**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/00164/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 20 February 2019** | **On 28 February 2019** |

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**DAVID OWUSU TABIRI**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr B Amunwa, counsel instructed by Fortwell Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

*1.* This is an appeal against the decision of First-tier Tribunal Judge Watson, promulgated on 29 November 2018. Permission to appeal was granted by First-tier Tribunal Judge O'Garro on 27 December 2018.

Anonymity

*2.* No direction has been made previously, and there is no reason for one now

Background

*3.* The appellant entered the United Kingdom as a visitor during 2001. According to the Secretary of State's summary of his immigration history, he extended his leave until 28 May 2003. Thereafter, the appellant made several unsuccessful applications for a residence card and leave to remain on human rights grounds. On 6 July 2017, he sought a residence card as confirmation that he was a family member of a European Economic Area or Swiss national exercising Treaty rights in the United Kingdom. The appellant submitted a customary marriage certificate which stated that he had married his spouse in Ghana on 28 August 2016 by proxy.

*4.* The Secretary of State refused the application by way of a decision dated 29 November 2017. The respondent considered the case of NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 00009 as well as Ghanaian law regarding customary marriage and noted that it was necessary for both parties to a customary marriage to be either Ghanaian citizens or have parents who are Ghanaian citizens. The appellant had provided no evidence that his sponsor was of Ghanaian descent and the birth certificate he had provided as evidence of his own Ghanaian ancestry was not accepted as valid because it was not issued within twelve months of his birth as required by the Ghana Registration of Births and Deaths Act 1965 (Act 301). The respondent did not, therefore, accept the legal validity of the appellant's marriage. In addition, it was not accepted that the signatory to the marriage certificate had the authority to confirm the facts attested to. Nor had the appellant submitted a statutory declaration to accompany the customary marriage certificate. The Secretary of State was not satisfied that the appellant's claimed marriage was registered in accordance with the Ghanaian Customary Marriage and Divorce (Registration) Law 1985. The respondent noted that the sponsor was studying in the United Kingdom however, it was noted that he had not declared that she had sufficient resources as required by Regulation 4 of the Immigration (European Economic Area) Regulations 2016 and nor was there evidence showing this. The respondent also noted that the evidence of the sponsor's employment related to 2016, that Manpower had confirmed that she no longer worked for the employer and there was no current evidence that she was a worker.

The hearing before the First-tier Tribunal

*5.* At the hearing before the First-tier Tribunal, the appellant and his sponsor gave evidence. The judge noted that while the appellant did not accept that it was necessary for both parties to a Ghanaian customary marriage to be of Ghanaian citizenship or parentage, no expert or other evidence was relied upon to the contrary. The judge noted that there was no evidence as to the citizenship of the sponsor's parents. He considered the

letter from the Ghana High Commission but preferred the evidence referred to in the decision letter.

*6.* The judge also considered whether the appellant was the durable partner of the sponsor but owing to inconsistencies in the evidence, concluded that he could not.

*7.* Lastly, the judge noted that the sponsor had produced an offer of employment to commence on the day after the hearing but was not employed on the date of the hearing.

The grounds of appeal

*8.* The grounds of appeal argued firstly, that the judge erred in failing to consider issues which it was conceded were not raised before him. Reference was made to an unreported case where the same expert referred to in NA had stated that only one of the parties and not both needed to be of Ghanaian descent. Secondly, it was said that the judge erred in finding that there was a requirement for the parties to reside in a common family home, PM (EEA – spouse – residing with) Turkey [2011] UKUT 89 considered. Lastly, it was argued that the judge erred in considering only the evidence of the job offer and had failed to consider that the sponsor's previous employment had ended in July 2018 or whether she could be considered a worker.

*9.* Permission to appeal was granted on the basis sought.

The hearing

*10.* In relation to the first ground, Mr Amunwa drew my attention to unreported Upper Tribunal cases regarding whether a valid customary marriage could take place between a Ghanaian and non-Ghanaian. He placed particular reliance on that of Amoako (IA/23315/2012). Mr Amunwa argued that the practice of the Upper Tribunal had been to depart from the principles in NA; that NA should be treated with caution given what said about the expert in Amoako. He submitted that the evidence before the judge satisfied the correct requirements in Ghanaian law. The consideration of the evidence regarding the parentage of the parties to the marriage was inadequate. The judge had a letter from the Ghanaian embassy which confirmed that the correct documentation and signatories had been obtained, but its significance was dismissed. There was sufficient evidence that the appellant and his sponsor were either Ghanaian or their parents were.

