Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/07559/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 07 January 2019	**On 15 February 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

OLALEKAN KAMORU SOKOYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: In person
For the respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Mr Sokoya ("the appellant") appealed the Secretary of State's ("the respondent") decision dated 08 August 2017 to refuse a residence card as the family member of an EEA national with reference to regulation 7 of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016").

2. The appellant, a Nigerian national, produced several documents to support his claim to have contracted a valid proxy marriage to a Portuguese national, Lurdes Rodrigues Da Costa, under Guinean law. The documents included a religious marriage certificate and register (11/02/16), a letter from John N. Usman of the Nigerian Embassy in

Conakry (30/10/14), an affidavit of support from the appellant's parents and a divorce certificate relating to the appellant's divorce from Ariana Daniela Sokoya (30/07/13). The appellant says that the marriage was contracted by proxy because he could not travel outside the UK because of his immigration status as an overstayer. His father lives and works in Guinea. The appellant does not explain why he and the EEA sponsor decided not to marry in the UK if they were living together here as claimed.

3. The respondent was not satisfied that the documents produced in support of the application showed that a valid proxy marriage took place under Guinean law. Background information provided by the Immigration and Refugee Board of Canada (09 October 2012) showed only civil marriage is recognised under the law and both spouses must give consent for the marriage to be legal. The respondent concluded that the religious marriage certificate was insufficient to show that a valid marriage took place under Guinean law. The letter from the Mr Usman at the Nigerian embassy in Conakry stated that the appellant married Marta Cedres Bethancourt in Conakry on 30 October 2014. If a marriage did take place, there was no evidence to show that the appellant was divorced when the marriage to the current EEA sponsor, Ms Da Costa, took place on 11 February 2016.

4. First-tier Tribunal Judge McGrade ("the judge") dismissed the appeal in a decision promulgated on 10 July 2018. He heard evidence from the appellant and the EEA sponsor. He did not find them to be credible witnesses and expressed doubts about the genuine nature of the relationship. He summarised the reasons given by the respondent for refusing the application. He concluded:

> "15. The Respondent noted a letter dated 30 October 2014 from John N Usman, of the Nigerian Embassy in Guniea (sic) was submitted along with the application. This letter indicates Olowate Sokoya married Juana Marta Cedres Bethencourt on 30 October 2014. In his statement, the Appellant states that this letter should have referred to his first wife, Ariana Daniela Sokoya, from whom he is now divorced. However, the letter would appeal not only to have given the wrong name for the Appellant's spouse, but also to indicate the marriage took place on 30 October 2014 being the date of the marriage. Given the date of the letter, I do not accept that this letter was issued in error. I can only conclude that the Appellant was married on this date or that the letter is forged.
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> 16. I consider the discrepancies in the accounts given by the Appellant and Lurdes Da Costa are very significant and must call into question the assertion that they are living together in a genuine relationship, either as spouses or otherwise. The Home Office Presenting Officer indicated he was not arguing that the marriage was a sham, but simply that the parties are not in a genuine relationship.
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> 17. The Appellant's counsel submitted that the validity of the marriage certificate had not been challenged by the Home Office Presenting Officer and there was a prima facie valid marriage certificate. He also indicated that the parties may have been nervous and that English was not Lurdes Da Costa's first language.

> 18. It is the position of the Respondent that the Appellant's marriage is not valid according to the law of Guinea as only civil marriages are valid in Guinea. The documentation produced indicates the parties underwent a religious marriage. There is a separate certificate headed Republic of Guinea, which suggests the marriage has been registered under the law of Guinea. I accept the certificate was not specifically challenge by the Home Office Presenting Officer. However, in light of my finding regarding the letter from John Usman dated 30 October 2014 and the very unsatisfactory evidence from both parties regarding their relationship, I am unwilling to attach any weight to this document. I am therefore not prepared to accept that the parties are validly married according to the law of Guinea. I am also unable to hold that the parties are in a genuine relationship, which would entitled them to succeed either as spouses or on the basis of a durable relationship. In these circumstances, the Appellant's appeal is refused on EEA grounds."

5. The appellant appealed the First-tier Tribunal decision. Although he appeared in person at the Upper Tribunal hearing, he was legally represented when the application for permission to appeal was made. The grounds of appeal argued that the judge failed to give weight to the significant amount of evidence that was produced in support of the appeal, which showed that they were in a durable relationship. The respondent failed to produce any evidence to show that the marriage certificate was not valid under Guinean law because it was a religious marriage.

6. Upper Tribunal Judge Lindsley granted permission in the following terms:

> "It is arguable that the decision errs in law as it is arguably not understood that this is a matter to be decided under the EEA Regulations which are distinct rather than part of the Immigration Rules and it is arguable that there is a failure to set out the relevant Regulations and assess the appeal under these Regulations giving distinct reasons for assessing the appeal under Regulations 7 (spouse) and Regulation 8(5) (durable relationship) of the 2016 EEA Regulations, see particularly paragraph 3 of the decision and generally and thus to give clear reasons for the decision; the First-Tier Tribunal also arguably errs in considering whether the marriage was genuine and subsisting rather than whether it was a sham or one of convenience, arguably the only relevant test in relation to an EEA marriage aside from the issue of whether the marriage was legally binding, and in this context arguably did not understand that the burden of proof of showing that there was such a relationship of convenience lies initially with the respondent, see paragraphs 2, 16 and 18; it is further arguable that there was a failure to consider the evidence of cohabitation when considering whether there was a durable relationship and in general to give clear reasons for the decision on this basis referencing all evidence before the First-tier Tribunal."

