Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12934/2016

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 7 February 2019 **On 16 May 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SULAIMON OWOLABI SALAUDEEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr R.O. Ojukotola of SLA Solicitors
For the respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 18 October 2016 to refuse to issue a residence card recognising a right of residence as the family member of an EEA national under The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006").

2. The respondent was not satisfied that the evidence produced in support of the application showed that a valid marriage had taken place under

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Nigerian law, specifically, section 42 of the Birth, Death etc. (Compulsory Registration) Decree No.69 1992 Act Cap. B9 Laws of the Federation of Nigeria, 2004. The respondent noted that background evidence indicated that a proxy marriage is only lawful when celebrated in accordance with native law and custom. Nigerian law specifies that a customary marriage must be registered within 60 days and must be in accordance with local government bye-laws. The registration document produced by the appellant did not contain all the relevant requirements to show that the marriage was registered properly under Nigerian law. The evidence did not show that the relevant details were provided for the EEA sponsor, including the consent of her parents. The fact that the claimed registration document did not contain the information required by Nigerian law cast doubt on the reliability of the document. The respondent was not satisfied that the evidence showed that the marriage was valid. The respondent concluded that there was insufficient reliable evidence to show that the appellant was a 'family member' for the purpose of regulation 7 of the EEA Regulations 2006.

3. The respondent went on to consider whether there was sufficient evidence to show that the appellant was in a durable relationship and was therefore an 'extended family member' for the purpose of regulation 8(5), but the respondent was not satisfied that there was sufficient reliable evidence to show that the appellant was in a durable relationship with the EEA national sponsor as claimed.

4. First-tier Tribunal Judge Widdup ("the judge") dismissed the appeal in a decision promulgated on 03 July 2018. The appellant asked for the appeal to be determined without a hearing. The judge proceeded to determine the appeal on the papers. The judge noted that the burden of proof was on the appellant to show that the marriage was valid. He identified the correct case of *Awuku v SSHD* [2017] EWCA Civ 178, which overturned the earlier decision of the Upper Tribunal in *Kareem (Proxy marriages – EU law)* [2014] UKUT 00024. He considered the four documents relied upon by the appellant to show that a valid proxy marriage had taken place in Nigeria. The judge considered the general submissions made on behalf of the appellant and found that they failed to address the concerns raised by the respondent in the reasons for refusal letter. The judge went on to find:

> "20. I would have been helpful if I had been provided with expert opinion evidence from a suitably qualified Nigerian lawyer. The appeal bundle does contain a letter from Mr Ojukotola, who appears to be a solicitor practising in London. His letter is undated and does not refer specifically to the issues in this case but to concerns about the 2013 COIR and to misunderstandings by the Respondent about the Nigerian legal system.
>
> 21. That letter is undated and does not appear to have been obtained in connection with this appeal. There is no information about the author's qualifications or expertise.

> 22. For all those reasons I attach little weight to the report.
>
> 23. It follows that the Appellant has not discharged the burden of providing that this customary marriage is valid in Nigeria."

5. In the alternative, the judge went on to consider whether there was sufficient evidence to show that the appellant was in a durable relationship for the purpose of regulation 8(5). He referred to the evidence in some detail but concluded that, while there was evidence to show that correspondence was sent to the same address, the evidence did not show to the required standard of proof that the appellant was in a durable relationship with the EEA national sponsor as claimed.

6. The appellant appealed the First-tier Tribunal decision on the ground that the judge failed to consider whether the evidence produced by the appellant showed that a valid marriage took place under Nigerian law. The grounds accepted that the appellant's solicitors did not deal with issues under regulation 8(5) because the appellant relied solely on regulation 7.

<u>Decision and reasons</u>

Error of law

7. After having considered the grounds of appeal and the oral submissions I am satisfied that the First-tier Tribunal decision involved the making of an error of law. Although it was open to the judge to observe that the evidence produced by the appellant relating to the application of Nigerian law did not directly tackle the points raised in the reasons for refusal letter, his decision rested on the assumption that what was said in that letter was correct. The judge failed to carry out the central task of a fact-finding judicial decision maker, which was to assess the evidence for himself to ascertain whether it met the relevant requirements of Nigerian law.

8. The appellant does not challenge the findings made with reference to regulation 8. Only that part of the First-tier Tribunal decision that deals with the assessment under regulation 7 is set aside and will be remade.

Remaking

9. The respondent asserts that the documents produced in support of the application for a residence card were not sufficient to show that a valid marriage took place according to Nigerian law.

10. Despite his findings relating to regulation 8(5) the respondent made no allegation that this is a marriage of convenience entered into for the purpose of using rights conferred by the EU treaties as a means to circumvent the requirements of the immigration rules or to demonstrate rights of residence.

11. The appellant relied on four key documents to demonstrate that a valid marriage took place by proxy in Nigeria on 28 June 2012.

