Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/08460/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2018	**On 29 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR JOSEPH KONADU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Tampuri, Counsel instructed by Tamsons Legal Services
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Ghana, born on 17 January 1970, who appealed to the First-tier Tribunal against the refusal by the respondent, dated 21 June 2016, to refuse the appellant's application for a residence card under Regulation 7(1)(a) and Regulation 21(b) of the Immigration

© CROWN COPYRIGHT 2018

(EEA Regulations) 2006, with reference to Regulation 2 which states that a spouse does not include a party to a marriage of convenience.

2. In a decision promulgated on 1 August 2017, Judge of the First-tier Tribunal Jessica Pacey dismissed the appellant's appeal for want of jurisdiction. Given the findings of the Court of Appeal in **Khan v SSHD & Anor [2017] EWCA Civ 1755** which overturned **Sala (EFMs: Right of Appeal) [2016] UKUT 411** that decision was incorrect as the appellant arguably would have had a right of appeal as an extended family member.

3. The appellant appealed with permission on the grounds that the judge erred in finding that the appellant was habitually resident in the UK. The divorce had been executed under Ghanaian customary law and Divorce (Registration law). Reliance was placed on **Awuku [2017] EWCA Civ 178** which concluded that **Kareem** and **TA** had been wrongly decided.

Error of Law Discussion

4. The First-tier Tribunal considered the EEA Regulations and noted that the application had been refused on the basis that the appellant had produced a divorce certificate dated 12 June 2014, issued in Ghana, pertaining to the cessation of his previous marriage to a Ms Awuah. The respondent had relied on Section 46(2) of the Family Law Act 1986 and the respondent's Immigration Directorate Instructions which stated that an overseas divorce obtained other than by means of proceedings shall be recognised under Section 46(2) of the Family Law Act 1986 if:

   "(a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained;

   (b) at the relevant date –

      (i) each party to the marriage was domiciled in that country; or

      (ii) each party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and

   (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date."

5. Although reliance was placed on **Awuku** this is not a case where the First-tier Tribunal wrongly required that the validity of the divorce be shown to be recognised as valid by the law of another country. This was a case where the respondent relied on the provisions of UK law and there was nothing before me to suggest that those provisions, set out in the preceding paragraph, do not apply. Although the respondent took no issue with the domicile provision, the respondent was not satisfied that it had been shown that neither party to the marriage was habitually resident in the United Kingdom in the year immediately preceding the divorce.

6. Ms Everett accepted before me that the judge erred in finding that the appellant was habitually resident in the UK, as it was not disputed before me that the appellant did not have leave to remain in the UK and Ms Everett further accepted that to be habitually resident an individual would require such leave; however I am not satisfied that any error was material. As noted by the First-tier Tribunal, the appellant's former wife was also in the UK and had remained there since her arrival on 24 May 2011. There was no information or evidence before the First-tier Tribunal to suggest that she was not habitually resident in the UK and therefore it had not been demonstrated that his divorce was one that should be recognised under Section 46(2) of the Family Law Act 1986.

7. In addition to her findings that the divorce was not recognised and therefore the appellant's later purported marriage to the sponsor, an EEA national, was not valid, the judge made additional findings that she did not "find the appellant's account of his relationship with Ms Wansema to be credible".

8. The Tribunal found that there were inconsistencies in the evidence and also reached the conclusion that the appellant was coaching the sponsor or attempted to coach the sponsor during the course of the hearing. The judge considered that the sponsor stated that the appellant did not work but that his name was on the utility bills because friends gave him money and she wanted him to be responsible for paying the bills; the judge did not find to be a credible explanation given that the sponsor was working and therefore able to pay the bills. It was not credible that the appellant was apparently reliant on some random sums of money from friends which could not guarantee there would be enough money to pay bills and that there was no information or evidence which might support that claim.

9. The judge also did not find the sponsor's evidence in relation to her council tax and her receipt of a single person discount evidence to be credible. The First-tier Tribunal Judge further noted that the respondent in her refusal letter had contacted EDF Energy and British Gas who confirmed that they had not provided gas or electricity to the appellant's address and that the bill provided with the appellant's application was fictitious. EDF Energy also confirmed the account number provided did not match their records. The respondent considered this to be an attempt to deceive the respondent and an attempt to gain residence card using fraudulent documents.

10. The Tribunal considered all the evidence and directed herself in relation to **RP (Proof of Forgery) Nigeria [2006] UKAIT 0086** and that an allegation of forgery needs to be proved and a bare allegation carries no weight. However in the Tribunal's findings the respondent had discharged the burden of proof with respect to the documents in question.

11. I have considered the relevant jurisprudence in relation to marriages of convenience including **Papajorgi (EEA spouse – Marriage of convenience) Greece [2012] UKUT 0038 (IAC)** and the Court of Appeal in **Rosa [2016] EWCA Civ 14** where it was confirmed that the

burden of proof on the issue of marriage of convenience lies throughout on the Secretary of State. Although the First-tier Tribunal Judge did not cite the relevant case law, in the findings that she reached, which were in the further alternative to her findings on the validity of the marriage, the First-tier Tribunal Judge considered all the evidence and it was apparent that she was satisfied that the respondent had discharged the burden in showing that the marriage was one of convenience, including because of the fraudulent documents and that she did not find the appellant's account of his relationship with the sponsor to be credible ([16] of the decision).

Conclusion

12. The decision of the First-tier Tribunal contains an error of law only insofar as the decision has been superseded by the Court of Appeal in **Khan** and the appellant did have a right of appeal. I re-make the decision dismissing the appellant's appeal under the EEA Regulations.

No anonymity direction was sought or is made.

Signed Date: 29 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed no fee award is made.

Signed Date: 29 March 2018

Deputy Upper Tribunal Judge Hutchinson