*11.* In relation to the second ground, Mr Amunwa drew my attention to the lack of clear findings as to the category of qualified person the judge believed the sponsor to be. There was reference to her student finance and employment records, with the judge stating that she was not a worker nor jobseeker. There were no findings about her studies. He argued that

the judge was wrong to argue that the sponsor was not a jobseeker given that she had a job starting the day after the hearing.

*12.* On third ground, Mr Amunwa argued that the judge's criticism of the evidence of cohabitation did not refer to the evidence and it was unclear what the discrepancies were.

*13.* For the respondent, Mr Bramble agreed that the judge erred as contended in the first ground and that this error was potentially material. This was dependent upon whether the sponsor could meet the requirements of Regulation 6, that is whether the sponsor was exercising Treaty rights at the date of hearing.

*14.* Mr Bramble submitted that the sponsor was starting employment the next day after the hearing and last worked on 7 July 2018. He argued that she was not a worker but was in between jobs. He argued that the sponsor could not meet the requirements of Regulation 6(2) because there was no evidence that she had registered as unemployed. He wondered aloud whether the sponsor was a student with appropriate insurance. He concluded that the first error was immaterial. In relation to the third ground, he argued that the goalposts had moved from the original grounds which referenced Diatta v Land Berlin. Nonetheless, he submitted that the judge's findings on cohabitation were sufficient.

*15.* In response, Mr Amunwa said that he read Regulation 6 differently and that it was 6(1) that was relevant. The sponsor satisfied the conditions in that she was already resident in the United Kingdom, had been working, was seeking work and had provided evidence that she was had a genuine chance of being engaged. Alternatively, the sponsor was a worker at the date of the hearing because she had signed a contract of employment on 8 November 2018 and was due to report to work on 20 November 2018.

Decision on error of law

*16.* It was common ground that the judge's reliance on NA amounted to an error of law given what was said in Amoako regarding the expert evidence having changed on the nationality requirements for parties to a customary marriage in Ghana. Furthermore, in McCabe v McCabe [1994] 1 FLR 410, the Court of Appeal found there be a valid customary marriage between an Irish and a Ghanaian national. It further transpires from Amoako and a further unreported case of Agyei (EA/12991/2016) that there exists a UKBA document which states that at least one of the parties to a Ghanaian customary marriage must be a Ghanaian national. Clearly that is not the same as requiring both parties to be Ghanaian nationals or of Ghanaian parentage.

*17.* The appellant's alternative case is that he meets the requirements set out in NA. He has never claimed to be anything other than a Ghanaian national. Furthermore, in his application form for a residence card he states that his original passport has been with the Secretary of State since

2008. The appellant's bundle before the First-tier Tribunal contained further evidence that both he and the sponsor were either Ghanaian nationals or had Ghanaian parents. That evidence included confirmation from the Ghanaian High Commission, which the judge rejected for inadequate reasons.

*18.* I have carefully considered whether the above-mentioned error is material given Mr Bramble's submissions to the effect that the sponsor could not show that she was a qualified person at the date of the hearing. The difficulty with that argument, is that the judge did not carry out a detailed consideration of the evidence before him as to the sponsor's position. There was only a passing reference to Regulation 6 and no consideration of the various Conditions set out therein. The brief consideration of the sponsor's qualification is woven around findings as to whether the parties were cohabiting. There appears to have been no separate assessment of her student status.

*19.* The sponsor's payslips and tax records for 2013-2016 were before the judge, as were documents from Student Finance, comprehensive health insurance policies and payslips for 2018. The evidence before the judge was that the sponsor had a work history, she had shown she was applying for jobs after graduating and that she had a job to start the day after the hearing. It is apparent that the judge failed to adequately consider all the relevant evidence before him regarding whether the sponsor was exercising Treaty rights. Furthermore, his brief findings were inadequate.

*20.* Having found that the judge erred in his assessment of whether the sponsor was a qualified person, it follows that the error regarding the validity of the marriage is a material error.

**Decision**

**The making of the decision of the First-tier Tribunal involved the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 2 hours by any judge except First-tier Tribunal Judge Watson.**

Signed Date 08 April 2019

Upper Tribunal Judge Kamara