Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01474/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 August 2013

Determination Promulgated
On 14 August 2013
…………………………………

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR SAHEED KOLAWOLE ADEREMI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O A Olujinmi
For the Respondent: Mr T Wilding

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 15 July 1989. He has been granted permission to appeal the determination of First-tier Tribunal Judge Rose dismissing his appeal against the decision of the respondent refusing his application for a residence card on the basis of his marriage to an EEA national.

© CROWN COPYRIGHT 2013

2. The appellant arrived in the UK on 8 May 2011 with entry clearance on a Tier 4 (General) Student visa, valid from 21 April 2011 until 30 August 2012. He entered into a proxy marriage with his EEA national spouse on 18 July 2012 and provided a marriage certificate as proof of this. He also sent in a sworn affidavit in which his father, Mr Sule Aderemi claims that the marriage took place with the consent of both parents. As evidence that his marriage is subsisting he provided a tenancy agreement dated 20 February 2012 for 9A Lindley Road in his name only. He submitted a bank statement addressed to him and an online TV licence for his EEA spouse. The respondent did not consider his evidence sufficient to demonstrate that the appellant was in a genuine and subsisting relationship.

3. The appellant provided a Slovakian passport as evidence of his sponsor's nationality. The respondent said he had failed to provide any other evidence to show how she entered the UK, therefore raising the question as to when, and how, the relationship was originally formed. Given the timeliness of this marriage, his immigration and lack of sufficient evidence regarding the claimed subsisting relationship, the respondent concluded that this proxy marriage had been entered into to remain in the United Kingdom.

4. The appellant's application was refused under Regulation 7 of the Immigration (European Economic Area) Regulations 2006 as the respondent did not accept the proxy marriage certificate and other evidence applied as sufficient to demonstrate the validity of their relationship.

5. The respondent also considered whether the appellant was in a durable relationship and would expect the appellant to demonstrate that he had been living together with his EEA national sponsor for at least two years. Again, the respondent considered that the appellant had not provided sufficient documentation to suggest that he was in a durable relationship. His application was refused under Regulation 8(5) and 17(4)(b) of the 2006 EEA Regulations.

6. The appellant chose to have his appeal considered on the papers without an oral hearing.

7. The judge had before him the Home Office Country of Origin (COI) Report on Nigeria referring to customary marriages, which in principle may be valid. He noted, however, that the COI Report dated January 2012 cites, at paragraph 24.23, a United States State Department Reciprocity Schedule, according to which it was necessary for both parties to the marriage to be physically present at the same location with witnesses to sign certain marriage documents, and "proxy marriages have ceased to be valid but still occur".

8. The judge noted the submissions provided by the appellant's representatives which referred to an earlier COI Report, dated April 2011, which cited an email from the British High Commission in Abuja stating that "although proxy marriages are not

registered under Nigerian civil law, they are allowed under customary law". The judge noted that the email was dated 1 December 2008. The statement in the more recent USS Reciprocity Schedule implies that at one time customary marriages had been valid. The email from the British High Commission was not cited in the later COI Report.

9. The judge had regard to the certificate of marriage provided by the appellant and to an affidavit by his father which referred to the marriage. In his judgment, however, in the light of the State Department Reciprocity Schedule, neither of those documents established the validity of the marriage. The judge was therefore not satisfied that the appellant was the sponsor's spouse.

10. The judge next considered whether the appellant and his sponsor partner were in a durable relationship. He considered that the tenancy agreement did not establish that there was a durable relationship between the appellant and the sponsor. The refusal letter referred to a tenancy agreement dated 20 February 2012 as being in the appellant's name only. The tenancy agreement provided for the appeal was dated 19 February 2012 but recorded the term of the tenancy as beginning on 20 February. The judge inferred that it was this document referred to in the refusal notice. It purported to be signed by the sponsor as well as by the appellant, but the first section of the document identified the parties to the tenancy, and "the tenant" is shown as the appellant alone. The judge attached little weight to this document as evidence of cohabitation.

