Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05141/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Decision Promulgated**
On : 2 August 2013	**On : 5 August 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SESAN ADELEYE ADEKUNLE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Malik, instructed by Chancery CS Solicitors
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 22 March 1984. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a Residence Card under the Immigration (European Economic Area) Regulations 2006, Lord Burns and I sitting as a

panel found, at an error of law hearing on 18 June 2013, that the Tribunal had made errors of law in their decision. We directed that the decision be set aside and re-made by the Upper Tribunal.

2. The appellant applied, on 15 February 2012, for a Residence Card as confirmation of a right of residence as the family member of an EEA national. He submitted, with his application, a marriage certificate stating that he was married to his EEA national in Nigeria on 3 February 2012 under customary law. His wife was a French citizen.

3. The appellant's application was refused on 8 June 2012 on the grounds that he had failed to produce sufficient evidence that he was related as claimed to an EEA national. The respondent did not consider that the marriage conformed to the requirements set out in the Nigerian Marriage Act. It was considered further that, since the appellant had only been divorced from his previous, British, wife in December 2011, it was unlikely that he would marry again within two months, and the respondent noted that very little evidence had been provided to show that he and his EEA national wife resided together in the United Kingdom.

4. The appellant appealed against that decision and, at his request, his appeal was determined on the papers, without an oral hearing. First-tier Tribunal Judge Page gave some consideration to the status of customary marriages but found that, as they were not recognised by the Nigerian civil authorities, they were not considered to be valid for the purposes of acquiring residence as a spouse under the EEA regulations. Judge Page made some observations about the documentary evidence produced by the appellant, noting references in the documents to the "Customary Marriage Act" which he was not satisfied existed. He concluded that the appellant's purported customary marriage did not meet the requirements under Nigerian law to have the same status as a marriage properly registered under Nigerian law and he was not satisfied that the appellant had acquired the status of spouse of an EEA national. Having made that finding, he did not consider it necessary to go on to consider the other issues raised by the respondent and he dismissed the appeal in a determination promulgated on 19 April 2013.

5. Permission to appeal to the Upper Tribunal was sought on behalf of the appellant on the grounds that the judge had erred by dismissing the appeal on the basis that a marriage according to local custom was not a valid marriage, since paragraph 35 of the Nigerian Marriage Act recognised customary marriages as being valid. Permission to appeal was granted on 16 May 2013.

6. At the error of law hearing Lord Burns and I found the Tribunal's determination to be materially flawed, for the following reasons:

> "In view of Mr Deller's indication, we concluded that there were material errors of law in the judge's decision such that it ought to be set aside and re-made. The judge had made adverse findings at paragraphs 13 and 14 in relation to references in the documents to the Customary Marriage Act, an issue which had not been previously raised by the respondent in the refusal decision as being of concern and which the appellant had therefore not been put on notice to address. Furthermore, there were issues as to the validity of a customary marriage which

arose from sections of the Marriage Act and which had not been properly addressed by the judge, albeit that he was in some difficulty himself without proper guidance. As such, we considered that the Tribunal's decision had to be set aside, with a view to fresh findings being made with respect to all issues raised in the refusal decision and not limited to the question of the validity of the marriage. We considered it appropriate for the matter to remain in the Upper Tribunal and indeed no submissions were made to the contrary."

Appeal hearing and submissions

7. The appeal came before me for a resumed hearing on 2 August 2013. The appellant attended with Fatou Mbengue, his claimed wife, whom I shall refer to as "the sponsor". Mr Malik had advised the Tribunal at the error of law hearing that she would be attending and giving oral evidence. Ms Martin applied for an adjournment of the proceedings on the grounds that the impending reported decision from the Deputy President of the Upper Tribunal referred to at the error of law hearing was still awaited and was relevant to the matter of the validity of the customary marriage. Mr Malik did not object to an adjournment on that basis but asked that the sponsor be able to give her evidence today. With the agreement of the parties I decided that the most appropriate course was to hear all of the oral evidence and submissions on the genuineness of the relationship and the marriage and resume for a further hearing once the reported decision was available in order to hear relevant submissions if that was necessary.