Decision and reasons

7. I agree with Upper Tribunal Judge Lindsley that the First-tier Tribunal decision lacks the structure that would make clear to the parties what findings of fact were made in respect of each element of the relevant legal framework.

8. At [3] the judge incorrectly referred to "the relevant immigration rules" being set out in the EEA Regulations 2016. The immigration rules are a distinct legal framework setting out the respondent's policy relating to

leave to enter and remain under UK law. The legal framework for residence under European law is not included in the UK immigration rules. Rights of residence under European law are governed by the direct effect of the Treaty on the Functioning of the European Union and the Citizen's Directive (2004/38/EC). The EEA Regulations 2016 are intended to transpose the provisions of the Citizen's Directive into UK law. An appeal under the EEA Regulations 2016 is brought on the ground that "the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom".

9. The judge also failed to identify the specific regulation applicable in this case. The appellant applied for a residence card as the family member of an EEA national. The relevant provisions are Article 3(1) of the Citizen's Directive and regulation 7 of the EEA Regulations 2016. Despite this lack of rigour, the decision broadly identified the correct legal issue, which was whether the evidence showed that the appellant contracted a valid marriage under Guinean law in order to show that he is a 'family member' for the purpose of rights of residence under European law.

10. The burden of proof was on the appellant to show on the balance of probabilities that a valid marriage was contracted under Guinean law: see *Awuku v SSHD* [2017] EWCA Civ 178. The respondent cast doubt on the validity of the religious marriage with reference to identifiable background information. The appellant produced no evidence in response to show the marriage certificate and register, both of which purported to be issued in English, were sufficient to show that a religious marriage contracted by proxy was a valid marriage under Guinean civil law.

11. It was open to the judge to make findings on the reliability of the evidence in light of his credibility findings and other aspects of the evidence that raised concerns. Most notably, it was open to the judge to find that the evidence purporting to be from the Nigerian embassy cast further doubt on the credibility of the application and the reliability of the marriage certificate and other documents relating to the marriage. The letter made no sense; nor did the appellant's explanation. The letter pre-dated the claimed marriage in 2016 and referred to a different woman. The appellant's explanation, that the letter mistakenly gave the name of Juana Marta Cedres Bethencourt rather than his first wife's details, went no way to explaining the difficulties with this piece of evidence. The letter was dated 30 October 2014, but the appellant claimed that he divorced his first wife the year before. A divorce certificate purporting to be issued by the Guinean authorities in August 2013 formed part of the evidence. The logical consequence of the explanation offered by the appellant in his witness statement was that he remarried his first wife, if so, then there was no evidence, as the respondent pointed out, to show that he was divorced before marrying the EEA sponsor. There was no evidence to suggest that polygamous marriages are permitted under Guinean law.

12. Given the difficulties with the evidence it was open to the judge to conclude that the letter from the Nigerian embassy indicated that the appellant was either married to another person on 30 October 2014 or

that the document was forged [15]. Having come to that conclusion, and taking into account his adverse assessment of the credibility of the witnesses, it was open to the judge to conclude that the appellant had failed to establish the reliability of the evidence produced in support of his claim such that he could be satisfied to the required standard of proof that a valid marriage had taken place under Guinean law [18].

13. Mr Sokoya argued, in effect, that the hearing was unfair because there was no interpreter and his wife had difficulty in understanding some of the questions. The appellant was legally represented before the First-tier Tribunal. Section 1(k) of the First-tier Tribunal appeal form asked whether anyone giving evidence at the hearing would require the assistance of an interpreter. No interpreter was requested. The appellant was represented at the hearing. There is no indication that the legal representative raised any concerns about the EEA sponsor's ability to speak or to understand English at the hearing. There is no evidence to suggest that any request for an adjournment was made to allow for an interpreter to be present if one was needed. The judge took into account the fact that English was not the EEA sponsor's first language [17]. I conclude that insufficient evidence has been produced to indicate that the lack of interpreter caused any significant difficulties for the sponsor such that it rendered the hearing procedurally unfair.

14. Mr Sokoya raised the issue in an attempt to explain some of the concerns raised by the judge about the discrepancies in the evidence given by him and the EEA sponsor at the hearing. The judge heard evidence from the witnesses and was entitled to make an assessment of their overall credibility. It is understandable that the appellant disagrees with the decision, but the judge's findings relating to the credibility of the witnesses were within a range of reasonable responses to the evidence as summarised in the decision.

