**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/22118/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision & Reasons Promulgated**
**On 6th June 2017** **On 15th June 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**
Appellant

**and**

**MRS GEORGINA YEBOAH**
(ANONYMITY DIRECTION NOT MADE)
Respondent

**Representation:**

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr M Al-Rashid Counsel instructed by David A Grand Solicitors

**DECISION AND REASONS**

**1.** Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

**2.** The Appellant, a citizen of Ghana, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 1st June 2015 to refuse her application for a residence card as confirmation of a right to reside in the UK as the spouse of Mr William Amankwah, a Dutch national (the Sponsor). First-tier Tribunal Judge Seelhoff allowed the appeal in a

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decision promulgated on 26th September 2016. The Secretary of State appeals against that decision with permission granted by First-tier Tribunal Judge Saffer on 19th April 2017.

**3.** The background to this appeal is that the Appellant claims to have entered the UK in September 2001 on a visit visa valid until March 2002. She was arrested on 27th March 2008 working illegally in reliance on a forged Home Office letter. Following her arrest she was sentenced to eight months' imprisonment. She informed the Home Office that she had married a Dutch national and she was released from detention and was ultimately granted a residence card on the basis of her marriage on 18th February 2010.

**4.** On 10th December 2014 an application was made on the Appellant's behalf for a further residence card. In that application it was claimed that the Appellant was still married to her husband but they had not resided together over the previous eighteen months. In these circumstances the Appellant was invited for an interview on 13th March 2015. She did not attend. Her representative advised the Home Office that because she and her husband were separated she would not attend an interview. A second interview was arranged for 2nd April 2015 and the Appellant did not attend this either, apparently on legal advice. The Secretary of State considered the application and referred to Regulation 20B of the Immigration (EEA) Regulations 2006 (the 2006 Regulations) noting that where an Appellant, inter alia, failed to attend an interview on at least two occasions the Secretary of State could draw any factual inferences about the Appellant's entitlement to a right to reside as appear appropriate in the circumstances. As the Appellant had not attended two interviews the Secretary of State relied on Regulation 20B(4) and (5) concluded that, as the Appellant had failed to attend an interview and provide up-to-date evidence supporting her application, it was deemed appropriate to draw the inference that the Appellant was not a qualified person. The application was refused with reference to Regulation 2 and 20B(5) of the 2006 Regulations.

**5.** At the hearing in the First-tier Tribunal the judge suggested that as the marriage in this case had been conducted by proxy the decision of **Kareem (proxy marriages – EU law) [2014] UKUT 00024 (IAC)** and **TA & Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC)** would appear to be relevant to the case. The judge heard submissions and made a number of findings from paragraphs 20 to 26. At paragraph 20 the judge noted that there was no evidence that the Appellant's proxy marriage conducted in Ghana would be recognised by the authorities in Ghana or the authorities in Netherlands and concluded that it was not open to him to allow the appeal under Regulation 7 as there was insufficient evidence to establish that the Appellant is married to a European national. The judge went on to find at paragraph 21 that there is no evidence to find that the Appellant's husband is currently exercising treaty rights in the UK and no evidence of him working at all from 2014 and therefore found that the appeal would have to be dismissed pursuant

to Regulation 7. The judge noted that there was insufficient evidence as to the Sponsor's long-term work history to conclude that he was entitled to permanent residence. The judge considered whether the marriage was one of convenience and concluded that he was satisfied that the Secretary of State had good reason to question the legitimacy of the relationship and to draw adverse inferences from the Appellant's failure to attend interviews. The judge said, "Having considered all the evidence before me I remain concerned about the marriage in this case". The judge said, "Whilst the Respondent may have turned a blind eye to the Appellant's immigration history on the previous application, given the quick end to the marriage I find that it was reasonable for the Respondent to re-visit the immigration history". [23]

**6.** At paragraph 24 the judge said:

> "I do not agree with Counsel's argument that the Home Office is in some way estopped from arguing that a relationship is one of convenience simply because they have previously issued a residence card. On the contrary if new information comes to light it must be incumbent on the Respondent to act on that information."

