disrespect" for this choice. Judge Kempton should have requested an oral hearing to ask the appellant

and his spouse questions and had no right to make the criticisms that she did about the failure of the appellant had his sponsor to give oral evidence.

iv. The Ghanaian Marriage Act 1991 states that the marriage can be registered any time after the marriage. Therefore, as long as the marriage is correctly registered in Ghana it does not matter that it was not registered within three months of marriage as was previously required by the law. Judge Kempton should have accepted that the appellant and his sponsor have conducted a valid marriage according to the Ghanaian legislation.

v. The appellant applied under regulation 7(a) of the 2006 Regulations as the spouse of an EEA national, and not as a "relevant EEA national" under regulation 8 of the 2006 regulations as the respondent asserted.

vi. Following the ruling in **CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080** ("**CB**") it is widely accepted that the United Kingdom will recognise the validity of proxy marriage provided that the marriage is legal in that country as long as the requirements for a proxy marriage are met.

vii. The onus of proving that a customary marriage took place is on the party making the assertion. The appellant provided letters from the Accra High Court and Accra Metropolitan Assembly to confirm the validity of the statutory declaration and the authenticity of the marriage certificate. Judge Kempton failed to give herself reasonable time to study the official documents placed before her and "ignored the case law cited in support of the appeal and the principles of the burden of proof and standard of proof is civil evidence rule et cetera and was motivated to dismiss the Appellant's appeal".

viii. The immigration judge failed to familiarise herself with regulations 7 and 8 of the 2006 regulations.

The hearing

6. At the hearing, on behalf the appellant, Mr Plowright adopted the grounds of appeal and made the following submissions which I summarise. The Judge attacked the genuineness of the marriage and stated that it amounts to fraud, but the respondent has not asserted that the appellant's marriage is fraudulent. Judge

Kempton thereby went beyond the ambit of the appeal which was to determine whether the appellant's marriage was valid. Judge Kempton made no finding as to the validity of the marriage or in respect of the appellant's reliance on **NA.**

7. Mr Plowright did not seek to rely on paragraph 5 of the appellant's grounds of appeal which argued that the reasons for refusal letter was defective because the pages were odd-numbered whilst the even numbered pages were omitted. It stated that the respondent had to be reminded on several occasions of this anomaly before a well paginated Reasons for Refusal Letter was issued again on 21 February 2014.

8. On behalf of the respondent, Mr Duffy adopted the Secretary of State's rule 24 response. He further argued as follows. There was no error of law in the determination. Judge Kempton had not made a finding that the documents were not genuine. There was no evidence provided that the appellant's spouse is a Ghanaian national because she needed a visa to enter Ghana. **NA** states that both parties to a proxy marriage have to be Ghanaian nationals. Therefore, there was not a valid proxy marriage in Ghana because the appellant's spouse is no longer a Ghanaian citizen. The law on proxy marriages was made clear in **Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC)** ("**Kareem**"), and although that case was not referred to by either party, Judge Kempton should have been aware of it.

9. In reply it was argued on behalf of the appellant that it does not matter whether Judge Kempton was aware of **Kareem** as it follows from **CB** that both parties do not need to be Ghanaian citizens.

Error of law in the determination

10. One of the appellant's first main contentions is that Judge Kempton found that the proxy marriage was a sham and a means to facilitate the issue fraudulently of a residence card, even though the respondent had not suggested that it was not genuine. Mr Duffy accepted at the hearing that the respondent has not made an allegation that the documents provided by the appellant were not genuine or that the marriage was fraudulent as found by Judge Kempton.

11. We therefore find that Judge Kempton erred in law by making such a finding.

12. The Judge in her determination made no finding as to whether the proxy marriage was valid under the law of Ghana. Judge Kempton appeared to say that the claimed marriage was one of convenience, as the only finding she made was that the appellant

is not in a subsisting relationship with his sponsor as an unmarried partner.

13. This is a problematic as the Judge seems to have lost her way as to what the appeal was about and the law applicable to the appeal. Judge Kempton did not take into account the recent case of **Kareem** even though it had been promulgated a month earlier.

14. In line with **Kareem**, the issue to be determined by Judge Kempton was whether the appellant has entered into a valid proxy marriage under the law of Ghana which would be recognised as valid in Belgium. The Judge fell into error as he failed to make a finding on this.

15. A second main contention of the appellant is that the appellant was entitled to elect to have a hearing on the papers, and that Judge Kempton was not entitled to draw adverse inferences from this decision.

16. As to this contention, we find that the onus of proving that a customary marriage took place is on the party making the assertion, which in this case is the appellant. If the appellant did not submit any or sufficient evidence of that contention, the First-tier Tribunal Judge was clearly entitled to so find. If there is evidence of that contention that the appellant could have presented, but did not present, that is a matter that the First-tier Tribunal Judge was entitled to take into account. We accept that it is open to a party to have the appeal decided without a hearing but such a party must take the consequences if there is likely to be an issue which requires oral testimony. In any event as we have found that the Judge had erred on the primary ground this aspect is less meritorious.

17. However, for the reasons above we find that there is an error of law in the determination of Judge Kempton and we set the determination aside.

Withdrawal of the appeal

18. At the hearing, we decided it was appropriate in the light of the directions which stated were we to find an error of law, the appeal should be determined at the hearing. We decided to proceed without adjourning the hearing to remake the decision under appeal.

19. However, Mr Plowright made an application on behalf of the appellant pursuant to rule 17(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to withdraw the appeal. Mr Duffy on behalf of the Secretary of State did not object to the application.

20. Permission of the Upper Tribunal is required for a party to withdraw its case. Having carefully considered the facts of this case as a whole, and having noted that the appellant seeks to withdraw his appeal and that the Secretary of State does not object to such a course, we give consent for such withdrawal.

21. Accordingly with our consent and pursuant to rule 17(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 the appeal is recorded as "Withdrawn with the consent of the Upper Tribunal", and notice is hereby given to the parties that the withdrawal has taken effect pursuant to rule 17.

22. The effect of the appeal being withdrawn is that the proceedings before the Upper Tribunal are at an end. There is no appeal before the Upper Tribunal.

Decision

The appeal was withdrawn with the consent of the Upper Tribunal.

Signed by

A Deputy Judge of the Upper Tribunal Judge

Mrs S Chana

Dated 6th day of July 2014