(i) *Marriage certificate*

The document states that it is a “Native Law & Custom Marriage Certificate” and purports to be issued by the Mushin Local Government on “13th Agust, 2012”. The reference number given is: “MCC/MLG/011/2012”. The document is addressed: “To whom it may concern” and purports to certify that Dos Prazeres Pataco Claudia Marisa was married to Salaudeen Sulaimon Owolabi according to native law and custom on 28 June 2012. However, the document does not contain any other information about the parties to the marriage apart from their names. It purports to be signed by the registrar for the “Chairman Mushin Local Government Council”. The name of the registrar is not included. The certificate is sealed with a stamp stating “Grade ‘A’ Customary Court – Mushin”

(ii) *Letter from Mushin Local Government*

The letter purports to be issued by the Mushin Local Government Grade ‘A’ Customary Court. It is also dated 13 August 2012 and gives the reference number “MCC/MLG/224/2012”. Again, it is addressed “To whom it may concern”. The letter states that the two people named were married under native law and custom on 28 June 2012 at an address in “Awofeso Street, Palm Groove, Shomolu, Lagos State, Nigeria”. It states that the groom’s father, Salaudeen Ganiyu Oerinde, “moved an oral motion in the court on the 13th day of August, 2012 to this effect suitably supported by 7 paragraph affidavit and completed Form MCM. 1 submitted to the Court by himself.” The letter is signed by Joshua Olushola Adetomiwa, JP who is said to be the Court Registrar. The letter purports to be on headed paper but there is no address or other contact details in the header. The only contact details given in the letter is a Yahoo email address for the registrar who signed the letter. The letter is sealed with the same seal as the marriage certificate.

While I do not purport to be an expert in handwriting, the signature on the marriage certificate and the letter appear to be similar. The first letter ‘J’ has a distinctive sweep that is similar on both documents. The original documents indicate that the same blue pen may have been used to sign both documents. The impression is that both documents purport to be issued on the same day by the same registrar.

(iii) *Affidavit of Salaudeen Ganiyu Oderinde*

The affidavit is said to be sworn by the appellant’s father on 13 August 2012. It contains a photograph and various seals purporting

to be from the "Cashier – Magistrate Court Lagos State". The affidavit runs to seven paragraphs. The appellant's father confirmed the name and address of his son in the UK. He also confirmed the name and the address of the EEA sponsor. The marriage was said to have taken place according to native law and custom at the same address in Awofeso Street, which is the given address for the appellant's father. The affidavit states that "the marriage was conducted by proxy with the consent of the parties, both families and dowry accepted as confirmed in the attached completed Form MCM.1" It is reasonable to infer from what is said in the letter purporting to be from the customary court that this was the affidavit mentioned by the registrar.

(iv) *Form MCM.1 – registration of marriage by native law and custom*

The final document completes the set. It purports to be a copy of the Form MCM.1 document referred to in the letter from the registrar and the affidavit. The document does not appear to be a form, as such, but is a typed/word processed document, which purports to have been received by way of a seal of the "Grade A Customary Court – Mushin" on 13 August 2012. The signature on the original document is similar in form and ink to those of the registrar who purported to issue the marriage certificate and the letter from the customary court in Mushin.

The document outlines the name, marital status, occupation, age, nationality, state of origin (if applicable), residential address and the name and relationship of the person who consented to the marriage for the appellant and the EEA sponsor. The form provided details of the date of the customary marriage and the address where it took place. The dowry is was stated to be: "Kolanuts and fruits". The details of four witnesses were given (i) Oderinde Hammed Babatude; (ii) Lateef Adebayo Sulaimon; (iii) Lopez Vas Carina Anna; and (iv) Mendes Claudia. The declaration is signed by the appellant's father and is dated 13 August 2012.

12. Taken together, the four documents purport to be a marriage certificate issued by the registrar in the Grade 'A' Customary Court in Mushin with the supporting documents that were stated to be necessary to register the marriage.

13. The Court of Appeal in *Awuku* made clear that the general rule under the law of England and Wales is that the formal validity of a marriage is governed by the law of the country where the marriage was celebrated.

14. The evidence contains a copy of the underlying source material from the Foreign and Commonwealth Office referenced in the Nigerian Country of Origin Information (COI) Report dated 14 June 2013 referred to in the decision letter. The letter from the British High Commission to the Country

of Origin Information Service at the UK Border Agency is dated 04 February 2013. The letter outlines the BHC's understanding of the relevant Nigerian law as follows:

> "One of the functions of local governments in Nigeria is to register all marriages. This is provided for in the Fourth Schedule to the 1999 Constitution of the Federal Republic of Nigeria. As a result, some local governments have bye-laws for the registration of customary law marriages.
>
> Some of these bye-laws make registration of customary law marriages compulsory and prescribe a penalty for failure to register such marriage. In addition to the foregoing, the Birth, Deaths etc (Compulsory Registration) Act Cap.B9, Laws of the Federation of Nigeria, 2004 (the "Act") also stipulates that customary law marriage be registered within a specific period after its celebration. Specifically, section 30 of the Act provides as follows:
>
>> "Notwithstanding anything contained in any enactment every customary marriage is to be registered within sixty (60) days in the area court or customary court where the marriage was contracted."
>
> The foregoing provision of the Act presupposes the statutory and therefore legal recognition of customary law marriages. The Honorary Legal Adviser is therefore of the opinion that so called "proxy marriages" as an aspect of customary law marriage, are legal; and legal recognition is conferred by registration in an area or customary court."

