IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10587/2011

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 March 2015	**On 19 March 2015**
Prepared on 12 March 2015	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MRS BECKY HANSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Goldborough of Messrs Addison & Khan Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Ghana, born on 16 August 1969 entered Britain in 2002 and overstayed. She claimed to have married an EEA national in 2005 in a customary marriage in Ghana, and was granted a residence permit as the wife of an EEA national. She appealed against a decision of the Secretary of State made on 23 February 2011 to refuse an application for a permanent residence card under the Immigration (EEA) Regulations 2006.

2. Her appeal was allowed by Judge of the First-tier Tribunal O'Garro in a determination promulgated on 9 August 2011. That decision was appealed to the Upper Tribunal. On 1 December 2011 Upper Tribunal Judge Storey heard submissions and made a decision to set aside the determination of Judge O'Garro for error of law. On 22 March 2012 he held a CMR hearing and issued further directions. His decision (a corrected version of one promulgated in February) and further directions was promulgated on 17 April 2012. He directed that the appellant provide a statement regarding the circumstance and the date of her divorce, by the end of April and indicated that when he received that statement or if no further statement were received he would determine the appeal. This he did in a final determination dated 28 August 2012 in which he dismissed the appeal. The appellant appealed to the Court of Appeal who in an order dated 21 October 2013 allowed the appellant's appeal by consent, quashed the decision of Upper Tribunal Judge Storey and remitted the appeal to the Upper Tribunal to be determined "only on the issue of the date of the appellant's divorce".

3. The appellant's customary marriage in Ghana, in 2005, was to Thomas Gyebi who was described by Judge O'Garro as "a Ghanaian/Austrian" national. On 1 November 2005 she was granted a residence card. On 10 September 2009 that residence card was revoked as the Secretary of State stated that there was information that the appellant was no longer married to her spouse and that they had been divorced on 11 June 2007. As her marriage had not subsisted for three years the respondent was entitled to revoke the residence card. The appellant did not appeal that decision. Instead, she made an application in August 2010 for a permanent residence card. This appeal is against the refusal of that application.

4. The appellant's evidence before Judge O'Garro was that she and her husband had lived together until 2009 when the marriage had broken down and her spouse had left the matrimonial home. She said that on 11 June 2007 she had been granted a customary divorce in Ghana. Having considered information relating to West African customary divorces Judge O'Garro stated that the divorce which had taken place was essentially an agreement between the heads of the appellant's and her spouse's families and that she was satisfied that the divorce was dissolved otherwise than by "proceedings" and, taking into account the provisions of Section 46(2) of the Family Law Act 1986 she stated, in paragraph 24 of the determination that she was satisfied "that the appellant has not affected a divorce recognised by the laws of the United Kingdom. This must mean that the appellant is not legally divorced from her EEA spouse and remains a family member of an EEA national spouse". She then went on to conclude that the appellant and her husband had been exercising Treaty rights for five years and found that the burden lay on the respondent to show that the appellant's spouse was not exercising Treaty rights. She concluded that the appellant remained a family member of an EEA national, that the respondent had not considered the correct EEA Regulations in determining her application and therefore the refusal was

not in accordance with the law and the appellant's application remained outstanding for a lawful decision. She then allowed the appeal.

5. The Secretary of State appealed arguing, *inter alia*, that the judge was not entitled to state that the appellant had never been divorced as there was nothing in the Immigration (EEA) Regulations 2006 to say that divorce was not recognised unless it was terminated by "proceedings". Having made that mistake the judge had also erred in finding that the appellant's husband was exercising Treaty rights and therefore the determination was flawed. Permission to appeal was then granted. As stated above, the appeal then came before Upper Tribunal Judge Storey. He heard evidence from the appellant and in his determination he stated that the appellant had stated that the divorce had taken place in 2007. He concluded that there was an error of law in the determination of Judge O'Garro in that she had decided that the appellant had not divorced until 1 October 2009 whereas in fact the appellant had divorced in 2007. Moreover, Judge O'Garro had wrongly stated that the divorce was not lawful. He also said that there was no evidence that the appellant's husband had been habitually resident in Britain or that he was exercising Treaty rights here. Judge Storey therefore set aside the decision of Judge O'Garro.