8. The appellant and the sponsor then gave oral evidence in turn and were cross-examined at some length by Ms Martin, in regard to their relationship, the marriage proceedings, their own family and life and their knowledge of the other's family and life. I also sought some clarification from the parties myself. The evidence is set out in my record of proceedings and extends to some 30 pages of notes. As such I do not propose to set it out or even summarise it and will refer to relevant parts in my findings.

9. Ms Martin, in her submissions, referred to the inconsistent evidence given by the appellant and the sponsor in regard to the various family members present at the marriage ceremony, the witnesses at the ceremony and registration, the reasons for the absence of the sponsor's mother and other matters. She referred to a decision of the Vice-President in a recent unreported case in which the essential ingredients of a customary marriage were set out and submitted that the ingredients were lacking in the appellant's case as there was no evidence of written consent being given to the marriage either by the appellant or the sponsor's mother who were absent. The appellant had also given inconsistent evidence about the checks carried out before the marriage. The appellant and sponsor appeared to know little or nothing about each other's families and their lives and it was clear that they were not in a relationship and were not married. Ms Martin submitted that in the alternative, if they were found to be married and in a relationship, it was, according to an article she produced about customary marriage in Nigeria, not possible for them to be married since they were both required to be natives of Nigeria or persons of Nigerian descent, which was not the case with the sponsor who was of Senegalese descent and of French nationality.

10. Mr Malik acknowledged that there were obvious inconsistencies in the evidence but submitted that the relationship was fairly recent. He asked me to make my own findings on the relationship. With regard to the ceremony itself, the inconsistencies in the evidence about those present could have been due to the fact that the appellant's family lived in a big house and that there were so many people present. He asked me to find that there had been a marriage but could make no further submissions on the point, other than to submit that customary marriages were valid within Nigerian law.

11. Both parties were in agreement that if I were to find that the relationship and marriage was not genuine and that there had been no marriage ceremony, there would be no need for a further hearing and the appeal could be finally determined. On the other hand if I found the marriage to be genuine there would be a further hearing at which submissions could be made on the validity of the customary marriage, in the light of the Vice-President's forthcoming reported decision.

Consideration and findings

12. I have no doubt that there never was any customary marriage ceremony in Nigeria and that there is not a genuine relationship and marriage between the appellant and the sponsor. The evidence of both was so completely riddled with inconsistencies that it was plain that neither was being truthful.

13. With regard to their "relationship", there was a significant lack of knowledge on the part of the appellant and sponsor about each other's lives and families. Neither was able to give the names of the other's siblings and the sponsor did not even know how many siblings the appellant had, despite having claimed to have spent some time in the family compound in Nigeria where they all lived, after the wedding. Whilst the appellant gave evidence that the sponsor had a sixteen year old sister living with her boyfriend in London whom she saw once a week, the sponsor's evidence was that both her sisters lived in France with their mother. The sponsor was unable to give the names of the appellant's parents, despite having apparently attended the marriage ceremony in Nigeria with them, and was unable to say who Michael Adekunle was, whilst the letter of confirmation of the customary marriage names him as the appellant's father. The appellant said that the sponsor's mother had never been to visit her in the United Kingdom since they had been together, whilst the sponsor said that her mother had visited last year and had met the appellant. The appellant had no idea of the sponsor's work or studies before she came to the United Kingdom whilst the sponsor's evidence was that she had studied a degree in economics at university in France. When asked when the sponsor came to live in the United Kingdom, the appellant said that she came in 2009, whilst the sponsor said that it was in mid-2011 and, when told of the appellant's evidence, said that she spent a few weeks here in 2009. That in turn contradicted the account of both that they had first met and started living together in March 2011.

14. The appellant has produced a number of utility bills and bank statements addressed to himself and to the sponsor individually at their previous and current address. However, that in itself is not evidence of cohabitation as partners and shows little more than that

they have the same address for correspondence or, at its highest, that they share accommodation. Included in the documents is a voter registration confirmation for the 2013 register of electors which includes the names of the appellant and sponsor at their claimed address, but with two additional names. When clarification was sought, the appellant explained that the property consisted of separate studio flats and that the other two people lived in different flats. However it is clear that the registration is for the one address and suggests shared accommodation rather than a family home. None of the documents are addressed to the appellant and sponsor together and neither is there evidence of joint bank accounts. In view of the significant inconsistencies in the oral evidence of the appellant and sponsor about their lives I place no weight upon the documentary evidence as evidence of cohabitation between partners/ husband and wife.

