



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05215/2018

THE IMMIGRATION ACTS

Heard at Field House
On 23rd August 2019

Decision & Reasons Promulgated
On 2nd September 2019

Before

UPPER TRIBUNAL JUDGE DAWSON
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

MR OLUBUNMI OLAWUNMI SHITTU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaekwu, Moorehouse Solicitors

For the Respondent: Ms S Cuna, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria. He appeals against the decision of First-tier Tribunal (“FtT”) Judge Taylor promulgated on 26th March 2019, dismissing his appeal against a decision to refuse to issue an EEA Residence Card as the family member of an EEA national exercising treaty rights in the UK in accordance with

Regulation 7 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”).

2. The appellant had claimed a right to reside in the UK as the family member of an EEA national. The appellant claims that he is the spouse of an Italian national, [NW], and that their marriage took place by proxy in Nigeria on 16th February 2017. In refusing the application made by the appellant the respondent, in a decision dated 19th July 2018, referred to the marriage certificate and sworn affidavit of the appellant’s mother, but concluded that the evidence provided does not confirm that the appellant’s proxy marriage was performed and registered legally in Nigeria. The respondent did not believe that the evidence produced was sufficient to establish that the appellant is married according to Nigerian law. The respondent was therefore unable to confirm that the appellant is a family member of her EEA sponsor.

The decision of the FtT

3. The appellant gave evidence before the FtT as set out at paragraphs [9] to [10] of the decision. The appellant maintained that he had married his sponsor on 16th February 2017 in accordance with Ogun State laws and customs, and the marriage was registered on 5th June 2017. He claimed that the marriage was registered in Ijebu North Local Government Council as stated on the ‘Certificate of Registration of Traditional Marriage’, in accordance with marriage laws, and by a competent officer. The appellant accepted that neither he nor his sponsor were present at the marriage, but his evidence was that the parents of both parties were present, and that the marriage certificate was issued by the local government area where his parents were from.
4. The FtT judge referred to the decision of the Court of Appeal in Awuku -v- SSHD [2017] EWCA Civ 178 and noted that in the law of England and Wales, the general rule is that the formal validity of a marriage is governed by the law of the country where the marriage was celebrated (“the *lex loci celebrationis*”). A marriage by proxy

will be treated as valid in England, if recognised by the local law, even if one of the parties is domiciled and resident in England.

5. At paragraph [14] of his decision, the FfT judge states as follows:

“... It is for the appellant to demonstrate that the marriage certificate was issued by a proper competent authority, and reliable independent evidence was required to show that the marriage could be recognised in the country in which it took place. Kareem advised that mere assertions as to the legal position would carry very little weight.”

6. At paragraph [15] of the decision, the FfT judge referred to the Certificate of Registration of Traditional Marriage that was relied upon by the appellant. The judge stated:

“... In this appeal the appellant has submitted a certificate of registration of a traditional marriage but has submitted no evidence that this marriage would be recognised in Nigeria in the same way as a civil marriage. The appellant has stated that neither of the parties were present at the marriage but has submitted no evidence that such a proxy marriage would be recognised. At the hearing, the appellant’s representative submitted a constitution document showing that a local government may register marriages, but the document is silent on the matter of proxy marriages. It was submitted that the Home Office guidance advised that proxy marriages were accepted as valid in the UK, but this was on the proviso that there (*sic*) were recognised in the country which they took place. It was submitted that the COIS report on Nigeria advised that proxy marriages were recognised, but the COIS report was not in the appellant’s bundle, there are several COIS reports on Nigeria and the representative did not specify which COIS report applied. Some countries allow proxies with one party present, some with non-present, and some have residence requirements on the party who is present. The appellant has submitted no documentary evidence showing that a marriage with no party present is recognised in Nigeria, and in the absence of any evidence in support of his assertion that the marriage is valid, I cannot be satisfied that the marriage would (*sic*) recognised in Nigeria. If the marriage is not recognised in Nigeria, it would not be recognised in the UK for the purposes of EEA Regulations”

The appeal before the Upper Tribunal

7. The appellant advances two grounds of appeal. First, in reaching the decision that he could not be satisfied that the marriage was valid under Nigerian law, the FfT judge failed to consider the registration documents that the appellant had provided as evidence of the validity of his marriage, and failed to consider the COI report

dated 14th June 2013 that was expressly referred to in paragraph [4] of the written skeleton argument. That report confirms that proxy marriages are valid in Nigeria. Second, the FfT judge erred in proceeding upon the premise that there was no right of appeal against a decision under Regulation 8 of the Immigration (European Economic Area) Regulations 2016.