11. The judge considered the more recent documents which related to a different address. There was no evidence as to the tenancy on those premises. He said the documents before him did not include any documents relating to the sponsor's personal circumstances such as bank statements or tax returns, or any evidence as to her relationship with him. According to the Reasons for Refusal Letter, the appellant had failed to provide any evidence other than the sponsor's passport to show how she entered the UK, "therefore raising a question as to when and how their relationship was originally formed". The further submissions maintained that the sponsor did not need to show how she entered the UK. The judge found that whilst it is not a requirement of the Regulations that such evidence be provided, it is for the appellant to establish that he meets the requirements of Regulation 17, and the evidence about the sponsor's entry into the UK was potentially relevant to the issue of their relationship with the appellant. He was not satisfied that the appellant was the sponsor's partner and in a durable relationship with her.

12. Permission to appeal was granted by an Upper Tribunal Judge on the basis that a panel of the Upper Tribunal is to consider the whole issue of customary marriages by proxy, and in the circumstances it is appropriate to grant permission in order to await the outcome of the panel hearing.

13. I did not believe that it was appropriate to adjourn the hearing pending the outcome of the panel hearing. The panel hearing has not been concluded and consequently its decision is not imminent. In any event Mr. Wilding alluded to one of the areas of

interest to the panel. There was no evidence that this marriage will be recognised in Slovakia.

14. Mr Olujinmi submitted that the judge confused the customary law in Nigeria with a civil marriage under the Marriage Act 1990, Chapter 218. He said that customary law regulates customary marriage but it is not a written law. The requirements of a customary marriage are that the parties have the capacity to enter into the marriage; they have the consent of the parents; there is a payment of a dowry by the intended husband to the parents or representatives of the intended spouse; and a marriage ceremony according to the customs of the people concerned.

15. He said the marriage in this instance took place in Nigeria on 18 July 2012 and was registered on 2 August 2012. He did not know what form the marriage ceremony on 18 July 2012 took. His instruction is that the marriage took place and is confirmed in the sworn affidavit submitted by the appellant. The judge cannot go behind the sworn affidavit if there is no evidence to the contrary. In any event the judge has not given reasons for rejecting the documents that were before him to support the appellant's evidence that a customary marriage took place between him and his sponsor on 18 July 2012.

16. Mr Olujinmi further submitted that the judge did not accept that the appellant was in a durable relationship with his EEA spouse because her name was not on the tenancy agreement, although it was signed by her and the appellant. Mr Olujinmi said that there should be other factors other that just this reason for rejecting the tenancy agreement.

17. He said that there is no requirement on an EEA national to submit evidence as to when she entered the UK in order to establish a durable relationship. This is not required by her under the case of **Metock** . There were other documents such as the TV licence, the bank statement from Lloyds TSB which he accepted was in the appellant's own name, and the TV licence which was in both names. The requirement to show that the appellant and the sponsor have been living together for two years is the Home Office policy which is contrary to the EEA Directive.

18. Mr Wilding submitted that there was nothing wrong with the First-tier Tribunal's determination. Much of what Mr Olujinmi has said is a disagreement with the determination. The appellant chose to have his appeal determined on the papers. There was no original evidence from him and his wife. He did not submit any expert evidence on customary marriage and did not explain anything specific by which he was married.

19. Mr Wilding submitted that one of the areas of interest to the panel hearing cases on customary marriage is the question as to whether a European national has the capacity to marry by proxy. There is no evidence that this marriage will be

recognised in Slovakia. She exercised the right of movement as a Slovak national. She needed to show that Slovak national law will recognise this marriage.

20. Mr Wilding said there was no evidence as to what form this marriage took place. There was no evidence as to what requirements of this particular custom needs to be met. The judge considered the marriage certificate and the affidavit, but with the lack of any specific evidence as to whether the marriage met the customs of the appellant's particular group of people, it cannot be said that the judge erred in law.

