**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/12704/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 June 2019** | **On 3 July 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**MRS CECILIA AWUAH**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Pipi of Counsel, Devine Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*1.* The appellant is a citizen of Ghana. She was born on 6 November 1982.

*2.* The appellant appealed against the respondent's decision to refuse her a residence card dated 5 August 2015.

*3.* This appeal has a considerable history which I need to set out. Judge Obhi (the judge) dismissed the appellant's appeal in a decision promulgated on 2 October 2017. The judge did not accept that a proxy marriage had taken place.

*4.* The original grounds claimed the judge erred materially. The grounds read inter alia as follows:

> *"2. … The appellant confirmed in evidence that she had marriage under Marriage Ordnance on 10 August 2013 and subsequently her customary ceremony took place as her father was not well.*
>
> *3. It is submitted that the judge made a material error of law through resolve a material matter. The appellant had said they had 'booked' not 'put' (the date for the Marriage Ordnance. The Ghanaian authorities had not put a date as 17 September instead the statutory declaration was sworn on 17 September 2013. The judge could not distinguish statutory declaration from the marriage certificate by Marriage Ordnance therefore her findings cannot be relied upon.*
>
> *4. The judge had proceeded on the basis that she had to be satisfied that the marriage was valid under customary law only. The marriage was registered under the licence number JDA/0019/2013 was in accordance with Ghanaian law. In the case of **Metock** the ECJ ruled against host nation restriction on when and where the marriage took place and how the non-EEA national entered the host country. The judge seems to have erred in this regard. The witness statements were signed at pages 9 and 11 of the appellant's bundle."*

*5.* Further grounds at 5–9 alleged that the judge failed to take account of the statutory declaration and could not distinguish between the marriage certificate and the statutory declaration. Further, whilst the judge referred to discrepancies as regards the date of the marriage she erred in law by failing to specify the date and give reasons as the information was contained in the statutory declaration and marriage certificate and was confirmed orally by the appellant. The judge's assessment of case law was in error.

*6.* Judge C A Parker granted permission on 6 December 2017. She said inter alia as follows:

> *"The grounds allege that the judge made material errors of law as she misunderstood the appellant's evidence at the hearing and failed to consider the statutory declaration, sworn on 17 September 2013 which had been submitted with the application. The decision in **Kareem (proxy – EU law) [2014**] is no longer good law and should not have been applied.*
>
> *I have carefully considered the judge's decision and note that, as claimed in the grounds of appeal, a statutory declaration, dated 17 September 2013, forms part of the respondent's bundle. However, at paragraph 26 of her decision the judge refers to the absence of a statutory declaration in this case and places weight upon this in reaching negative findings. The statutory declaration was considered at some length at pages 6 to 7 of the*

*respondent's refusal decision and found to be lacking. I have considered this in assessing whether there is an arguable error of law in the decision and find that the judge may have come to a different view about the document, had she been aware of it. I am satisfied that this is an arguable error of law. Although the refusal letter refers to the case of* ***Kareem****, the judge placed no reliance upon it in her decision.*

*There was no reference to this in the judge's decision, but evidence was before her concerning the appellant's pregnancy with twins, due in November 2017. There is no criticism of the judge for not considering the appeal under Regulation 8 (other family member – durable relationship). She was bound by* ***Sala*** *and, further, the appellant's sponsor did not attend the hearing. However, this may fall to be explored at any further hearing."*

7. The Secretary of State filed and served a Rule 24 response on 27 December 2017 inter alia as follows:

> *"2. Even if the judge is mistaken about the statutory declaration, other reasons are given for rejecting the marriage as validly conducted as set out in paragraphs 25 and 27 – 29. It was open to the judge to find that the marriage is not validly conducted due to the discrepancies in the documents and the explanations given at the hearing.*
>
> *3. The judge also has concerns about the genuineness of the marriage itself, given that the appellant an EEA sponsor failed to attend two marriage interviews and the EEA sponsor also failed to attend the hearing before the FTT.*
>
> *The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the Judge of the First-tier Tribunal directed himself appropriately."*

8. In a decision promulgated on 5 March 2018, Upper Tribunal Judge Allen found that the decision of the judge contained a material error of law. He remitted the appeal to the First-tier Tribunal but preserved the particular finding of the sponsor's qualifying status.

9. The appeal was heard again before Judge Nixon. In a decision promulgated on 31 July 2018, she dismissed the appeal under the EEA Regulations. She did not find the appellant to be a credible witness. She found the appellant had failed to show she was in a subsisting relationship with the sponsor. Judge Nixon did not accept the paternity of the children being that of the sponsor. See [21] of the decision. Judge Nixon also found that the appellant had failed to show that she and the sponsor lived together for any lengthy periods and concluded that the appellant had failed to show she and the sponsor were in a durable relationship. Judge Nixon dismissed the appeal under Regulations 7 and 8.