8. Permission to appeal was granted by Upper Tribunal Judge Keith on 19th July 2019. The matter comes before us to consider whether or not the decision of FfT Judge Taylor involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

Discussion

9. We deal first with the second ground of appeal relating to the right of appeal for ‘Extended Family Members’ of EEA nationals. At the hearing before us, Mr Nwaekwu did not pursue that second ground. He was right not to do so. As FfT Judge Taylor sets out at paragraphs [7] and [8] of his decision, the 2016 Regulations in their original form had removed the right of appeal for extended family members, and although the respondent had indicated that legislation was to be introduced to reinstate the right of appeal for extended family members, a right of appeal did not exist as at the date of the hearing before the FfT. The representatives had agreed that there was no right of appeal for extended family members and the judge proceeded on that basis. Regulation 36(1) of the 2016 Regulations provides that *“The subject of an EEA decision may appeal against that decision under these Regulations”*. An “EEA decision” was defined in Regulation 2 of the 2016 Regulations as in force as at the date of the hearing of the appeal, and the date upon which the decision was promulgated, as follows:

“EEA decision” means a decision under these Regulations that concerns –

- (a) a person's entitlement to be admitted to the United Kingdom;
- (b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card,

document certifying permanent residence or permanent residence card (but does not include a decision that an application for the above documentation is invalid);

(c) a person's removal from the United Kingdom; or

(d) the cancellation, under regulation 25, of a person's right to reside in the United Kingdom,

but does not include a decision to refuse to issue a document under regulation 12(4) (issue of an EEA family permit to an extended family member), 17(5) (issue of a registration certificate to an extended family member) or 18(4) (issue of a residence card to an extended family member), a decision to reject an application under regulation 26(4) (misuse of a right to reside: material change of circumstances), or any decisions under regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person);

10. It was not until 28th March 2019, that the exclusion of an appeal against a decision to refuse to issue a document under regulations 12(4), 17(5) or 18(4) to an extended family member, was revoked by the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019/468 (*Part 3 reg.3(2)*). As at the date of the hearing before the *FtT*, and the date upon which the decision was promulgated, the appellant was not “the subject of an EEA decision”, and quite properly, as set out at paragraph [8] of the judge’s decision, the parties agreed that there was no right of appeal for extended family members and the appeal therefore proceeded as an appeal against a decision to refuse to issue the appellant with a residence card, to confirm that he is the family member of an EEA national under Regulation 7 of the 2016 Regulations.
11. Turning to the validity of the marriage, the *FtT* judge noted, at [14], that it is for the appellant to demonstrate that the marriage certificate relied upon by the appellant was issued by a proper competent authority, and reliable independent evidence was required to show that the marriage would be recognised in Nigeria. At paragraph [15], the *FtT* judge noted that in this appeal the appellant has submitted a certificate of registration of a traditional marriage but had submitted no evidence that his marriage would be recognised in Nigeria in the same way as a civil marriage.

12. We accept that the *FtT* Judge erroneously refers to a failure by the appellant's representatives to specify the COIS report relied upon. The Judge was however right to note that a copy had not been provided to the Tribunal. The Nigeria Country of Origin Information Report dated 14th June 2013 is referred to in the appellant's skeleton argument. An extract of the relevant section was handed to us by Mr Nwaekwu. We pause to note that a party relying upon background material in support of a proposition must ensure that the relevant material is before the Tribunal. Tribunal Judge's cannot be criticised for failing to consider material that has not been provided to the Tribunal. The 'Nigeria Country of Origin Information (COI) Report published on 14th June 2013, that is referred to at paragraph [4] of the appellant's skeleton argument states:

Proxy marriage

Users should note that sources quoted below appeared to provide inconsistent information on the legal status of proxy marriages in Nigeria.

23.26 The US State Department Reciprocity Schedule, in an undated section on marriage certificates in the country, accessed 4 December 2012, recorded that: '... both parties to the marriage technically must be physically present at the same location with witnesses to sign certain marriage documents, proxy marriages have ceased to be valid but still occur.' [3e]

23.27 However a letter from the Foreign and Commonwealth Office to the UK Border Agency of 1 February 2013, provided by the British High Commission following consultation with their honorary legal adviser, observed in response to the following questions:(bold added):

'Are proxy marriages recognised as being legal by the Federal Government of Nigeria?

Proxy marriage is a fairly common practice amongst communities in Nigeria. It is recognised under Nigerian customary law as a form of customary law marriage. A marriage is by proxy where the presence of the bride and groom is not required at the ceremony. In most cases, it is celebrated by the immediate and extended family of the bride and groom ... Proxy marriages find their origin in the fact that under customary law, marriage creates a relationship not only between the parties to the marriage but also between their families._

'Because customary law marriages are legally binding and recognised as one of the types of marriages in Nigeria, "proxy marriages" which form part of customary law marriages are also legally binding where celebrated in accordance with the native law and custom of the particular community.

'If proxy marriages are legal, what process is followed in order to obtain legal recognition of the marriage?_

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 byelaws for the registration of customary law marriages...Some of these byelaws 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 a 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. [2c].’

13. There was no expert evidence before the FfT judge as to the legal status of proxy marriages in Nigeria, in particular if all proxy marriages are legal, the process to be followed to ensure that there is legal recognition of the marriage.

