IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005064

First-tier Tribunal No: EA/04132/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21st February 2024

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE METZER KC

Between

JUDE BEST OSAYOMWANBOR
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Atuegbe, Solicitor, instructed by R & A Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 24th January 2022

DECISION AND REASONS

1. These written reasons reflect the oral decisions which we have given to the parties at the end of the hearing.

Background

2. We had set aside the decision of Judge Thorne in our previous error of law decision which was promulgated on 9th August 2023. We did so, without preserving any of Judge Thorne's findings of fact. We nevertheless explained why we decided to retain remaking in the Upper Tribunal, at §8 of our decision. The issues in dispute were narrow, as was the nature and extent of any necessary fact-finding. These had been whether the appellant was in a relationship as claimed before 31st December 2020 and if so, whether the relationship was durable. In our decision, we explained that the reliability of the evidence about the appellant's marriage by proxy in Nigeria and his prior claimed divorce were likely to be two areas of focus, if not the exclusive ones.

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3. Since our decision, we held a remaking hearing on 23rd October 2023, which we had to adjourn, because it transpired that there was disagreement as to the precise nature of the appellant's application which the respondent had refused in her decision dated 15th April 2022. That decision had considered and refused an application as a durable partner. Mr Atuegbe submitted that the appellant had not applied as a durable partner under the EUSS route, but as a spouse. Having issued further directions, it became clear that:

   3.1. the appellant had indeed made an application as a spouse rather than a durable partner under Appendix EU;

   3.2. the respondent had treated the application as being made as a durable partner;

   3.3. the appellant had appealed to the First-tier Tribunal in his IAFT-5 form, on the basis that his application had been wrongly considered as a durable partner, and he relied on his marriage to his wife.

4. On 2nd November 2023, we issued further directions that the respondent was to confirm whether she contested the appeal, and for parties to confirm whether they were content for remaking to be decided on the papers. The respondent indicated that she sought a hearing, and continued to contest the appeal, on the basis that she had grave concerns about the appellant's claimed customary marriage by proxy in Nigeria, said to have taken place on 6th November 2020, as there was a reluctance to provide the respondent with any details of any relationship prior to the documents said to evidence the marriage being produced. The respondent was concerned that the evidence did not suggest there was any existing relationship between the parties before the partner flew to Germany, stayed with the appellant for 3 days between 29th October and 1st November 2020, and then returned to the UK. Whilst the respondent accepted that valid customary marriages by proxy could take place, it was unusual for the parties to the proxy marriage to be in separate countries from one another at the date of the marriage (6th November 2020).

5. We have explained this because when, at the beginning of the hearing, we identified and agreed the issues we were being asked to decide, the first issue (if not the sole issue) was whether the appellant's marriage was a valid one. In response, Mr Atuegbe suggested that the case before the First-tier Tribunal had been put differently, namely whether, as a general principle, customary marriages in Nigeria were recognised in law, whereas the respondent was not now disputing that general principle, and was instead disputing the reliability of the evidence that a legally valid marriage had taken place. We indicated that since the respondent's response to directions, (including the reference to its grave concerns), we had understood the respondent to be challenging the reliability of evidence about the specific marriage, rather than general principles, following our comment at §8 of our error of law decision about the reliability of the evidence about the claimant's marriage. The general principles have been established since Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC) and we have proceeded on the assumption that as a general principle, Nigerian proxy marriages are capable of being recognised, (and which was not disputed). We canvassed with Mr Atuegbe whether, in the circumstances, the appellant would thereby be seeking an adjournment, for example to obtain and adduce further evidence. He confirmed that the appellant wanted to proceed with the hearing today.

The issue before us

6. The first issue before us was whether a customary marriage by proxy, recognised as being valid under Nigerian law, and consequently under the law of the EU country of which the appellant's partner was a national (Italy), had taken place. We considered the authority of Cudjoe (Proxy marriages: burden of proof) [2016] UKUT 00180 (IAC), the relevant propositions for which we cite later in these reasons.

