Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51206/2013
Oral judgment

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 July 2014	**On 31 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NANA ANINAKWA BONSU ASANTE

Respondent

Representation:

For the Appellant: Mr T Melvin, a Home Office Presenting Officer
For the Respondent: Mr D Adams, Counsel, instructed by Makanda Bart & Co

DECISION AND REASONS

1. The respondent Mr Nana Aninakwa Bonsu Asante, whom I shall refer to as the appellant as he was before the First-tier Tribunal, is a citizen of Ghana and his date of birth is 29 June 1967.

2. The appellant made an application on 10 September 2013 for a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 on the basis of his marriage to an EEA national, a citizen of Belgium, Agnes Osie Bonsu. In support of his application the appellant provided a marriage certificate dated 12 June 2012 in order to establish that a marriage by proxy took place in Ghana on 30 June 2011.

3. The application was refused by the Secretary of State because according to the decision-maker the appellant had not provided evidence that the marriage was conducted in accordance with law in Ghana and that the appellant had not established the durability of the relationship.

4. The appellant appealed against the decision of the Secretary of State and his appeal was allowed by Judge of the First-tier Tribunal Sweet following a hearing on 7 April 2014. The determination is dated 17 April 2014.

5. The appellant and the EEA sponsor attended the hearing and gave oral evidence. The First-tier Tribunal made findings at paragraphs 20 and 21 of the determination.

> "20. The burden of proof is on the Appellant and the civil standard of the balance of probabilities applies. The Appellant first arrived in the UK as a visitor in 2005 with a two-year visa, under which he could spend six months at a time in the UK. He returned to Ghana and came again to the UK in 2007. He met his wife, Agnes, in late 2009. She is a Belgian citizen and therefore an EEA national. It appears that the relationship started some three months after their meeting and some time in February 2011 the Appellant proposed to her. They entered into a proxy marriage in Ghana on 30th June 2011 and it is that marriage which the Respondent does not accept as being recognised, because following **CB (validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080** three requirements exist for a proxy marriage to be accepted as valid in the UK for immigration purposes: the type of marriage must be recognised in the country in which it took place; and the marriage must have been properly executed as to satisfy the requirements of the law of the country in which it took place; and there must be nothing in the law of either party's country of domicile that restricts the freedom to enter into the marriage. The Respondent considered that the Appellant had not provided evidence that the EEA sponsor was of Ghanaian descent or that either of them have direct familiar links to Ghana.
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> 21. I have reached a contrary view, because the Respondent did not give consideration to the IDI dated July 2012 and published 4th December 2013, and conclude that the marriage was indeed recognised in Ghana and was properly executed in order to satisfy the law of that country and neither party was restricted

> from entering into that marriage. Furthermore, pursuant to **Amoako** there is no requirement to show that both parties are of Ghanaian origin, but in any event it is clear that the Appellant and his spouse are both of Ghanaian origin. It follows therefore that in my view the Appellant is a family member being the spouse of the EEA national. It is not necessary therefore for me to consider whether there is a durable relationship under Regulation 8(5), because the Appellant meets the family member requirement under Regulation 7. It follows therefore that the Appellant should be issued with a residence card."

6. The Judge found that the marriage by proxy was valid and recognised in Ghana and that there was no need for him to go on to consider the durability of the relationship. The Secretary of State was granted permission to appeal by Judge Hollingworth on 6 May 2014. The grounds seeking permission argue that the Judge failed to consider whether or not the marriage was valid in Belgium and the Judge misdirected himself in relation to **Kareem (Proxy marriages - EU law) Nigeria [2014] UKUT 24 (IAC)**. The Judge failed to engage with the submissions made by the Presenting Officer at the hearing.

7. I heard oral submissions from both representatives. Mr Melvin relied on the case of **TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)**. Mr Adams was unsuccessful in trying to persuade me that **TA and Others** was wrong. In my view the Judge made a material error of law. It is clear from recent jurisprudence that whether there is a marital relationship for the purposes of the 2006 Regulations must always be examined in accordance with the laws of the member state from which the Union citizen obtains nationality. The Judge did not consider whether the marriage was recognised in Belgium and this amounts to a material error of law.

8. I set aside the decision and pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 there was no evidence before the First-tier Tribunal that the marriage is recognised in Belgium, and I remake the decision pursuant to Section 12(2)(b)(ii) of the 2007 Act and dismiss the appeal pursuant to Regulation 7 of the 2006 Regulations.

9. The Judge did not consider the durability of the relationship and this issue must be determined. There has been a previous hearing before the Upper Tribunal on 10 June 2013 before Lord Justice Matthews and Upper Tribunal Judge King. The matter had on that occasion been listed for an error of law hearing. Mr Melvin informed me that on that occasion the appellant attended alone and unrepresented and he was warned by the panel that its provisional view was that the First-tier Tribunal had made a material error in relation to Regulation 7 and if that was the decision the matter should be remitted to the First-tier Tribunal to make findings of fact relating to the durability of the relationship. The appellant and the EEA sponsor both attended before the First-tier Tribunal. The appellant

attended the hearing before me alone. He had informed his representative that his wife was unwell. There was no further evidence submitted by either party.

10. I remit the matter to the First-tier Tribunal. The First-tier Tribunal should consider the durability of the relationship in the context of Regulation 8 (with regard to Regulation 17(4) and (5) of the 2006 Regulations).

Signed Joanna McWilliam Date 20 July 2014

Deputy Upper Tribunal Judge McWilliam