14. Mr Nwaekwu submits that the ‘Certificate of Registration of Traditional Marriage’ that was relied upon by the applicant was issued by a Registrar of marriage, in the relevant Local Government Council of Ogun State. He submits that the very fact that the certificate was issued, is evidence of a marriage that is recognised as a valid marriage in Nigeria. We disagree. It is immediately apparent from the COI report that was relied upon by the appellant that there is inconsistent information on the legal status of proxy marriages in Nigeria, but on at least one authoritative view, “proxy marriages”, which form part of customary law marriages are legally binding where celebrated in accordance with the native law and custom of the particular community. As to the process to be followed in order to obtain legal recognition of the marriage, it appears that some local governments have bye-laws for the registration of customary law marriages and some of these bye-laws, make registration of customary law marriages compulsory and prescribe a penalty for failure to register such marriage. In addition there appears to be a statutory obligation under s30 of the Birth, Deaths etc (Compulsory Registration) Act Cap B9,

Laws of the Federation of Nigeria 2004 that every customary marriage is to be registered within sixty days in the area court or customary court where the marriage was contracted.

15. At paragraphs [8] to [12] and [15] to [27] of the appellant's skeleton argument before the FfT, the author makes assertions as to Nigerian customary law and the recognition of a proxy marriage that is permissible under Nigerian customary law, as a valid marriage. The author however discloses no expertise to assist the Tribunal upon matters relating to Nigerian customary law or the requirements to establish a valid marriage.
16. We make no observations as to whether all proxy marriages are capable of being recognised as a valid marriage in Nigeria. There is simply insufficient evidence before us to reach an informed view. We do however observe that even on the very limited information set out in the 'Nigeria Country of Origin Information (COI) Report published on 14th June 2013, there appear to be two pre-requisites to a marriage by proxy being recognised as a valid marriage in Nigeria. First, the marriage must be celebrated in accordance with the native law and custom of the particular community where it takes place. It appears that the appellant is of Yoruba ethnicity. Before the FfT Judge there was an Affidavit of marriage signed by the appellant's mother. She states "... *all cultural requirements and marriage rites were observed and witnessed by a select group of elders community ...*". There was no expert evidence before the FfT as to the requirements for the celebration of a marriage within the Yoruba community so that the tribunal judge could be satisfied that the marriage was celebrated in accordance with the native law and custom of the Yoruba community. Second, there appears to be a requirement for the marriage to be registered in accordance with the laws of Nigeria, whether Federal or in accordance with local government byelaws. It is apparent from the limited information that was before the FfT, that notwithstanding anything contained in any other enactment, every customary marriage is to be registered within sixty days in the area court or customary court where the marriage was contracted.

17. On any view, this second requirement is in our judgment fatal to the appellant's appeal. We drew Mr Nwaekwu's attention to the 'Certificate of Registration' that was before the FfT judge. The certificate confirms the date of marriage to be 16th February 2017, but the date of registration is said to be 5th June 2017. That is plainly outside the 60-day requirement for registration. Furthermore, the registration appears to have been by a registrar of marriage in Ijebu North Local Government Council in Ijebu Igbo Division of Ogun State of Nigeria, rather than in the area Court or Customary Court where the marriage was contracted, as appears to be required by Nigerian Law.
18. Although the FfT Judge did not refer to the COI report that was relied upon by the appellant, it is clear that it was in the end open to the Judge to conclude, as he did at [15]:
- “...In the absence of any evidence in support of his assertion that the marriage is valid, I cannot be satisfied that the marriage would (*sic*) recognised in Nigeria. If the marriage is not recognised in Nigeria, it would not be recognised in the UK for the purposes of EEA Regulations”
19. This appeal demonstrates the particular need for a party relying upon a marriage by proxy to ensure that there is adequate evidence before the decision maker that establishes on the balance of probabilities, that the marriage is valid and recognised by the law of the country where the marriage is celebrated (“*the lex loci celebrationis*”). In Kareem [2014] UKUT 24 (IAC), the Upper Tribunal confirmed that 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. Furthermore, the tribunal confirmed that it should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of 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 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. The observations made by the tribunal as to the evidential requirements Kareem remain undisturbed by the decision of the Court of Appeal in Awuku -v- SSHD [2017] EWCA Civ 178. We take this opportunity to reaffirm the guidance provided in Kareem:

- 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. It should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of 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 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.

20. Upon a proper application of the principles here, it is the paucity of evidence confirming there to be a valid marriage under Nigerian law, that in the end, caused the appeal to be dismissed by the FfT judge. It was in our judgment open to the FfT judge to conclude that in the absence of any evidence in support of the appellant's assertion that the marriage is valid, the judge could not be satisfied that the marriage would be recognised in Nigeria.

Decision:

21. The appeal is dismissed.
22. The decision of the First-tier Tribunal did not contain a material error of law and the decision of FtT Judge Taylor shall stand.
23. No anonymity direction was made by the FtT.

Signed _____ Date 23rd August 2019

Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

We have dismissed the appeal and there can be no fee award.

Signed _____ Date 23rd August 2019

Upper Tribunal Judge Mandalia