6. He told the Presenting Officer that it was for him to ascertain whether or not the appellant's husband was exercising Treaty rights and although the Presenting Officer initially stated that the respondent would not do so that issue was eventually conceded by the respondent. The issues before the Tribunal was therefore narrowed to that of whether or not the appellant and her husband had been married and exercising Treaty rights on 10 September 2009 when the residence permit had been revoked and thereafter when a decision was made to refuse to issue the appellant with a permanent residence card. Judge Storey considered the relevant issue to be:-

> "If *on* 1 September 2009 she was still not divorced then revocation was unlawful and, of fundamental importance to the present appeal, she would be entitled to a permanent residence card on the basis of the period between her marriage in 2005 and her divorce in October 2010 (during which the SSHD now accepts her husband was exercising Treaty rights). If on the other hand she was in fact divorced in 2007 then the SSHD was clearly entitled to revoke her residence card and to refuse her permanent residence. One of the requirements of Regulation 10 is that the marriage must have last *[sic]* three years."

7. Judge Storey then went on to state that the documentary evidence before the First-tier Judge from the respondent referred to a customary divorce in June 2007. He stated that Judge O'Garro had said in her determination that the appellant had said that the divorce was on 11 June 2007 and that that was the date given in the statutory declaration form signed by the father of the appellant and her husband and also the date of the notice of dissolution document produced. He concluded that the appellant clearly failed to meet the three year requirement between the claimed date of

marriage in February 2005 and the June 2007 divorce – the period was about two years and four months. In paragraph 16 he stated that:-

> "As already indicated, there is a serious conflict in the claimant's own documentary and oral evidence as to the date of her divorce. Her case depends on her not having been divorced in 2007 but rather not until October 2009, yet in evidence before me she said she divorced in 2007 and that was also the date given in the documents she submitted in the context of the earlier decision appeal *[sic]* against revocation of her revocation card *(he clearly meant residence card)*. Given her failure to explain why there should be two very different dates given for the claimed divorce, I am not persuaded that she has discharged the onus of proof on her to show that she was married for 3 years or longer. Given her failure to establish that her marriage to her EEA national spouse lasted for 3 years, it is clear that she cannot meet the requirement of reg 10(5)(d)(i). It is also clear that she cannot show she is entitled to permanent residence on the basis of an unbroken marriage with an EEA national (exercising Treaty rights) between 2005-2010. It follows:
>
> (i) that she has failed to show she has a retained right of residence; and
>
> (ii) that she cannot qualify for permanent residence under reg 15(1)(b).
>
> Her appeal against the decision of the SSHD cannot succeed."

He therefore dismissed the appeal.

8. It appears that the arguments before the Court of Appeal which led to the appeal being remitted to the Upper Tribunal and the decision of Judge Storey being quashed were that it was accepted that Judge Storey misunderstood the evidence given by the appellant regarding the date of her divorce and that the Upper Tribunal had erroneously informed the appellant the case management hearing listed for 22 March 2012 had been adjourned and that further directions of Judge Storey dated 13 April 2012 had not been served.

9. In these circumstances the appeal came before me for hearing. In his initial submissions before me Mr Tufan stated that although the issue had been focused on the date of divorce the reality was that following the decisions of the Tribunal in **Kareem (proxy marriages – EU law) Nigeria [2014] UKUT 24 (IAC)** and in **TA (Kareem explained) [2014] UKUT 316 (IAC)** it was clear that the appellant's marriage to the EEA national was not valid in the first place and therefore she had never been entitled to a residence card let alone a permanent residence card and therefore the issues before the Tribunal fell away. I stated, however, that I would hear evidence and submissions relating both to that issue and the date of the divorce. Mr Tufan stated that the reason that the respondent had found that the appellant had been divorced in 2007 was that the appellant's husband had written to the respondent stating that that was

the case because he wished to bring in another spouse from Ghana by whom he already had a child.