7. Second, we also canvassed whether even, if it were a valid marriage, the respondent contested that it was a marriage of convenience, noting that the definition in Appendix EU of a "spouse" expressly excludes marriages of convenience. Mr Melvin indicated at the beginning of the hearing that the respondent did not submit that the marriage was one of convenience, albeit as the evidence later developed he made a final submission that the timing and the fact of the Nigerian customary marriage was one of convenience, particularly as it was a matter of weeks before the 'IP Completion Day' of 31st December 2020, under the European Union (Withdrawal Agreement) Act 2020, as compared to the later UK marriage in October 2021. Mr Melvin confirmed that the genuine and subsisting nature of the relationship is not in dispute, nor is the validity of the UK marriage in 2021. Mr Melvin argued that the evidence was not reliable that a valid proxy marriage had taken place in Nigeria and its timing called that into question, as well as whether it was for convenience. We also bear in mind that the burden of proving a marriage of convenience is on the respondent, in contrast to the appellant needing to prove the validity of his marriage.

8. We briefly recite the evidence; the law; the parties' submissions; and our findings and conclusions.

The evidence

9. The appellant and his partner adopted their witness statements and were cross-examined by Mr Melvin. They gave evidence without an interpreter and did not seek one. The key documents were the "enrolment of order" dated 26th November 2020, at page 11 of the appellant's bundle ('AB'), said to record the appellant's marriage on 6th November 2020; and the affidavit dated 15th November 2020 filed by the appellant's partner to the Nigerian court in order to ask for the proxy marriage to be registered or 'enrolled', at page E3 of the respondent's bundle ('RB'). The appellant had received these documents in the UK from his lawyer in Nigeria who attended the Court enrolment hearing and had sent them via the post (DHL) and via email, although he had not realised that he needed to disclose any correspondence from that lawyer. The appellant gave evidence on photographs relating to members of his and his partner's families in Nigeria exchanging gifts, in or around June 2020, at which family elders agreed to the couple's marriage. The appellant's partner accepted that they had not met, face to face, from 2011, when they had known each other in Nigeria, until 29th October 2020, when they met in Germany, and were together until the appellant's partner returned to the UK on 1st November 2020, but said that they had been in regular contact previously. She explained that her affidavit had referred to her living in Nigeria and moving to a different address in Nigeria on marrying the appellant, because although she did not live there, and the appellant did not, it was understood that addresses in Nigeria were required for many transactions and processes in Nigeria. The implication was that it would be understood that the appellant and her partner did not actually live at the addresses specified in the affidavit. We were also referred to a bank transfer from the appellant's partner to the appellant on 2nd December 2020, at page 16, AB.

The law

10. In terms of the law, we refer to two headnotes of Cudjoe:

> "1. It will be for an appellant to prove that their proxy marriage was in accordance with the laws of the country in which it took place, and that both parties were free to marry. The burden of proof may be discharged by production of a marriage certificate issued by a competent authority of the country in which the marriage took place, and reliance upon the statutory presumption of validity consequent to such production. The reliability of marriage certificates and issuance by a competent authority are matters for an appellant to prove.
>
> 2. The means of proving that a proxy marriage was contracted according to the laws of the country in which it took place is not limited to the production of a marriage certificate, as is recognised in Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC)."

The parties' submissions

The Appellant

11. In his brief skeleton argument, the appellant's representative, Mr Atuegbe reiterated the fact of the appellant's previous divorce (not in dispute) and relied on an article, said to have been written by a dispute resolution expert, about how customary marriages were celebrated, which required the couple to be free to marry, for the payment of a dowry, and a ceremony. The appellant had produced relevant court documents and the earlier photographs corroborated the two families' agreement to the marriage. There was no need for witness statements from proxies or family elders and it would not have been appropriate to ask for such statements. The fact that appellant's partner sent money to the appellant indicated that there was no need for the couple to have attempted to circumvent in the income requirements of the Immigration Rules. The absence of correspondence from the Nigerian lawyer or letters or statements from proxies should not be held against the appellant. The partner had explained why her affidavit referred to addresses in Nigeria.

The Respondent

12. The respondent had expressly stated its "grave" concerns a number of months ago (her skeleton argument was filed and served on 1st November 2023). The appellant had not addressed those concerns.

13. The appellant's partner's affidavit (page E3/RB) was deposed as being true and correct and filed as a formal court document. In it, she had stated at §5 that the couple "reside at" an address in Benin City. They had "both" "moved" to this address after the marriage ceremony (§6) and that before their marriage, the partner "was living" at a different specified address in Benin City (§7). Contrary to the partner's deposition that these statements were truthful, they were not.

14. The respondent did not accept the provenance of the affidavit and the enrolment of order, where it was claimed that they had been obtained and sent by the appellant's lawyer, but there was no communication from him, whether an email, letter, or even the DHL envelope or record. The order did not state that the

marriage had been by proxy, and it appeared on the face of it that the couple had married in person. It did not name the proxies (who were unknown) and there were no statements or letters from them.