21. The judge was presented with background evidence and he preferred one over the other. The appellant requested a paper hearing, therefore he could not have been cross-examined. The reasons for refusal letter challenged every part of the appellant's appeal, but he chose to proceed by providing no evidence to show that his marriage was valid. There is no evidence as to why he did not marry in the UK or Nigeria. The judge's findings rejecting the validity of the customary marriage were open to him.

22. With regard to the durable relationship, Mr Wilding said he did not know what **Metock** has to do with this. The sponsor exercised her right to freedom of movement. There was a complete absence of detailed evidence to show that the relationship is existing. The appellant has been in the UK for two years. The sponsor is not here today to support him. No adjournment has been requested for her to attend. We have no evidence from her friends or family to support the relationship. There is no error in the judge's decision.

23. In reply Mr Olujinmi submitted that it is not relevant for an EEA national to show that she has the capacity to enter into such a relationship or that her country of nationality must recognise the marriage. She has exercised her freedom of movement. In any event, customary law is such that if somebody submits to the marriage then it is valid. Even though the appellant chose to have a paper hearing, the respondent should have submitted further reasons as to why she opposed the appellant's father's affidavit and other papers that were before the judge.

24. I find that the judge did not make an error of law.

25. With regard to the validity of the proxy marriage, the judge was presented with COI Reports of April 2011 and January 2012. He gave reasons why he preferred the later report. He looked at the marriage certificate and the affidavit by the appellant's father in the context of the US State Department Reciprocity Schedule, and it was open to him to reject the appellant's evidence that he was the appellant's spouse for the reason given by him.

26. In any event, Mr Olujinmi submitted that customary law is not written down and it is subject to the customary law of the appellant's people. He did not submit any evidence either from an expert or from the appellant himself or his father as to what form the customary marriage took and whether it conformed to the customary

ceremony of his people. The affidavit by his father was wholly inadequate in that regard. The mere fact that there is an affidavit by his father confirming that the marriage ceremony took place on 18 July 2012 does not of itself establish that there is a valid marriage between the appellant and his EEA national partner.

27. The appellant chose to have his appeal heard on the papers. He did not attend the hearing with his wife to give oral evidence about their relationship. There was no written evidence from the appellant, his spouse, friends of the couple or relatives in support of their relationship. The judge looked at the documents before him and found they were woefully inadequate. The fact that the sponsor signed a tenancy agreement which does not bear her name does not make the document legal as Mr. Olujinmi seemed to suggest. The TV licence which bears both names was issued on 16 January 2013 and was valid until 31 December 2013. The letter from the Post Office about their Life Insurance cover was dated 29 January 2013. The telephone bill was in the appellant's name only and was dated 7 January 2013. There was no evidence before the judge as to when their relationship started and therefore no evidence as to the duration of their relationship. Most of the documents submitted by the appellant were issued in January 2013. While I accept, as did the judge, that the sponsor is not required to prove when she came to the UK, it would have helped in establishing how long they have been in their relationship. We do know that the appellant came to the UK in 2011. He has not said when he met the sponsor and when their relationship began. Mr Olujinmi said that the two year cohabitation policy is against the EEA Directive. He has not submitted any case law to support his argument. The respondent's refusal letter says that the two year cohabitation requirement is in line with the Home Office Immigration Rules. There is no case law that this Rule is incompatible with the EEA Regulations.

28. Mr. Olujinmi relied on **Metock** which is a decision by the ECJ. I find that **Metock** has not application to this case. The ECJ decided that a national of non-member state could accompany or join their spouse, a Union citizen, in a member state other than that of which he is a national and that benefit cannot depend on the prior lawful residence of such a spouse in another Member State. This is not the case here.

29. I note that the EEA sponsor was not in court today to give support to the appellant. Due to the dearth of documentary or other evidence to support the appellant's claim that he is in a relationship with the EEA national, I find that the judge made no error of law in his finding that the appellant and the sponsor are not in a durable relationship.

30. The judge's decision dismissing the appellant's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun