Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09306/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 23 January 2018	**On 27 February 2018**

Before

THE HONOURABLE MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE HANSON

Between

ABENA MANSAH
(Anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr K Siaw, Solicitor
For the respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge O'Malley, promulgated on 17 August 2017, in which the Judge dismissed the appellant's appeal against the respondent's refusal to grant a residence card as a dependent family member of an EEA national exercising treaty rights in the United Kingdom.

Background

2. The appellant, a citizen of Ghana, was born on 30 September 1963. The appellant's son Mr Owusu resides in the United Kingdom and is in a relationship with an EEA national Ms Twene, a citizen of Austria, whom he married in a traditional ceremony in Ghana on 24 October 2015. It is not disputed that the EEA national is exercising treaty rights in the United Kingdom. The appellant's son is now a naturalised British citizen.

3. Having reviewed the evidence, the Judge sets out findings of fact from [37] of the decision under challenge. The Judge found the witnesses credible. In relation to the marriage between Mr Owusu and Ms Twene, upon whom the appellant is dependent, the Judge makes the following findings:

> "51. Ms Twene and Mr Owusu were married in a traditional ceremony in Ghana on 24 December 2005. They have three children, born on 12 October 2006, 4 October 2009 28 November 2014.
>
> 52. Whilst they refer to each other as spouse I find that their marriage is a customary marriage. There is no civil marriage in Ghana or in any EU state. The evidence given by Ms Twene is that the marriage is not recognised in Austria as she has not completed the steps necessary to achieve that recognition. The decision refers to Ms Twene as "*your purported daughter-in-law"* but does not clarify why that prefix is used. The remainder of the decision is infected with the error that the appellant's son (or father as he is referred to in the decision) is the sponsor.
>
> 53. There were no documents before me to confirm that the respondent, or the Austrian government, accept that Mr Owusu is the spouse of Ms Twene. There were no documents included in the bundle to show that Mr Owusu's previous leave in the UK was as the spouse of a qualified person, under Regulation 7, as opposed to being someone who satisfies Regulation 8, having proven a durable relationship. This is a significant point in this appeal and the burden is on the appellant.
>
> 54. Mr Owusu was not present to give evidence. There was a witness statement from him, which refers to Ms Twene as his wife but gives no clarification of the basis of his stay in the UK or of the decision made after his appeal.
>
> 55. I accept that there has been a hearing in the First-tier Tribunal relating to Mr Owusu's entitlement to remain under the EEA Regulations which was successful. That decision was not before me. I understand that there has also been a previous application for this appellant which was not successful. Again, I do not have that information before me.
>
> 56. On the basis of the evidence before me, I am not satisfied that Mr Owusau is recognised in Austria or in the UK as the

> spouse of Ms Twene. I am satisfied that they would be recognised as being in a durable relationship. They are not in a civil partnership therefore the appellant is not a relative in the ascending line of the spouse of the qualifying person.
>
> 57. On the basis of that finding her appeal must fail."

4. The Judge considered, in the alternative, whether the appellant is a dependent relative within regulation 7 and found such dependency to be proved although repeated the conclusion that, as a result of the findings in relation to the relationship between the appellant's son and the EEA national sponsor, the appellant did not satisfy regulation 7 (1) (c).

5. In relation to arguments advance before the Judge pursuant to regulation 8, the Judge relied upon the decision of the Upper Tribunal in Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC) and the finding there was no statutory right of appeal against a decision of the Secretary of State not to grant a residence permit to a person claiming to be an extended family member. Whilst it is acknowledged this finding is itself infected by arguable legal error following the decision of the Court of Appeal in Khan [2017] EWCA Civ 1755 there is no need to comment further upon this aspect of the decision in light of our primary finding below.

6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on the basis it was arguable the Judge's approach as to whether the EEA national sponsor had entered into a marriage with the appellant's son that was valid under Ghanaian law, and thus one that was recognised as valid under English law, was flawed and, arguably, that the judge's approach to the question of whether the appellant was a family member of the EEA national was therefore flawed.

7. The respondent filed a rule 24 response dated 26 September 2017, paragraph 4 of which is in the following terms:

> "… The Respondent does accept that on the face of the evidence the Appellant's grounds are arguable but without further documents the error cannot be conceded."

Discussion

8. Mr Wilding was asked to confirm exactly what the respondent's position was in light of the potential ambiguity in [4] of the rule 24 response.

9. Mr Wilding confirmed that the only issue was whether the appellant's son was validly married to an EEA national exercising treaty rights. The son had, following earlier proceedings, been granted a permanent residence card on the basis of his relationship with the EEA national. In light of the findings in relation to other issues, all of which fall in the

appellant's favour, it was submitted the proceedings were now academic.

10. Whilst accepting the Judge may have determined this issue on the basis of the law as it was understood at the date of the hearing before the First-tier Tribunal, we find the Judge erred in law in a manner material to the decision to dismiss the appeal. The correct approach when assessing a marriage issue is that set down by the Court of Appeal in Awuku [2017] EWCA Civ 178. In that case the Court of Appeal held that Kareem (proxy marriages – EU law) [2014] UKUT 24 had been wrongly decided and that the law of England and Wales recognised proxy marriage if valid by the law of the place of celebration and so the spouse of an EU national who has concluded such a marriage will qualify as a family member within Article 2 of the Directive.

11. In light of Mr Wilding not raising any issue with regard to the validity of the Ghanaian marriage, and in light of the other positive findings made by the Judge, we set the decision of the First-tier Tribunal aside with all findings other than those relating to the validity of the marriage, based upon it not been recognised in Austria, being preserved findings.

12. We substitute a decision allowing the appeal under the EEA Regulations.

Decision

13. **The First-tier Tribunal Judge materially erred in law. We set aside the judge's decision. We re-make the decision as follows. The appeal is allowed.**

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 24 January 2018