Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **EA/09433/2017**

THE IMMIGRATION ACTS

Heard At Field House
On 19 March 2019

Decision and Reasons Promulgated
On 09 April 2019

Before:

Upper Tribunal Judge
John FREEMAN

Between:
Mohd. TAHIRU
(anonymity direction not made)

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Nesa Ostadsaffar* (counsel instructed by Jade Law, on 17 September only)
For the respondent: Mr Toby Lindsay

DETERMINATION & REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Cox), made at Bradford without a hearing, at the appellant's invitation, on 16 March, to dismiss an EEA appeal by a citizen of Ghana. The only issue at this stage is whether the judge was entitled not to be satisfied that the appellant had contracted a valid customary marriage there with his wife, who is a citizen of France.

2. The requirements for registration of a customary marriage in Ghana are set out in the Ghanaian Customary Marriage and Divorce (Registration) Law 1985, s. 3 (1) – (2). Registration is however no longer compulsory, following an amendment in 1991. There is no issue but that the appellant had satisfied the requirements for registration requiring a statutory declaration showing the parties' names, places of residence, and family support: the only issue is on s. 3 (1) (c), which requires the declaration to show that the parties have complied with the conditions essential to the validity of the marriage under the relevant customary law.

3. On this point the Home Office relied on the opinion of an expert witness on Ghanaian law, set out in *NA* (Customary marriage and divorce, evidence) Ghana [2009] UKAIT 00009. This was Mercy Akman, a member of the Bar both in Ghana and here. At paragraph 11 of her opinion (paragraph 12 of the decision), Miss Akman set out the effect of a Ghanaian authority, requiring agreement by the parties and their families, and cohabitation, none of which is in issue in this case.

4. However at paragraph 5 (11) Miss Akman also says "A valid customary marriage can only be validly contracted between two Ghanaian citizens …", and this is the point on which the Home Office refused to recognize the validity of this marriage, since the declaration did not show that the appellant's wife was a citizen of Ghana, as well as of France. Miss Ostadsaffar however proposed to show, by means of unreported decisions of the Upper Tribunal, that Miss Akman had since changed her opinion on this point.

5. Mr Lindsay objected to this point being taken, without either notice in the grounds of appeal, or permission to cite the unreported decisions concerned. This was fully justified, for both reasons, and so I adjourned the hearing to 28 November, with directions which were complied with, to an extent. Following a succession of case management hearings, at which the solicitors failed to appear themselves or instruct counsel, but let the appellant appear unrepresented, I decided on 19 March that the appeal must be resolved, which I was able to do, thanks to the decisions cited below. Solicitors should however realize that they are professionally obliged to appear at all hearings in cases where they are on record, unless they have got permission beforehand not to be.

6. Customary marriages between citizens of Ghana and spouses from other countries are a common feature in appeals of this kind. If Miss Akman's opinion in *NA* was still being relied on by the Home Office on 20 October 2017 (the date of the decision under appeal here), despite her changing her mind, they, and those advising appellants, need to know where they stand, by means of a 'reported' decision.

7. The judge's reasons for dismissing this appeal are quite clear from paragraphs 24 – 25

> "… the Appellant has not provided any evidence to show that the Ghanaian law relating to customary marriage does not require both parties to be Ghanaian nationals.
>
> Further although the Ghanaian documents refer to the marriage being recognised as lawful under Ghanaian customary law, there is nothing to show that the authorities considered whether the parties had capacity to marry in Ghana by proxy."

8. Although the refusal letter expressed general reservations about the quality of documentary evidence coming from Ghana, this is the only real issue in the present case. The unreported decision which I gave the solicitors leave to cite is *Yeboah* (IA 19837-14), by deputy Upper Tribunal Judge Saini. It relies in turn on *Amoako* (IA 23315-12) by Upper Tribunal Judge Martin, where two sources of Ghanaian law are dealt with.

9. The first is an expert report by Miss Akman, already available by the date of the hearing in June 2013, where she confirms 'after additional research and reflection' that customary marriages are available between non-Ghanaian citizens. That is half the picture: the rest is given in the Home Office's own guidance 'Customary Marriage and Divorce/Proxy Marriage contracted in Ghana' (17 January 2012).

10. On the point in issue, that guidance seems to be identical to the response (2 November 2016) to a country of origin information (COI) request, put before me by Mr Lindsay. The eligibility criteria for proxy marriages in Ghana are given as follows:

> ii. Ghanaian nationals resident in Ghana or abroad.
>
> iii. At least one of the parties must be a Ghanaian national/citizen.
>
> iv. If both parties are non-Ghanaian nationals, at least one of the parents of any of the couple must be a Ghanaian national for a customary marriage to be registered.
>
> v. Non-Ghanaian nationals with no parental links to Ghanaian citizenship are **not** entitled to customary marriage certificates.

11. So far as can be seen, this represents the Home Office's own current guidance on the subject. This was also the guidance considered, with the exception of (iv) by Mark Turner J and Upper Tribunal Judge Craig in *Agyei* (EA 12991-16), decided on 21 November 2018. As the Tribunal took the guidance from *Amoako*, this may have been an oversight. Since the question of whether both parties had to be Ghanaian nationals was the only one before the Tribunal in *Agyei*, the appellant's appeal against refusal of a residence card was allowed.

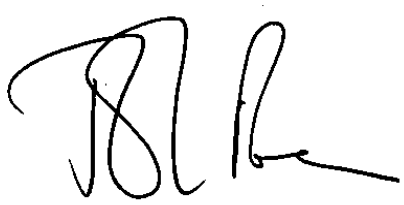
12. Mr Lindsay was content to accept that decision as correct on the issue and criteria set out in it. The only point he raised on the question of citizenship requirements for customary marriage in Ghana was on (iv). However, while in this case the sponsor has 'no parental links to Ghanaian citizenship', the appellant is a Ghanaian citizen. So far as I can see, (iv) does no more than clarify the effect of (ii) and (iii): capacity to contract a

customary marriage in Ghana requires that *either* one party must be a Ghanaian citizen, *or* at least one of the parents of either party must be one: if *neither* parent is, then of course (iv) will not be satisfied.

13. It is a pity that the Home Office did not take heed of what appears to be their own current guidance, dating from 2012, until the presenting officer in *Agyei* was shown *Amoako* (see paragraph 6 of the decision), but have been content to rely on what even by the date of the decision in *Amoako* in 2013 was the out-of-date version of Miss Akman's opinion, set out in *NA* (Customary marriage and divorce, evidence) Ghana [2009] UKAIT 00009, at paragraph 11, but no part of the conclusions or guidance given by the Tribunal there.

14. Until the contrary is shown, and in line with Miss Akman's current opinion, that guidance should be taken to represent the law on capacity to contract a valid customary marriage in Ghana, so far as citizenship is concerned. In other words, *either* one party must be a Ghanaian citizen, *or* at least one of the parents of either party must be one. In this case, that condition was satisfied, and it follows that the appeal is allowed.

Appeal allowed



Upper Tribunal JudgeFreeman
(a judge of the Upper Tribunal)

Dated 04 April 2019