



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/27276/2012

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 27 May 2014

On 29 May 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

**MR NSIKANABASI UMOH ESSIEN
(No Anonymity Direction Made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Michael Wainwright of counsel instructed by Daniel Aramide Solicitors

For the Respondent: Mr P Deller a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 25 April 1978. He has appealed the determination of First-Tier Tribunal Judge Wellesley-Cole ("the FTTJ") who dismissed his appeal against the respondent's decision of 9 November 2012 to refuse to grant him leave to remain in the UK as the family member of an EEA national under the provisions of

the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). His wife and sponsor is a French citizen.

2. On 3 February 2014 I heard the appeal against the decision of the FTTJ, concluded that there was an error of law and set aside the decision to be remade in the Upper Tribunal. I also gave directions. My Decision and Directions is set out in the Appendix to this determination.
3. Prior to the hearing the appellant's representatives made an application for an adjournment. They said that the appellant's wife could not attend the hearing because she would be sitting an examination. The application was refused. Mr Wainwright renewed the application. I was given copies of the wife's student card and a schedule of LLB examinations at Holborn College. I was told that her attendance was necessary because she would give evidence about whether the marriage would be recognised under French law. In reply to my question, Mr Wainwright accepted that she had no expertise in French law apart from being of French nationality. He was unable to tell me whether, in accordance with my directions, any efforts had been made to obtain expert evidence as to French law relating to foreign marriages and in particular a proxy marriage in Nigeria. I refused the application. There is nothing to connect the wife with the examination schedule. The examination which I was told she was going to sit was at 2 pm on the day of the hearing and there was no evidence to indicate that she would not been able to attend the hearing before me at 10 am and then go on and sit the examination at 2 pm. Finally, there was no witness statement from her indicating what evidence she would have given and it was admitted that, whilst she would have been called to give evidence about recognition of foreign marriages under French law, she had no relevant expertise.
4. I have no evidence above and beyond that which was before the FTTJ. The appellant relied on his 46 page bundle produced for that hearing. At the hearing before the FTTJ the appellant and his wife relied on their witness statements and did not give oral evidence. Mr Wainwright indicated that this course would be followed and the appellant would rely on the documentation in his bundle and submissions.
5. Mr Deller relied on the refusal letter and Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC). He submitted that, in line with this authority, I had to judge the validity of the claimed marriage by French law. The burden fell on the appellant to establish that the marriage was valid under French law and he had provided no evidence to do so. The respondent accepted that his wife was a French citizen and a worker in this country. The only question in the appeal was whether they were validly married to each other. He adopted the submissions made by the Presenting Officer to the FTTJ and asked me to apply the same reasoning in relation to her finding that the marriage was not one which was recognised under Nigerian law. He submitted that the appeal failed, for two reasons; the failure to establish a valid marriage under

Nigerian law and the failure to establish a valid marriage under French law.

6. Mr Wainwright said that he could not address me on the requirements of French law because the appellant had no evidence about this. He submitted that the marriage should be recognised as a valid marriage under Nigerian law. The respondent had given no proper reasons for any doubts as to the validity of the Nigerian documents. Kareem stated that the production of a marriage certificate issued by a competent authority would usually be sufficient. On the face of the documents there was nothing to indicate that they were not valid. The respondent had not produced any evidence to gainsay this, for example in the form of a document verification report. He argued that the documents should be accepted. I was asked to allow the appeal.
7. Mr Deller did not wish to reply and I reserved my determination.
8. The appellant's application for a residence card under the 2006 Regulations stands or falls on the one issue in this appeal; whether he and his wife have entered into a valid marriage which should be recognised.
9. The appellant and his wife said that they were married in a marriage ceremony under Native Law and Custom on 25 February 2012 in Lagos Nigeria. The marriage was by proxy as neither of them attended. Members of the family did attend. The documentary evidence which the appellant produced in support was a Native Law and Customary Marriage Certificate issued on 2 May 2012, a sworn affidavit of the same date and a confirmation of traditional marriage letter also dated 2 May 2012. Subsequently there was a reconfirmation letter dated 19 February 2013.
10. At the hearing before the FTTJ the respondent's position was not that the marriage documents were forged but that they were not reliable. There was conflicting information about the validity of proxy marriages in Nigeria. The appellant's representative argued that the question to be addressed was not whether the marriage was valid under Nigerian civil law but whether it was valid under Nigerian native law and custom. I note that the original documents were produced by the appellant's representative at that hearing, which would have made it difficult for the respondent to have them checked before the hearing.
11. Whilst I have set aside the decision of the FTTJ because of the failure to consider the validity of the marriage under French law I indicated in paragraph 7 of my Decision and Reasons that I was not persuaded that the FTTJ erred in law in concluding that the appellant had not established that a valid marriage had been contracted under Nigerian law whether nationally or locally. Having studied the evidence relied on by the appellant and taking into account Mr Wainwright's submissions I have reached the same conclusion as the FTTJ for the reasons set out in paragraphs 8 and 9 of her determination; that to the

standard of the balance of probabilities the appellant has failed to establish that his marriage is valid either under native law and custom or Nigerian civil law.

