Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01553/2020

THE IMMIGRATION ACTS

Heard remotely at Field House via video (Teams)	**Decision & Reasons Promulgated**
On 19 October 2021	**On 15 November 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

STEPHEN ADDAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr P Norris of Lawrence & Associates Solicitors
For the respondent: Ms H Aboni, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Microsoft Teams. A face-to-face hearing was not held because all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal McIntosh (the judge) who, in a decision promulgated on 9 April 2021, dismissed the appellant's appeal against the decision of the Secretary of State for the Home Department ("the respondent" or "SSHD") dated 31 January 2020 refusing to issue the appellant a residence card confirming his status as a former family member of an EEA national exercising Treaty rights in the UK who has retained a right of residence following the end of his marriage to that EEA national.

Background

2. The appellant is a national of Ghana, born on 5 January 1972. It is unclear from the papers before me when or how the appellant entered the UK, or whether his entry or any period of his residence has been in accordance with the requirements of the Immigration Rules.

3. On 13 December 2013 the appellant applied for a residence card as confirmation of his right to reside in the UK as the spouse of Elizibeta Bozena Gebala, a Polish national residing and working in the UK. The appellant claimed he and Ms Gebala had undergone a customary marriage in Ghana by proxy. This application, and another made in 2014, were refused. A further application for a residence card, this time on the basis that the appellant had a retained right of residence following his divorce from Ms Gebala, was refused on 23 July 2017. The appellant appealed this decision to the First-tier Tribunal.

4. In a decision promulgated on 27 February 2019 Judge of the First-tier Tribunal Bowler dismissed the appellant's appeal. In reliance on NA (Customary marriage and divorce - evidence) Ghana [2009] UKAIT 00009 Judge Bowler was not satisfied that a requirement that the two parties to a customary marriage were Ghanaian or of Ghanaian descent was satisfied. Nor was Judge Bowler satisfied that the proxy marriage was valid because information provided by the appellant suggested that "in virtually all cases customary marriage involves a gathering at which the bridegroom's family makes payment of a bride price to the bride's family"; the respondent had raised the issue of a dowry payment, but the appellant had not engaged with the issue. Judge Bowler found that the absence of evidence that a dowry was paid undermined the appellant's claim relating to the validity of the marriage.

5. Judge Bowler considered a Statutory Declaration dated 14 November 2012 which purported to confirm that all the requisite customary rights had been duly performed. Judge Bowler noted that the document at page 4 of the appellant's bundle (presumably the document prepared by Samuel Moakye-Yiadom dated 14 November 2012) attested to the stamp, signature and seal of the Notary Public detailed in the Statutory Declaration, but that it did not attest to the contents of the Statutory Declaration. Judge Bowler had regard to extracts of Ghanaian legislation relating to the registration of customary marriage but

noted that the legislation did not address the issues raised by the respondent, including that relating to the dowry.

6. On 8 October 2018 the appellant made a further application for a residence card. This was refused by the respondent on 31 January 2020 in terms similar to those identified by Judge Bowler.

7. The appellant appealed the respondent's decision pursuant to regulation 36 of the Immigration (European Economic Area) Regulations 2016.

The decision of the First-tier Tribunal

8. The judge had before her a bundle of documents prepared by the respondent, which included a letter from the Passport and Immigration Section of the Ghana High Commission, dated 17 January 2013, confirming that a list of documents, including a 'Form of Register of Customary Marriage issued by the Registrar, Accra Metropolitan Assembly, on 15 November 2012', were genuine. A bundle of documents prepared by the appellant included, inter alia, a Statutory Declaration dated 14 November 2012 relating to the proxy marriage, two further documents attesting to the genuineness of signatures and stamps, and several documents relating to a customary divorce between the appellant and Ms Gebala on 4 December 2015 including another Statutory Declaration, and a poor photocopy of a 'Form of Register of Divorce'.