**7.** The judge noted at paragraph 25 that there was virtually no evidence before the Tribunal at all in relation to the Appellant's marriage and found that the Appellant had failed to prove that this was a genuine marriage.

**8.** Having made all of the findings set out above the judge went on, under the heading 'Notice of Decision' to find "The appeal is allowed under the EEA Regulations".

**9.** The Secretary of State appealed against that decision on the basis that the decision to allow the appeal appears to be inconsistent with the judge's findings of fact. It is submitted that the decision to allow the appeal seems therefore to be a slip of the pen and amenable to amendment pursuant to the slip Rule in Rule 31 of the Tribunal Procedure Rules 2014. Permission to appeal was granted by First-tier Tribunal Judge Saffer on the basis that it is clear that the judge intended to dismiss the appeal.

**10.** At the hearing before me both Mr Al-Rashid and Mr Tufan agreed that it is obvious that the judge intended to dismiss the appeal. Both representatives also agreed, with reference to the decision of the Upper Tribunal in **<u>Kathsonga</u> ("slip rule"; FtT's general powers) [2016] UKUT 228 (IAC)**, that Rule 31 of the 2014 Procedure Rules could not be used to reverse the effect of the decision. I agree that Rule 31 is not the proper way to deal with the apparent error in this case.

**11.** It is equally apparent to me, based on the judge's reasoning from paragraph 20 onwards, that First-tier Tribunal Judge Seelhoff intended to dismiss the appeal and that his decision to allow the appeal is not consistent with the reasoning in paragraphs 20 to 25.

**12.** At the hearing before me Mr Al-Rashid referred to the fact that the case law in relation to proxy marriages has moved on since the date of the decision. He pointed out that the First-tier Tribunal Judge's decision was promulgated on 22nd September 2016 at which point the relevant authorities in relation to proxy marriage were those in **<u>Kareem</u>** and **<u>TA</u>** and he accepted that the judge relied on those properly at that time. However he pointed out that since then the Court of Appeal have issued the decision in **<u>Awuku v SSHD</u> [2017] EWCA Civ 178**. He submitted that if I were to remake the decision the findings at paragraph 20 cannot stand. In these circumstances he suggested that it was appropriate to set the decision of the First-tier Tribunal aside and to remit the decision to the First-tier Tribunal to look at the whole issue again.

**13.** In terms of the other findings Mr Al-Rashid submitted that at paragraph 24 the judge had failed to identify any new information which had come to light which enabled the Home Office to raise the marriage of convenience issue despite having previously issued a residence card. He submitted that the decision in **<u>Rosa v Secretary of State for the Home Department</u> [2016] EWCAS Civ 15** says that it is clear that a marriage of convenience is to be determined at the point of the marriage. He further submitted that the judge's finding at paragraph 25 that the marriage is not genuine cannot stand in light of his erroneous conclusions that the marriage is not legally valid; that there was a quick end to the marriage; his failure to identify what new information had come to light to credibly cast doubt on the relationship; and his failure to give due recognition to the Secretary of State's conclusion in 2010 that this is a genuine marriage. The Rule 24 response further contends that the judge failed to deal specifically with the erroneous point in the reasons for refusal letter that the adverse inference drawn by the Secretary of State for the Appellant's failure to attend the interview is that she is not a qualified person. It is submitted that this is perverse as only an EEA national can be a qualified person and the Appellant is not an EEA national.

**14.** Mr Tufan pointed to paragraph 21 where the judge also found that there is no evidence to show that the Appellant's husband is currently exercising treaty rights in the UK therefore concluding that the Appellant's husband is not a qualified person. He submitted that on that basis alone the appeal must fail. Mr Tufan referred to the decision in the case of **<u>EG and NG</u> (UT Rule 17; withdrawal Rule 24: Scope) Ethiopia [2013] UKUT 143**. He relied on paragraph 3 of the headnote and contended that raising an issue in the Rule 24 notice is not sufficient to bring it before the Upper Tribunal. He accepted the point made about the proxy marriage but pointed out that the issue of the validity of the marriage had not been raised in the reasons for refusal letter but this was something that the judge raised at the hearing.