12. Even if the appellant had established that his marriage was valid under Nigerian law he would also, in line with Kareem, be required to establish that the marriage was contracted between him and his wife according to the national law of the EEA country of her nationality as a qualified person; that is France. Although given an adjournment and the opportunity to do so the appellant has not produced any evidence to show that the marriage was contracted between him and his wife according to French law. In the absence of any witness statement from his wife and the admission that she has no relevant expertise I am not persuaded that an adjournment to allow her to give evidence would have produced any material evidence as to the operation of French law in this area.
13. Whilst I have set aside the decision of the FTTJ dismissing the appeal I remake the decision and also dismiss the appellant's appeal.

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Signed
Upper Tribunal Judge Moulden

Date 28 May 2014

APPENDIX

1. The appellant is a citizen of Nigeria who was born on 25 April 1978. He has been given permission to appeal the determination of First-Tier Tribunal Judge Wellesley-Cole ("the FTTJ") who dismissed his appeal against the respondent's decision of 9 November 2012 to refuse to grant him leave to remain in the UK as the family member of an EEA national under the provisions of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). His wife and sponsor is a French citizen.
2. The respondent refused the application because she did not accept that the appellant was validly married to the sponsor. It was not accepted that the documents submitted established that they were married or that a proxy customary marriage conducted in their absence in Nigeria was legally recognised.
3. The appellant appealed and the FTTJ heard his appeal on 3 July 2013. Both parties were legally represented. There was no oral evidence and the appeal was determined on the basis of submissions. The FTTJ considered the country information before her and concluded that the local government in the area in Nigeria where the claimed marriage took place did not recognise customary marriages by proxy and that the documents said to establish the marriage were questionable. The appellant had not established that he and the sponsor were validly married. She dismissed the appeal under the 2006 Regulations.
4. The appellant applied for and was granted permission to appeal on grounds which argued that the FTTJ erred in law in her interpretation of the material before her and that on the basis of the latest country information she should have reached the conclusion that there was a valid marriage.
5. At the hearing before me the appellant, who was accompanied by the sponsor, explained that he had discovered only recently that his former solicitors had closed down. He had not been able to obtain his papers from them. He brought with him a bundle of photographs showing groups of those present at the wedding ceremony. He accepted that neither he nor the sponsor were amongst them. He also produced four affidavits from those who attended the wedding. He accepted that neither the affidavits nor the photographs had been put before the FTTJ.
6. Since the determination in this appeal the Upper Tribunal has promulgated the reported determination in Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC). The summary, prepared by the panel, states;

- "a. A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.
- b. The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.
- c. A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.
- d. In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.
- e. In such an appeal, the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.
- f. In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.
- g. It should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of the EEA country and/or the country where the marriage took place, the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight.
- h. These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships."

7. Mr Deller accepted and I find that although the FTTJ could not have been aware of Kareem this contains a statement of the current law which I must apply. The FTTJ should have considered whether the marriage was contracted "according to the national law of the EEA country of the qualified person's nationality". The sponsor is that person and her nationality is French. The failure to do so is an error of law. That on its own is sufficient to lead to the conclusion that the decision should be set aside. However, I am not persuaded that the FTTJ erred in law in concluding that the appellant had not established that a valid marriage had been contracted under Nigerian law whether nationally or locally.

8. Having found that the FTTJ erred in law I set aside her decision which should be remade in the Upper Tribunal. I adjourned for the hearing to take place at a later date. It is clear that the appellant had no knowledge of Kareem or the evidence which he was likely to need to obtain as a result. Furthermore, his former solicitors have ceased to practice and he needs time to try and obtain his papers from them or whoever might now have them.

DIRECTIONS

- 1) To be listed for first available date after three months hence.
- 2) Time estimate - two hours.
- 3) The hearing will encompass the issues raised in Kareem.
- 4) Both parties are permitted to serve further evidence, including expert evidence as to French law relating to the marriage.
- 5) No Interpreter required.