*10.* The grounds before me claim that the judge erred in proceeding on the basis that the appellant was required to prove that her proxy marriage was valid under Ghanaian law rather than to require the respondent, who alleged that it was not valid to prove the same. The judge correctly said at [15] that she was starting by considering whether or not the marriage conducted in Ghana was conducted in accordance with the laws of that country, however, Judge Nixon did not quote the Ghanaian law and erred in ending [15] by saying *"..... provided she is able to show that the marriage certificate is reliable".*

*11.* The judge said at [16] that she had concerns about the validity of the certificate but did not consider Ghanaian law in that regard such that it was not clear how she arrived at her conclusion.

*12.* **Awuku [2017] EWCA Civ 178** overturned the Upper Tribunal decision in **Kareem** such that the respondent's decision was in error. At [15] of **Awuku** it was said that *"..... the law of the country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted ('the lex loci Celebrationis')."*

*13.* The judge did not refer to any Ghanaian law in her decision such that her conclusion that the marriage was not valid was contrary to the ruling in **CB Brazil** and lex loci celebrationis. The judge referred to the statutory declaration at [7] of her decision and said *"..... the parents were there but there was no mention of her husband"*. The grounds claim that was evidence that the judge did not know the purpose of the statutory declaration. At page 4 of the refusal the respondent quoted Ghanaian law PNDC law 112; at Section 3(2). For the purpose of registering the marriage, the parents were mandated to confirm certain information in the Statutory Declaration which the judge appeared not to understand.

*14.* At [19]–[22] the judge considered the appeal under Regulation 8. It was accepted that the couple resided at different addresses temporarily, however, their relationship was claimed to be subsisting, they had twins and there was nothing wrong for the appellant "to seek respite" after the birth of twins. The judge was in error when she said the appellant and sponsor no longer live together. The fact that they were not under a single roof did not mean that they were not husband and wife.

*15.* Judge Simpson granted permission to appeal in her decision dated 3 September 2018. She said inter alia as follows:

> *"2. Permission to appeal is granted because:*
>
> *(i) Notwithstanding the real lack of clarity of the grounds upon which the application for permission to appeal was advanced, on careful reading of the totality of the decision there was arguable that the appellant was deprived of a fair determination of her appeal according to law with reference to Reg 7 of the EEA Regulations,*

*including clarity of the respondent's decision against which she appealed and furthermore clarity of the applicable law in her appeal, firstly, the legal principles concerning the validity of foreign marriages under English law, namely following* ***CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080*** *(that they are governed by the law of the country where the marriage took place i.e. lex loci celebrationis and not the domicile of the parties, and secondly where, the applicable lex loci celebrationis, Ghanaian law recognises proxy marriages, the marriage of the appellant and her husband would fall to be treated in principle as valid under English law, if shown by her to have been valid under Ghanaian law, i.e. that the requirements of the marriage law of Ghana were met and thereby in turn clarity concerning what those requirements were of which the appellant was determined to have shown were met or not met;*

*(ii) With reference to the permission grounds concerning dismissal of the appeal in the alternative under Reg 8, durable relationship, there appeared that the failure of the husband to attend the appeal hearing did not assist her appeal, together with her failure to attend two marriage interviews, however, there was arguable that the judicial treatment of the evidence of the birth of twin children on 24 November 2017 to the appellant, present with her at the hearing, with formal evidence of their birth certificates showing the appellant's claimed husband as the father and informant to the registrar, together with a record of the father in attendance on the day of their birth, by way of postnatal notes, that that judicial treatment was arguably inadequate to the determination of the issue.*

*(iii) The application for permission was lodged one day of time with bare explanation i.e. 'due to administrative error'. Notwithstanding given likely importance of the matter to the parties and the presence of children, discretion was exercised and time extended.*

*(iv) By way of observation those instructed by the appellant will need to ready themselves as the application proceeds to the next stage to advance with greater clarity and persuasion the grounds advanced."*

**Submissions on Error of Law**

*16.* Mr Pipi relied upon the grounds. Mr Whitwell conceded that the judge had erred in her approach to the proxy marriage. The burden was not on the appellant to prove that the marriage was valid. Nevertheless, there was

considerable evidence to show that the marriage was not genuine or subsisting.

## Conclusion on Error of Law

*17.* I do not find the judge's error with regard to the burden of proof as regards the proxy marriage to be material. The judge noted that as with the previous hearing and the interview, the sponsor failed to attend and his absence was significant. The judge identified inconsistencies and contradictions leading to her adverse credibility findings. See [25]-[31] of the decision. The judge made careful and comprehensive findings on the evidence before her. She gave clear and cogent reasons which she was entitled to come to on the evidence.

*18.* The judge was entitled to come to the conclusion that the paternity of the children as evidenced by the declaration on the birth certificate was not conclusive.

*19.* Whilst the judge erred with regard to the burden of proof in terms of the proxy marriage as I have identified above, I do not find that error to be material given her other findings which shall stand.

## Notice of Decision

*20.* The judge's error was not material and her decision shall stand.

No anonymity direction is made.

Signed Date 26 June 2019

Deputy Upper Tribunal Judge Peart