15. There was a stark gap in the evidence, in circumstances where even on their own case, the appellant and his partner had only met a matter of days before the claimed proxy marriage, for a very short period, having not seen one another in-person since 2011 and they were not even in the same country when the marriage had taken place (the partner had returned to the UK). The appellant had not discharged the burden of showing that the marriage was a valid one. The timing of it was also consistent with it being a marriage of convenience, even if the later UK marriage was not.

Findings and conclusions

16. We have considered all of the evidence in the round and do not recite it unless to explain why we have reached our decision.

17. We accept Mr Melvin's submission and find that the appellant's partner's affidavit is not reliable evidence of there having been a proxy marriage recognised by the Nigerian Courts. We have already referred to §§5, 6 and 7 of the affidavit, which refer to first to the partner living at one address in Benin City but after the marriage ceremony, the couple both living in a different address in Benin City. The affidavit is deposed as being true, and on its plain and straightforward reading, it is not. It gives the appearance that the couple live in Benin City, where they were married. We do not accept the explanation that because it is necessary to identify an address in a formal process, these are understood as meaning merely the homes of wider family members. If they were the family proxy members' addresses, this could have been readily stated in the affidavit, because proxy marriages are recognised in Nigerian law. Instead, the affidavit referred to the partner's move from one address in Benin City to another, on marriage. The affidavit is consistent either with a marriage never having taken place, (because it is not a reliable document) or some kind of ceremony took place, but which the authorities believed to be a marriage in person, when it was not. It is unnecessary for us to resolve which of those two scenarios occurred. In either case, the affidavit is not reliable evidence for a recognised proxy marriage.

18. We also find that the enrolment of order is also unreliable evidence of a recognised proxy marriage. The order does not refer to the marriage being a proxy marriage. It refers to the inaccurate affidavit, which states (incorrectly) that the couple live in Benin City. It does not refer to or name any proxies. It is consistent with the Court believing the couple to have married in person, in Nigeria. The evidential weakness in the appellant's case might have been resolved had there been, for example, evidence from the proxies themselves or from the lawyer who it is said had obtained the documents. In evidence, the appellant confirmed that he had originally received a copy of the enrolment of order from a lawyer who had attended the Court with proxy family members and that the lawyer had obtained this many months afterwards, in or around May 2021 when the importance of getting hold of a copy of this became clear. While Mr Atuegbe suggested that it was not common to have a lawyer's letter, and while we accept that in some cases it may not be necessary, where, as here, we had identified the reliability of the Court documents as a key focus and the respondent had set out months ago her concerns, the lack of such evidence is stark. While we have considered the photographs said to have been taken in June 2020 of family members, we also take into account the timing of the claimed marriage, less than two months before IP

Completion Day, and the fact the couple had only seen one another face-to-face for 3 days, a few days before the claimed marriage, said to be out of love, but with only electronic contact (of which we have no evidence) from 2011 to 2020. We do not go so far as to say that the respondent has proven a marriage of convenience. Rather, regardless of the genuineness of the relationship, the weakness and gaps in the documentary evidence about the validity of marriage are not addressed by the timing and suddenness of the marriage, after nearly a decade apart.

19. In conclusion, and we emphasise to avoid any upset or confusion, we do not suggest that the appellant's marriage to his wife in the UK in 2021 is not genuine and subsisting. However, we are not satisfied on the evidence before us that the appellant has discharged the burden of proving that a valid proxy marriage in Nigeria took place on 6th November 2020.

20. This appeal was pursued on the basis that the respondent erred in refusing the appellant's application as a spouse. The appeal is not that he was a durable partner. In the circumstances, the appellant's appeal fails and is dismissed.

<u>Notice of decision</u>

21. **The appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 fails and is dismissed.**

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19th February 2024

ANNEX – ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005064

First-tier Tribunal No: [EA/04132/2022]

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE METZER KC

Between

The Secretary of State for the Home Department

Appellant

and

Jude Best Osayomwanbor

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr O Atuegbe, Solicitor, R and A Solicitors

Heard via CVP and at Field House on 12 July 2023

DECISION AND REASONS

1. These written reasons reflect the oral decision which we gave to the parties at the end of the hearing.

2. We will refer to the appellant as the Secretary of State, and to the respondent as the claimant, for the remainder of these reasons.