## <u>Error of Law</u>

**15.** It is clear, as accepted by both parties, that the decision by the judge that the appeal should be allowed under the EEA Regulations is clearly a mistake in light of his findings in paragraphs20-25. I consider that this is a material error because the judge has therefore given insufficient reasons for his conclusion that the appeal should be allowed. In these circumstances I set aside the decision that the appeal should be allowed and remake it.

**16.** In re-making the decision Mr Al-Rashid asked me to go behind the findings made by the judge in paragraphs 20 to 25. However there is no challenge to those findings in the appeal before me. The Appellant did not cross-appeal the decision. Mr Al-Rashid pointed out that the Appellant could not appeal given that the appeal was allowed. However there was nothing to prevent the Appellant cross-appealing when the Secretary of State appealed against the decision. There is no challenge at all before me as to the findings made by the judge.

**17.** I acknowledge that the decision in **Awuku** advocates a different approach to proxy marriages. However the judge’s approach was not wrong at the time the decision was made. However, it was not in dispute that, given the change to the guidance in relation to proxy marriages under EU law, in remaking the decision I must find that the findings at paragraph 20 cannot stand. However I note in this context that Mr Tufan accepted that the validity of the marriage was not an issue raised by the Secretary of State in the reasons for refusal letter.

**18.** However the judge made a significant number of other findings that go to the heart of this matter. As pointed out above, there has been no challenge to those findings.

**19.** The judge found at paragraph 21 that there was no evidence to show that the Appellant’s husband is exercising treaty rights and no evidence that he has been working since 2014. This finding, which was not challenged, means that the appeal would have had to be dismissed in any event.

**20.** Further, the judge made alternative findings in relation to the marriage at paragraph 23 where he went on to consider in the alternative whether the marriage was one of convenience. Mr Al-Rashid did not point to where in the decision in **Rosa**, the Court of Appeal said anything contrary to the judge’s assessment at paragraph 24 that the Home Office cannot be stopped from arguing that a relationship is one of convenience simply because a residence card had previously been issued.

**21.** In considering this matter the judge took into account the adverse inference which the Secretary of State had drawn under Regulation 20B and concluded that the Appellant had not given a good reason for refusing to attend the interview and that the Respondent was entitled to draw adverse inferences. The judge agreed with those adverse inferences. The judge considered it reasonable to take into account the Appellant's immigration history in light of the quick end to the marriage, despite the

fact that the Secretary of State had previously issued the Appellant with a residence card. Contrary to Mr Al-Rashid’s submission in my view it is clear that the fact that the Appellant and Sponsor are no longer living together is new information which could suggest that a marriage is not one of convenience.

**22.** The judge concluded that the Appellant had not put forward evidence to substantiate her claim that the marriage had been genuine and the judge, as was open to him, concluded that the Appellant had failed to prove that this was a genuine marriage. In these circumstances and given all of the additional findings made by the judge, the conclusions at paragraph 20 in relation to proxy marriage do not infect the remaining unchallenged findings made by the judge at paragraphs 21 to 25.

**23.** In these circumstances the findings at paragraphs 21 to 25 shall stand. I therefore remake the decision based on those findings.

**24.** I dismiss the appeal for the reasons set out at paragraphs 21 to 25 of the First-tier Tribunal decision.

## Notice of Decision

**25.** The decision of the First-tier Tribunal contained a material error of law. I set aside that decision and remake it by dismissing the appeal on all grounds.

**26.** No anonymity direction is made.

Signed Date: 14 June 2017

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**
**FEE AWARD**

As the appeal is dismissed there is no fee award.

Signed Date: 14 June 2017

Deputy Upper Tribunal Judge Grimes