15. The evidence of the marriage ceremony in Nigeria was equally inconsistent and lacking in credibility. The appellant and sponsor gave different accounts of who was present at the ceremony, with the appellant claiming that both his parents and all his six siblings and their spouses and children were present, whilst the sponsor's evidence was that his siblings did not attend. The appellant initially said that the sponsor's mother attended the ceremony, but later said that she did not because she was ill, whilst the sponsor said that her mother could not attend because it was too short notice for her. The appellant said that the sponsor's sisters did not attend and that she had only her father and his work colleagues there from her side, whilst she said that her youngest sister attended with an aunt. The appellant said that after the ceremony the sponsor went to his family home and remained there until returning to the United Kingdom, whilst her evidence was that she went to her father's house, although spending some time in her in-law's home. The appellant and sponsor gave entirely different accounts of the contents of the dowry and their evidence also differed as to whether or not written consent had been given for the marriage by the appellant and the sponsor's mother. The sponsor's account of the witnesses was different to that of the appellant and to that stated in the documentary evidence. The appellant's evidence varied as to who registered the marriage in the court. He initially stated that it was his brother but then changed his account to his father when reminded of the contents of the letter from the Grade "A" customary court. The appellant named the witnesses at the marriage as his brother and the sponsor's father until reminded of the information in the marriage certificate, at which point he stated that he was referring to the statutory declarations.

16. Aside from the inconsistent evidence of the appellant and sponsor, the documents relating to the claimed marriage contain discrepancies in themselves. There is no evidence to undermine the observations of the First-tier Tribunal as to the existence of a "Customary Marriage Act", as referred to in the letter from the customary court, despite the appellant having since been put on notice of the matter. The statutory declarations both give the wrong date of birth for the sponsor, albeit only by one day. The statutory declaration from the appellant's brother refers to him being the head of the family in the absence of his father and the wording of the document suggests that he represented the appellant at the wedding, yet the appellant's evidence was that his father was in attendance himself and indeed that he attended to register the marriage. It is also of some significance that there are no photographs of the wedding. The explanation initially

offered by the appellant was that the photographs were all in Nigeria, but when asked why he did not have any here he said that he had one or two but had not been asked by his solicitor to produce them.

17. In view of the wholly inconsistent nature of the evidence, both oral and documentary, I have no hesitation in concluding that there never was any customary marriage ceremony in Nigeria or anywhere else. The appellant and the sponsor are clearly not in a relationship and the documents produced by the appellant in relation to the claimed customary marriage have simply been prepared for his application and are not reliable in any way as evidence of the events they claim to represent. Even if it was the case that the sponsor, as the stamps in her passport suggest, was in Nigeria at the time of the claimed marriage, I do not accept that she entered into a customary marriage with the appellant. There is and never has been a marriage between the appellant and the sponsor and the question of the validity of customary marriages under Nigerian law is thus not relevant to the determination of the appellant's appeal. The appellant is not married to the sponsor and is accordingly not a family member of an EEA national for the purposes of regulation 7 of the EEA Regulations. Neither is he the partner of an EEA national, for the purposes of regulation 8(5). He is not able to meet the requirements of the EEA regulations and is not entitled to a residence card.

18. Article 8 has not been pursued as a separate ground of appeal, but for the sake of completeness I do not consider that the appellant's removal from the United Kingdom would breach his human rights. For the reasons given above, it is clear that he does not have a family life with the sponsor. There is no suggestion of family life existing on any other basis. Whilst he may have established a private life in the United Kingdom and whilst his removal may well interfere with that private life, such interference is entirely proportionate to the legitimate aim of maintaining an effective immigration control. There does not appear to be any evidence before me of the appellant's length of stay in the United Kingdom, but I note that he was married in October 2008 to a British national whom he subsequently divorced. There is no suggestion that there were children of that marriage. In any event the evidence before me does not demonstrate that the appellant has developed ties in the United Kingdom such that his removal could be considered to be disproportionate. He has no basis of stay in the United Kingdom. He has a large family who are all in Nigeria and there is no reason why he could not re-establish himself there. The decision is not in breach of Article 8 of the ECHR.

DECISION

19. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal has been set aside. I re-make the decision by dismissing the appeal on all grounds.

Signed Date 5th August 2013
Upper Tribunal Judge Kebede