3. The hearing was conducted with the Judges attending at Field House, whilst the representatives attended via CVP. We checked at the beginning of the hearing that we and the representatives were able to understand one another and that they should let us know if there were any difficulties in doing so. No difficulties were indicated and we were satisfied that a fair hearing took place.

4. The Secretary of State appeals the decision of the First-tier Tribunal, Judge Thorne ("the Judge"), who allowed the claimant's appeal against the Secretary of

State’s refusal on 15th April 2022 of an application for settled status under the EU Settlement Scheme. The Secretary of State was not satisfied that the evidence showed that the claimant was in a durable relationship with his Italian partner, who claimed to be exercising treaty rights in the UK. The context is that both the claimant and his partner are of Nigerian background who claimed to have met in late 2011, without living together; the claimant’s partner visited him in Germany for a few days in 2020 and they claimed to have then married by way of proxy, in Nigeria, in November 2020. The claimant then came to the UK in February 2021 and he and his partner celebrated their proxy marriage and later entered into a civil Register Office marriage in the UK on 4th October 2021.

5. The Judge referred to the parties’ submissions and evidence and in very brief findings (at paragraph 12) concluded that the witnesses were honest and reliable and had been married as they claimed, which supported the claim that the marriage in Nigeria was valid under English law. As a consequence, they were married prior to implementation date of 31st December 2020. The Judge proceeded to allow the claimant’s appeal.

<u>The Secretary of State's appeal and the grant of permission</u>

6. The Secretary of State asserts that the Judge gave inadequate reasons for finding that the claimant and sponsor were credible witnesses or that their marriage was a genuine one. The claimant 's proxy marriage took place in November 2020 but his previous marriage was not dissolved until May 2021. The Judge had failed to provide reasons for why the marriage was valid under English law.

7. In his Skeleton Argument and in oral submissions before us, Mr Atuegbe on behalf of the claimant conceded that the Judge had made a material error in failing to provide reasons for his decision in finding the claimant and his partner credible and that the marriage was genuine. He confirmed, and we accept, that the issue of the dissolution of the previous marriage was raised in evidence before the Judge and that the dowry was returned which concluded the divorce in September 2011 according to customs and traditions and that the authorities in Nigeria would not have issued the marriage certificate in November 2020 without evidence of the previous marriage dissolution. No reference to this important evidence was contained within the decision. Although we applaud the brevity of the decision, it is essential that the basis upon which the credibility findings have been made are adequately set out. We agree with the parties that the Judge wholly failed to provide adequate reasons for his findings which amounted to a material error of law.

<u>Disposal of the appeal</u>

8. We turn to the question of disposal. We remind ourselves of the Court of Appeal’s decision in <u>AEB v SSHD</u> [2022] EWCA Civ 1512 and the nature and the extent of the necessary fact-finding, (see §7.2(b) of the Senior President’s Practice Statement). There is no suggestion that §7.2(a) applies, i.e. that the claimant has been deprived of a fair hearing or other opportunity to put his case. Both representatives were content for us to retain remaking in the Upper Tribunal. While we have not preserved any findings of fact, we also bear in mind that the issues are very narrow, namely whether the claimant was in a relationship, as claimed, before 31st December 2020 and if so, whether that relationship was durable. The reliability of the evidence about the claimant’s

marriage by proxy and his prior claimed divorce are likely to be the two areas of focus, if not the sole ones. Given the very limited focus and the representatives being content, we conclude that it is in accordance with the overriding objective to retain remaking in the Upper Tribunal.

Directions

9. The following directions shall apply to the future conduct of this appeal:

(1) The Resumed Hearing will be listed at Field House on the first available date, time estimate 1.5 hours, in person, without the need for an interpreter, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

(2) The claimant shall no later than 4pm, **21 days** before the Resumed Hearing file with the Upper Tribunal and serve upon the Secretary of State's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only. An electronic version of the bundle shall be filed in compliance with relevant UTIAC guidance.

(3) The Secretary of State shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4pm, **14 days** before the Resumed Hearing.

(4) Mr Atuegbe also confirmed, upon request from Mr Lindsay, that the claimant would attend with the original marriage and divorce documents on which he seeks to rely.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and we set it aside, without preserved findings.

The Upper Tribunal shall remake the decision on the appellant's appeal at a Resumed Hearing.

No anonymity directions are made.

Anthony Metzer KC

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 July 2023