10. The appellant gave evidence. She stated that she was not aware that her husband had had any other relationship before he had left her in 2009 and that she was unable to discuss that issue with him because he would beat her. She had initially met him through a friend in Ghana in 2004 and she stated that he had come to Britain in 2004 when she had started living with him and that he had worked between then and 2009. She confirmed that she had entered Britain in 2002 and remained without authority.

11. Asked when the marriage had taken place she said that it had taken place in 2004. It was pointed out to her that there was documentary evidence stating that she had married in 2005. She endeavoured to say that this was because a customary marriage was a long and drawn-out matter with various stages. Moreover there had been delay in registering the marriage as there was no need to do so. Mr Tufan put to her that the document showed that the marriage had taken place on 6 March 2006 – the appellant replied that her husband had been present at the marriage in 2005 and that she was not. Mr Tufan then asked her if her husband was Austrian or also Ghanaian. The appellant stated that he was "just Austrian". She was then asked if there was any evidence that the marriage was valid in Austria. The appellant said that she did not know if it was valid there – she had no evidence that it was. Asked if there was any evidence to show that she and her husband had been living together as a couple the appellant referred to water bills but said that they were not responsible for council tax nor was there a rent book. She said that she had last seen her husband a month ago at a funeral and had just greeted him. There had been no involvement by the police in her and her husband's relationship.

12. Asked why they had not married in Britain she said that she had been told by her lawyer that she could not do so.

13. She stated that she had not seen the 2007 divorce document until she had gone to court. She confirmed that she had stopped living with her husband in 2009. She was asked when her father had died and she said that he had died in April 2006. It was put to her that on the divorce certificate dated 2007 and it was noted that her father had signed it. The appellant said that that was not the signature of her father.

14. In summing up Mr Tufan referred firstly to the terms of the judgment in **TA** and stated that it was clear that, as the appellant had said that her husband was Austrian the marriage could not be valid and therefore the appellant had not been entitled to a residence card in the first place.

15. He then went on to submit that the question was then which of the two divorce documents could be relied on and stated that in any event I should find that the documents produced were not genuine. The reality was that there is no evidence as to the validity of the customary marriage in any

event. There was no expert evidence to say that the customary marriage was valid in Ghana. He argued that when considering the documents from Ghana I should apply the ratio of the determination in **Tanveer Ahmed** and that I should place little weight thereon. In any event there was no evidence that the appellant and her husband had been in a durable relationship – there is no credible evidence to back up her assertions. He asked me to dismiss the appeal and to further note that there had been no claim that the appellant's rights under Article 8 of the ECHR would be infringed by her removal.

16. In reply Mr Goldborough referred first to the issue of the nationality of the appellant's husband. He stated that the appellant was not in position to know whether or not her husband had retained Ghanaian nationality but in any event he pointed out that her evidence was that her husband had gone back to Ghana for the customary marriage which indicated that he had retained Ghanaian citizenship. The fact that there was agreement between the families would be an indication that the marriage was valid under Ghanaian law.

17. He stated that the appellant was clear that the divorce document dated 2007 was a fabrication put forward by her husband so that he could make a further application in respect of another relationship and the fact that he was married was an inconvenience to him. The divorce certificate could in any way not be valid because the appellant's father had died before the affidavit was made. He stated that it was clear from the second divorce certificate dated May 2010 that the appellant and her husband had lived together for five years between 2004 and 2009. He pointed out that it was accepted that the appellant's husband was exercising Treaty rights here at the time of the application for permanent residence and therefore there was evidence that the appellant had been entitled to a residence card.

18. In any event even if I were to find that the marriage was not valid, the reality was that the appellant would have qualified for leave to remain as an "extended family member" under Regulation 8 as she was the partner of an EEA national and they were in a durable relationship.

19. He accepted that the issue of the rights of the appellant under Article 8 of the ECHR were not before the Tribunal but stated that the issue of the private and family life of the appellant was reflected in the terms of the Immigration (EEA) Regulations and the length of the appellant's relationship was such that it was in the spirit of the Regulations that she should be granted leave to remain.