9. Having summarised the relevant immigration history and having directed herself as to the appropriate burden and standard of proof, the judge summarised the evidence before her and the parties' submissions. It was part of the appellant's case before the judge that he paid a dowry of £200 to Ms Gebala via his father, although it was not mentioned in his earlier appeal or written down at that time. The appellant relied on an unreported decision of the Upper Tribunal, Amoako v SSHD (IA/23315/2012), in which the country expert who gave evidence in NA resided from her previous opinion that customary marriages were only available to Ghanaian nationals. The appellant also relied on the unreported Upper Tribunal decision in Yeboah v SSHD (IA/19837/2014), which followed Amoako.

10. At [22] the judge noted the absence of any photographs of the proxy marriage ceremony and noted the absence of supporting evidence from Ms Gabala's proxy in Ghana (said to be a family friend) regarding the £200 dowry payment to Ms Gabala. At [23] the judge indicated that the issue of the payment of a dowry had previously been raised in the earlier appeal and by the respondent in her most recent Reasons for Refusal Letter. At [24] the judge found that the appellant's responses to questions asked about the dowry undermined his credibility.

11. Under the heading 'Decision' the judge found that the 'attestation' documents confirmed that the documents presented to the attestors were genuine but did not confirm the genuineness of the content of the documents. At [32] the judge

accepted that it was not necessary for a recognised customary Ghanaian marriage for Ms Gebala to be a Ghanaian national.

12. At [33] the judge found it significant that there was no personal evidence of the appellant's relationship with Ms Gebala, and at [35] the judge referred to 'government guidance', in respect of overseas divorces, reflecting the requirements under the Family Law Act 1986 for the recognition of overseas divorces obtained "by means of judicial or other proceedings."

13. At [36] the judge stated:

> "I conclude the relevance of establishing customary divorce is predicated on finding the marriage was indeed conducted in accordance with the customary requirements of a Ghanaian customary marriage. In respect of the marriage, I place no weight on the testimony of the appellant who with out [*sic*] good reason or reasonable explanation failed to mention before Judge Bowler, that he had paid a dowry of £200 to Ms Gebala. I find that the appellant failed to mention this fact because the sum had not been paid, that no dowry had been paid because the marriage had not taken place in accordance with the customary requirements under Ghanaian custom. In the absence of a recognised marriage, I find the alleged divorce is not valid."

14. The appeal was dismissed.

The challenge to the judge's decision

15. The grounds contend that the judge failed to consider the findings of the Upper Tribunal in Amoako that the production of a marriage certificate was sufficient prima facie proof of the validity of a marriage. The grounds claim that the appellant submitted a valid marriage certificate which had been validated by the Ghana High Commission and relevant judicial officers and that the issue of whether a dowry was paid was not relevant as this was not a requirement for the marriage to be recognised as valid. It was argued that the judge substituted her own criteria for what constitutes a valid marriage in Ghana. The grounds further contend that the divorce was obtained by way of judicial proceedings.

16. In granting permission to appeal Judge of the First-tier Tribunal Landes stated:

> I consider it arguable that the judge failed to consider the appellant's argument that production of the marriage certificate showing the marriage was duly registered was sufficient proof of the validity of the marriage. It is right that the case referred to (of Yeboah) is an unreported one and there is no mention in the decision of whether or not the judge permitted an unreported authority to be relied upon, but even assuming she did not, the argument in that case still fell to be considered. there were certainly submissions made to the judge that the evidence in relation to the payment of a dowry was not significant and the requirements of customary marriage in Ghana had been met [26].

> Although of course the appellant also had to show that his divorce was valid, the judge did not give separate consideration to this, in that she simply found that the divorce was not valid because the marriage had not been valid."

17. During the course of Mr Norris's oral submissions, he confirmed that there was no copy of the registration of the customary marriage before the First-tier Tribunal or the Upper Tribunal. Mr Norris held up a document that he said was the registration of the customary marriage, but no copy of that document could be located in the appellant's bundle, the respondent's bundle or the Tribunal file. Mr Norris, who represented the appellant before the First-tier Tribunal in respect of both First-tier Tribunal hearings, stated that the registration of the customary marriage had been before Judge Bowler, and that such registration was regarded as a 'marriage certificate'. He submitted that the fact that a registration of the divorce had been issued must mean that the marriage itself was registered. Mr Norris submitted, in respect of the divorce, that the divorce had been obtained by means of 'judicial proceedings' and he submitted that the term 'judicial proceedings' needed to be broadly interpreted and that the fact of the registration of the divorce, coupled with the various declarations and attestations, constituted 'judicial proceedings'.