15. There follows an extract from the relevant "Act". Section 30 confirms that every customary marriage should be registered within 60 days in the area or customary court where the marriage was contracted. Section 42 repeats the requirement for registration within 60 days. Section 42(2) states that the Chief Registrar shall required a list of specified information relating to the bride and groom including their full names, marital status, occupation, age, state of origin, place of residence, nationality, the name of the person who has consented to the marriage and his relationship with the bride or bridegroom. Section 42(3) states that Form CM.1 set out in the schedule to the Act "or any similar form as may be used for giving the information required under paragraph (2)".

16. This is the legal framework upon which the respondent made his decision. He was not satisfied that the documents produced by the appellant met the requirements of section 42(2) of the Act. The reasoning at pages 4-5 of the decision letter is somewhat confused. It seems the decision maker interpreted Nigerian law as requiring a sworn affidavit from both sets of parents, but I can see no provision in the Act to say that it was a requirement. It seems the decision maker also interpreted the law as requiring the EEA sponsor's family members to be present when the marriage was registered, but I can see no provision in the Act to say that this was a requirement either. The decision also seems to make a factually

incorrect assertion. It was asserted that "by providing the claimed Customary court document that states an oral motion was provided by a representative from both parties it is claimed that your EEA sponsor's father in law was in Nigeria on 28 June 2012 to attend the court oral motion". The letter says no such thing. It only says that the groom's father made an oral motion to the court supported by his affidavit and the information contained in Form MCM.1. The hearing was on 13 August 2012 not 28 June 2012, which is the purported date of the marriage.

17. The evidence suggests that proxy marriages are common in Nigeria. The requirements for a customary marriage may vary depending on local customs. The appellant says that the marriage was conducted under Yoruba law and customs, but I was not referred to any evidence to show what those customs involve. The MCM.1 form appears to record two witnesses with Portuguese names who are likely to be members of the EEA sponsor's family. It is not clear whether members of both families need to be physically present at the ceremony or whether it was sufficient for the EEA national sponsor's family to express their consent to the marriage in some other way.

18. I am asked to determine a narrow issue. Does the evidence before the Upper Tribunal show on the balance of probabilities that a proxy marriage contracted by native law and custom in Nigeria was registered and is therefore a valid marriage for the purpose of regulation 7 of the EEA Regulations 2006?

19. When the evidence produced by the appellant is analysed it becomes fairly clear that it forms a set of documents that were used to register a customary marriage with the registrar in the Grade 'A' Customary Court in Moshin. The substance of the requirements outlined by the respondent in his decision letter appear to be satisfied. The marriage certificate and the letter from the registrar contain consistent information and appear to be issued by the same registrar. In support of the oral application made by the appellant's father in court on 13 August 2012, he filed an affidavit and an MCM.1 form, which appears to contain the information required by section 42(2) of the Act.

20. There are some gaps in the evidence, which does not explain the requirements of Yoruba customary marriage. For example, it is not clear whether members of both families need to be physically present or whether there is provision for the EEA sponsor's family to witness the marriage in some other way. However, I bear in mind that the appellant does not have to prove his case with any certainty. I find that I cannot determine the issue with any certainty, but I satisfied that the evidence indicates that it is at least more likely than not that a valid marriage was registered under Nigerian law.

21. In light of the judge's unchallenged findings regarding the dearth of evidence to show a subsisting relationship, some issues arise regarding

the overall credibility of the application. Although I recognise that a person might still want to complete a customary ceremony, one might ask why a couple who both live in the UK chose not to contract a civil marriage in the UK, the validity of which could not be disputed, and instead chose to contract a marriage solely by native law and custom in Nigeria which they did not attend.

22. However, I am conscious of the fact that the respondent, perhaps because he was concentrating on the validity of the marriage, did not make an allegation that this was a marriage of convenience. The sole issue before me is whether the appellant has produced sufficient evidence to show that a valid marriage was likely to be registered under Nigerian law. I am satisfied that the evidence shows, at least to the balance of probabilities, that the appellant appears to have registered a valid marriage under Nigerian law and that the requirements of regulation 7 are met.

23. It is a matter for the respondent what action might be taken in light of the unchallenged findings of the First-tier Tribunal judge regarding the dearth of evidence of a subsisting relationship albeit there is quite a lot of evidence to show that the appellant and the EEA sponsor both used the same correspondence address for several years.

24. I conclude that the decision breaches the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is remade and the appeal ALLOWED on EU law grounds

Signed Date 14 May 2019
Upper Tribunal Judge Canavan