Discussion

20. Although the initial grounds for refusal included the assertion that the appellant's husband was not exercising Treaty rights here, before Judge Storey the respondent accepted that the appellant's husband was exercising Treaty rights here and therefore the only issue before him was whether or not the marriage had endured for three years for the appellant

to fulfil the requirements of Regulation 15. The issues before me have been enlarged in that there are the further arguments raised by both representatives which are relevant to this appeal. Mr Tufan argued that the marriage should not have been recognised in the first place as it was a customary marriage and Mr Goldborough argued that notwithstanding that the marriage might be considered not to be valid the reality was that the appellant and her husband had lived together in a durable relationship for many years.

21. I consider first the validity of the marriage. There are two issues which are of concern. Firstly whether or not this was a valid marriage under Ghanaian customary law and secondly whether the validity of the customary marriage should be recognised by the respondent. It is of note also is that the form of register of customary marriage which was served with the bundle of documents lodged by the appellant's then solicitors, Messrs Hafiz and Haque on 18 September 2012, (although it is not mentioned in the index) is blank. That document is missing from the bundle of documents submitted by the appellant's solicitors on 19 March 2014. The reality is that there is no evidence to show that the marriage was valid under Ghanaian customary law - there is no expert report which would indicate that that was the case. I can only conclude that the appellant has not discharged the burden of proof upon her and that the marriage was not a genuine customary marriage which was valid in Ghana.

22. Moreover, it is relevant that the appellant's husband was Austrian and in particular the appellant said that he was only Austrian, not Ghanaian, there is nothing to indicate that the marriage would be valid in Austria.

23. Even if I were to accept, as Mr Goldborough urged me to do, that the appellant's husband remained Ghanaian as well as Austrian it was as an EEA national that he was exercising Treaty rights here and it is from his Austrian nationality that the appellant hoped to be entitled to the residence card. I therefore consider that the appellant cannot succeed on the basis that she had made a genuine customary marriage, recognised in the country of the EEA national and therefore as the marriage was not valid I can only conclude that she was not entitled to the residence permit.

24. In any event, when I consider the issue as to the date of the divorce there is nothing to indicate that I should accept the later date for the divorce rather than the declarations that the divorce took place in 2007. For me to discount the document of divorce dated 2007 I would have to rely on the death certificate of the appellant's father but when considering all the documentary evidence within the context of this appeal and noting the conflicting documentation from the Ministry of Foreign Affairs and Regional Integration of the Republic of Ghana in the name of various legal officers certifying that certain names appeared on the statutory declarations made by the appellant's claimed uncle and that of her husband, those documents are, I consider, of themselves unlikely to be genuine as one from the director of the Legal and Consular Bureau , Ministry of Foreign

Affairs dated 28 June 2011, refers to "the signature of Samuel Boakye–Yiadom covering the signature of *Elizabeth* E Jeffrey-Amoako *Esq* Notary Public appearing on the statutory declaration dated 24 June 2011 as being the true and certified signature of Samuel Boakye-Yiadom" whose signature and seal appear on a statutory declaration of the appellant's uncle dated June 2011, as being genuine. That does not indicate that the statements made in the documents are themselves true but only the signature of the person before whom the declaration was made. The same comment can be made of the other documents which purport to verify the signatures of those before whom the declarations where made. The reality is that both the documents relating to the divorce in 2007 and that in 2009 are similar and none of the documents are in any way persuasive.

25. I conclude that I can place no weight on any of the documents relating to the marriage or the divorce and can only conclude that the appellant has not shown either that she was married as claimed or that she was divorced in 2009 or indeed that the marriage was subsisting. I do not consider that the appellant was an honest witness and the evidence which she produced relating to cohabitation was minimal.

26. I therefore conclude that the appellant has not shown that she was ever a party to a genuine customary marriage let alone that that marriage had been dissolved in Ghana or was valid.

27. Furthermore, I do not consider that there is any evidence to show that the appellant was in a durable relationship at any time with her claimed husband.

28. I therefore, in remaking this decision dismiss this appeal. I would add that the issue of the appellant's rights under Article 8 of the ECHR were not argued before me nor indeed does it appear that any application for leave to remain on that basis has ever been made.

Notice of Decision

The appeal is dismissed.

Signed Date **17 March 2015**

Upper Tribunal Judge McGeachy