15. I accept that the judge's credibility findings casting doubt on the genuine nature of the relationship muddied the waters. Although the judge did not follow a clearly structured approach, it seems from what he said at [16] that the Home Office Presenting Officer made clear that the respondent did not assert that the marriage, even if valid, was one of convenience contracted solely to circumvent immigration control. If no assertion was made that this was a marriage of convenience it is difficult to see how the judge's failure to take a structured approach to this issue could amount to an error of law.

16. The judge appeared to make findings as to whether the appellant was a durable relationship for the purpose of regulation 8 of the EEA Regulations 2016 although, again, the findings were made without clear reference to the relevant legal framework. Mr Melvin argued that this was a "new matter" for the purpose of section 85 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"), which was not considered by the Secretary of State. It was not open to the judge to determine whether the appellant was in a durable relationship for the purpose of regulation 8.

17. It is unclear why the decision letter did not, as is usual, go on to consider regulation 8 once a finding had been made that the evidence was not sufficient to show a valid marriage had taken place for the purpose of regulation 7. Although both issues come within the rubric of the main EEA ground of appeal, the factual matrix of the validity issue is arguably different to an assessment of the genuine nature of the relationship: see *Mahmud (S. 85 NIAA 2002 – 'new matters')* [2017] UKUT 00488. I bear in mind that the appellant before the Upper Tribunal is Mr Sokoya and not the Secretary of State. Even if it is the Secretary of State's view that the judge erred in considering a new matter, it is not his appeal and it makes no material difference to the Secretary of State given that the appeal was dismissed on all grounds.

18. The general interpretation section of the EEA Regulations 2016 purports to exclude an appeal against a decision to refuse to issue a residence card as an extended family member from the definition of an "EEA decision" giving rise to a right of appeal. However, the decision made by the respondent was an EEA decision that gave rise to a right of appeal. The ground of appeal is broad, and once engaged, provides for a fairly wide assessment of an appellant's EEA rights. Once a right of appeal has been established, I see no reason why it could not also include an assessment of EEA rights as an extended family member.

19. Even if it was open to the judge to go on to consider whether the decision to refuse a residence card amounted to a breach of the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom with reference to regulation 8, his failure to consider the evidence contained in the appellant's bundle would have made no material difference to the outcome of the appeal. The judge took into account the fact that the appellant and the EEA sponsor were consistent in some aspects of their evidence, but identified a number of "serious discrepancies" which he concluded undermined their claim to live together in a genuine relationship. The bundle of evidence contained over 200 pages. However, the witness statements were brief and did not provide any detail about the history or nature of their relationship. The evidence consisted largely of bank statements and utility bills. At its highest, it indicated that the appellant and the EEA sponsor use the same address for correspondence and paid bills there. Cohabitation is not a requirement under European law, but there was no tenancy agreement, no evidence from family or friends and no photographs or other evidence of an ongoing relationship.

Conclusion

20. Although the First-tier Tribunal decision should have been more rigorous, and would have benefited from a clearer structure, I find that it dealt with the core issue of the validity of the marriage adequately. Any inadequacies are not elevated to an error of law that would justify setting aside the decision. It was open to the judge to reject the reliability of the marriage certificate and other evidence of the proxy marriage with

reference to his own assessment of the appellant's credibility and the obvious weakness in the evidence of Mr Usman, which cast doubt on the credibility of the application as a whole. It was open to the judge to conclude that the appellant failed to produce sufficient reliable evidence to show that a religious marriage contracted by proxy was a valid marriage under Guinean law.

21. The respondent raised the question of whether the judge erred in determining regulation 8 issues when they were arguably a "new matter" for the first time at the Upper Tribunal hearing. There is no evidence to suggest that the respondent raised the question before the First-tier Tribunal. Indeed, it would appear from what is said at [16] that the suggestion that the appellant and the sponsor may not be in a genuine relationship came from the Home Office Presenting Officer. Although I accept that the findings relating to whether the appellant was in a 'durable relationship' for the purpose of regulation 8 are scant, it was open to the judge to make credibility findings as part of his assessment of whether the marriage was valid under regulation 7. The judge clearly took into account the appellant's assertion that he was living together with the EEA sponsor [16]. At its highest the evidence in the appellant's bundle only showed that the appellant and the EEA sponsor may use the same address, but did not go to the strength and nature of the relationship. The significant discrepancies identified by the judge went to the witnesses' knowledge of one another, which in several important respects was lacking. The appellant claimed to fast on Sundays but the EEA sponsor said that he ate normally every day [9]. The appellant claimed that his wife had plans to study journalism and music but the EEA sponsor said that she wanted to study health and social care [10]. The appellant claimed that his wife was about to start work for Primark the next week, but she confirmed that this was not the case [11]. They both stated the date of the marriage incorrectly [13]. Despite the voluminous number of pages, the evidence contained in the appellant's bundle went to a narrow issue, which was unlikely to make any material difference to the judge's core finding about the genuine nature of the relationship even if the appellant and the EEA sponsor use the same address.

22. For the reasons given above I conclude that the decision did not involve the making of an error of law that would have made any material difference to the outcome of the appeal.

DECISION

The First-tier Tribunal decision did not involve the making of a material error of law

The decision shall stand

Signed  Date 12 February 2019
Upper Tribunal Judge Canavan