Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/10558/2016
EA/10563/2016
EA/10565/2016
EA/10568/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 4th April 2019

Decision & Reasons Promulgated
On: 9th April 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Margeret [I] +3
(no anonymity direction made)

Appellants

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr P. Nath, Counsel instructed by direct access (Imperium Chambers)**
For the Respondent: **Mr N. Bramble, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants are all nationals of Nigeria who assert a right of residence in the United Kingdom under Regulation 7 of the Immigration (European Economic Area) Regulations 2016 ('the Regulations'). They assert that they are, respectively, the wife

and three minor step-children of a Mr [NM], a French national who is accepted to be exercising treaty rights in the United Kingdom

2. On the eve of the hearing before the First-tier Tribunal there were two matters in issue. The first was whether the Appellants were, as a matter of law, the 'family members' of Mr [M]: the Respondent had not accepted that the proxy marriage contracted between Mr [M] and the first Appellant Mrs [I] was a valid marriage. The second, alternative issue, was whether the couple were in a 'durable relationship'.

3. In its determination the First-tier Tribunal (Judge McGrade) dismissed the appeal on all grounds.

4. The Appellants now have permission to appeal to this Tribunal, granted by Upper Tribunal Judge Hemingway on the 4th March 2019.

Ground (i): The Proxy Marriage

5. The Respondent's position at the date of the refusal on the 23rd March 2016 was that the purported marriage was not valid. The Appellants had submitted a 'proxy marriage certificate' issued in Nigeria and the refusal letter explains that this is not regarded as a legal marriage. No reasoning was offered for that conclusion, other than to point to the fact that this had been the judgment of the First-tier Tribunal Judge in December 2013 when an earlier appeal had, on the same facts, dismissed.

6. In a witness statement dated the 8th February 2019 the barrister who appeared for the Appellants before Judge McGrade, a Ms Kareesha Turner, describes the events on the morning of the hearing as follows:

> "I appeared against Ms Lecointe. Ms Lecointe was very helpful and we had a brief discussion out of court so as to narrow the down the issues. Ms Lecointe indicated that she will be focusing on the relationship but that the proxy marriage is not disputed anymore.
>
> We started the hearing shortly after 10am and as part of the preliminary matters, I mentioned to the Judge that the proxy marriage is not being disputed anymore as we (the HOPO and myself) had a discussion outside but also because the position of the SSHD is incorrect with regards the legality of proxy marriages in Nigeria. Judge McGrade asked Ms Lecointe to confirm the position of the SSHD who acknowledged in open court that the SSHD would no longer be disputing the proxy marriage"

7. This discussion, and Ms Lecointe's concession, is not recorded in Judge McGrade's determination. Having recorded the evidence before him, with obvious dissatisfaction, Judge McGrade concluded [at §10]:

> "The First Appellant has produced what she indicated a proxy marriage certificate. The obvious difficulty with this certificate is that [NM] claims that they were not married by proxy, but in person. Given one of the parties to the alleged proxy marriage denies being married by proxy, and has given evidence that he and his wife were married in person in Nigeria, I am unable to attach any weight to this certificate and to hold that the parties were married by proxy or otherwise."

8. The Appellants now challenge that finding on two grounds. The first is that the First-tier Tribunal impermissibly went behind the concession made by Ms Lecointe. The second is that as a matter of law, the Nigerian proxy marriage was in fact valid. As I note above, the refusal letter contained no explanation as to why this had not been accepted, other than the fact that in 2013 a First-tier Tribunal had held it to be so. The Tribunal had on that occasion applied the same logic as the Upper Tribunal in Kareem (proxy marriages – EU law) Nigeria [2014], logic subsequently held by the Court of Appeal to be wrong in Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178.

9. For the Secretary of State Mr Bramble was unable to definitively confirm that Ms Lecointe had agreed to 'narrow the issues' as described by Ms Turner, since he had not been supplied with any information directly from her. He was however able to say that he would not oppose that particular head of challenge, since he had before him Ms Lecointe's note of the hearing, which indicated that she had asked not a single question about the marriage in cross-examination. This, coupled with the fact that Ms Turner is a barrister who has sworn a witness statement, was sufficient evidence to establish that the matter had been agreed in the terms she narrates in that statement. Moreover it would appear that at no stage had the Respondent alleged the marriage to be a marriage of convenience. The Respondent therefore agreed that this challenge to the First-tier Tribunal's findings was made out.

Ground (ii): Durable Relationship

10. The evidence before the First-tier Tribunal was to the effect that the First Appellant and her children had been living with Mr [M] for some eight years. Ms Turner had invited the Tribunal to find that as well as qualifying as 'family members' it must also be the case that the Appellants, in the alternative, qualified as 'extended family members' by virtue of the fact that the two adults in the family had been in a durable relationship for all of that time.

11. The First-tier Tribunal rejected that proposition in trenchant terms, identifying what it found to be numerous and serious discrepancies in the evidence.

12. The Appellants submit that the Tribunal's conclusions about the nature of the relationship was flawed for misunderstanding/ misrepresentation of the evidence. It is submitted that the inconsistencies identified in the determination were not

inconsistencies at all, but more significantly that the findings made were flawed for a failure to weigh all of the relevant evidence in the balance. It is submitted that that the Tribunal erred in failing to assess the quality of this relationship in light of the applicable policies and evidence. There was a wealth of evidence to support the contention that this was a family unit, and none of this evidence is addressed in the decision.

13. Mr Bramble was, once again, in a position where he could not defend the determination. He accepted that the file contained a large bundle of evidence going to cohabitation and family life, with documents placing the individuals in question in the same address for the past eight years. He agreed that whatever might be said about the discrepancies, it was an error for the First-tier Tribunal to fail to consider all of that other evidence in its assessment.

14. Given the lack of findings on the large volume of material evidence, the parties invited me to remit this matter to the First-tier Tribunal. I agree to do so.

Decisions

15. The determination of the First-tier Tribunal contains errors of law and it is set aside.

16. The decisions in the appeals will be remade in the First-tier Tribunal by a Judge other than Judge McGrade.

17. There is no order for anonymity.

Upper Tribunal Judge Bruce
4th April 2019