Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA 44428 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 May 2014	**24 June 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

LYDIA GYAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Ariyo, solicitor from Apex Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by a citizen of Ghana against a decision of the First-tier Tribunal which found that she had not shown that she was entitled to a residence card as confirmation of her right to reside in the United Kingdom.

2. The case got off to a bad start because of the Notice of Immigration decision which I find to be in a less than satisfactory form. It refers to the Immigration (European Economic Area) Regulations 2006, Regulations 2 and 8(5).

3. Regulation 8(5) is under the section dealing with extended family members and permits a person to enter the United Kingdom if that person can show that he is in a durable relationship with an EEA national.

4. Regulation 2 is the definition section and its relevance to the notice of immigration decision is not absolutely clear but Mr Jarvis speculates, and I think he may be right, that it is intended to refer to the definition saying that a spouse for the purposes of the Regulations is not a party to a

marriage of convenience. The point being that, as I understand it, a "marriage of convenience" is a marriage which is valid in substance in the sense that it is the result of an apparently binding legal ceremony but it is not a marriage in which the parties have any commitment to one another.

5. The explanation in the notice of immigration decision begins in the following terms:

> "You have applied for a residence card as confirmation of a right of residence as the spouse of an EEA national exercising treaty rights in the United Kingdom. However, your marriage is one of convenience. Your application has also been considered in accordance with Regulation 8 of the Immigration (EEA) Regulations 2006 but you have failed to prove that you are in a durable relationship with an EEA national."

6. I cannot avoid describing this as muddled. If there is a marriage it is hard to see why the Secretary of State was concerned to see whether there was a durable relationship. If the marriage was one of convenience for the purposes of the Regulations then no rights would follow from it. It is difficult to imagine any likely circumstances where a marriage of convenience masks a durable relationship.

7. The Reasons for Refusal Letter is a little more helpful. It begins by saying that the applicant has failed to provide evidence that she meets the criteria as an unmarried partner as detailed in the Regulations. The marriage relied on was a customary marriage in Ghana and I think it is settled law that such a marriage, even if wholly genuine in the sense that it was a reflection of an intention of the parties to live together permanently as a married couple, would not be a qualifying marriage for the purpose of the Regulations unless it was shown to be a marriage recognised both in Ghanaian law and in the law of the EEA citizen exercising treaty rights, in this case the law of France.

8. There was nothing before the Secretary of State that would possibly show that the relationship was a marriage for the purposes of the Rules and it is quite clear to me that the Secretary of State was trying to do the sensible thing in considering it as an application to remain as a person in a durable relationship. It is regrettable that there was reference to marriage of convenience remaining in the notice of immigration decision because it set up the possibility of somebody arguing the case in entirely the wrong direction. Indeed, I think it is also right to say that to some extent Mr Ariyo was misled because he has put some efforts into considering whether or not there is a marriage of convenience and where the burden of proof lies in the event of such an allegation.

9. Had it been the appellant's case at an early stage that the notice of decision was defective it may have been a point that found favour but it was in my judgment too late to raise such argument at the hearing before the Upper Tribunal. Any irregularities have been waived by engaging with the appeal process. No doubt if the appellant really had been confounded by the decision so that she did not understand it more thought would have been given to its form and meritorious arguments raised.

10. What is quite plain is that the First-tier Tribunal Judge dismissed the appeal because in his judgment the appellant had failed to show that she was in a durable relationship with an EEA national.

11. Several reasons were given for this. Some of them are peripheral. For example, there is reference to only three letters being produced to reflect ten months of cohabitation.

12. There is criticism in the grounds that this was not a rational or proper finding but I find no merit in those criticisms. It was part of the reasoning and the judge was entitled to find it an indication of a lack of good faith that only three letters could be produced by a couple who are allegedly living together as husband and wife.

13. Similarly, there is reliance on supporting evidence from the church pastor which, if taken at face value, was very supportive of the appellant because it referred to the appellant and her apparent husband being known to the church and recognised as a married couple. The First-tier Tribunal Judge clearly read the letter and was not impressed by it. Amongst the reasons for not being impressed was that it gave no indication of how long the couple had been attending the church and therefore how well-known they were to the pastor. In the absence of such evidence, the impression of the pastor, however honestly felt, was of little value. Again, I see no justification in criticising the judge for regarding the letter as a not particularly helpful strand of evidence.

14. However, the main reasons for finding that the relationship was not a durable relationship were the incongruity of the applicant entering the United Kingdom because of one relationship and quickly establishing a new one with the present purported partner and then the inconsistencies in answers given by the applicant and her partner as they were interviewed separately by the Secretary of State.

15. I see no possible criticism on the part of the judge for considering these inconsistencies to be material and indicative of a relationship that was not close and durable and akin to marriage and making the finding that he did.

16. The claimant in her grounds is very critical of the interview as portrayed in the Reasons for Refusal Letter because, in the Reasons for Refusal Letter, the Secretary of State draws attention to the unsatisfactory aspects which he used to rely on to refuse the application. I do not see any merit in this criticism. It is described as a “Reasons for Refusal Letter”. The Secretary of State was explaining why she reached the decision that she did. If it was the case that the Secretary of State had edited the interviews to only draw attention to the unsatisfactory elements and suppressed the rest there may be grounds for very grave concern and very serious criticism but this is manifestly not what has happened. The Secretary of State disclosed the full interviews and could not have been accused of hiding or ignoring anything. Even if she was, and it is clearly my view she was not, it is a point that gets nowhere because all the material was available to the Immigration Judge in the First-tier Tribunal who reached the decision that he did. The decision was by way of rehearing on that point and even if the deficiencies of the Secretary of State were made out, which they are not,

the point would have no substance. It is the First-tier Tribunal's decision that matters now.

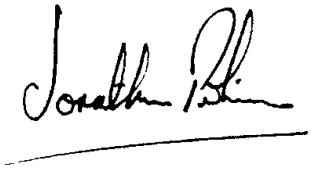
17. There was also a complaint that the First-tier Tribunal Judge did not understand the case because there is reference to interviews in the plural but that is a misunderstanding. There was one interview in the sense of one set of standard questions that were asked of applicant and her partner but they were each interviewed. It is clear to me that the plural is simply a recognition of what happened and not indicative of any error of any kind.

18. Mr Ariyo submitted that the First-tier Tribunal Judge muddled himself about the burden of proof when a marriage of convenience is alleged but I do not see that as a point either correctly made out or of any inherent merit. Certainly it is clear that an applicant does not have to begin by proving that the marriage is not one of convenience. That only becomes contentious if the point is taken and raised by the Secretary of State. If it does then, as I read the decision in **IS (marriages of convenience) Serbia [2008] UKAIT 31** and **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038**, it is for the Tribunal to decide on the totality of the evidence if the marriage is one of convenience or not. As I have indicated, this is a red herring in this case because the application has been dealt with on the basis that there is not a marriage at all but there might be a durable relationship. The Secretary of State found there was not and at the rehearing of the point in an independent appeal the First-tier Tribunal Judge also decided that there was not a durable relationship.

19. For the reasons given I am satisfied that the criticisms for that finding do not stand, that the First-tier Tribunal Judge was entitled to reach the conclusion that he did for the reasons given and I therefore dismiss the appeal.

20. I appreciate there are certain side issues here created by the Secretary of State's confusing use of the phrase 'marriage of convenience' in a decision that was not dealing with the marriage at all but for the reasons I have given I do not accept that they are relevant to the case that was actually heard and decided. It follows therefore that I dismiss the appellant's appeal in this case.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 23 June 2014