18. Ms Aboni submitted that the judge was entitled to find that the appellant had not told the truth regarding the dowry and that the judge was consequently entitled to find that the appellant had not met the requirements for a customary marriage.

19. I indicated to the parties that I was satisfied the judge materially erred in law when basing her conclusion that there had been no valid customary marriage on the issues revolving around the dowry.

Discussion

20. Mr Norris submitted that the existence of a marriage certificate, or the fact that a customary marriage was registered with the Ghanaian authorities, constituted prima facie evidence that a valid customary marriage had been contracted. There is some support for this proposition, at least insofar as it relates to the production of a marriage certificate issued with a competent authority of a country in which a marriage took place (see Cudjoe (Proxy marriages: burden of proof) [2016] UKUT 00180 (IAC)).

21. Mr Norris submitted that the registration of the customary marriage was the same as a marriage certificate, or should be approached on that basis. He did not however refer to any evidential basis in the material before the judge to support this assertion. But in any event, the registration of the customary marriage document could not be found in any of the evidence that was before the First-tier Tribunal, or indeed the Upper Tribunal. No such document appears in the respondent's bundle, or the appellant's bundle, or in the Tribunal file. Mr Norris claimed that the registration of customary marriage did

exist, that it was before Judge Bowler in the 2019 First-tier Tribunal hearing (although no express reference was made to it by Judge Bowler), and he held up to the screen a document he claimed was the registration document. But the fact remains that, for whatever reason, the document was not provided to the First-tier Tribunal. The Judge cannot therefore be said to have erred in law by failing to apply a presumption of validity in respect of a document that was not before the Tribunal.

22. I am nevertheless persuaded that the judge did err in law by basing her conclusion that there had been no valid customary marriage on the evidence relating to whether a dowry was paid. I accept that the Judge was entitled to draw an adverse inference that no dowry had been paid based on the failure of the appellant to make any mention of a dowry in his 2019 appeal and the absence of any supporting evidence that a dowry was paid. I accept that this does tend to show that the appellant was not telling the truth about the dowry. Whilst this is a factor to take into account in assessing the evidence in general, including whether there had been a valid customary marriage, it cannot however be determinative of whether a valid customary marriage took place. This is because there was no evidence before the Tribunal that a dowry was in fact necessary for the establishment of a customary marriage. Whilst I acknowledge the judge's reference to the evidence before Judge Bowler in respect of the information from the Kumasi Metropolitan Assembly, this evidence was not before the First-tier Tribunal in the 2021 hearing and, in any event, the evidence did not state that a dowry was a necessary pre-requisite in all cases of customary marriages.

23. I have considered whether the judge's error may immaterial. I note that the 2019 decision of Judge Bowler should be the starting point, and I remind myself that it is for the appellant to prove that his marriage was valid. The various documents provided by the appellant, including the Register of Divorce and the letter from the Passport and Immigration Section of the Ghana High Commission, dated 17 January 2013 (which specifically mentions the registration of the customary marriage), do however provide some evidence that the marriage may have been registered and that it may have been valid, and I additionally note that the judge did not engage to any material degree with the question whether there had been a divorce that was capable of being recognised in the UK. In these circumstances I cannot say that the decision would inevitably have been the same had the error of law not occurred.

Remittal to First-Tier Tribunal

24. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 a case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

25. Given the absence of any or adequate consideration of the issue of the validity of the divorce, and given the need for further consideration of the evidence relating to whether a valid marriage was contracted, I consider that, in these circumstances, there will need to be a full re-assessment of all the evidence rendering it appropriate to remit the matter back to the First-tier Tribunal for a full fresh (de novo) hearing.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

The case will be remitted back to the First-tier Tribunal for a de novo hearing before a judge other than Judge of the First-tier Tribunal McIntosh.

Signed *D.Blum* Date: 20 October 2021

Upper Tribunal Judge Blum