



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

Appeal Number: EA/06623/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd August 2019**

**Decision & Reasons Promulgated
On 20th August 2019**

Before

Upper Tribunal Judge Rimington

Between

**Babatunde Adebayo Ayoade
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: No representation

Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION

The appellant, a national of Nigeria born on 12th May 1980 appeals against the decision of First-tier Tribunal Judge NMK Lawrence promulgated on 18th January 2019 which refused his appeal. That appeal was against the Secretary of State's refusal dated 14th September 2018 of his application for a residence card under the Immigration (European Economic Area) Regulations 2016 on the basis that he had engaged in a proxy marriage to [JM] a Lithuanian national exercising treaty rights.

According to the decision of the Secretary of State, the applicant had not provided sufficient evidence to show he qualified as the spouse of an EEA national. The Secretary of State refused his application on the basis that (i) the registration of the marriage did not include all the elements required by the statutory provisions under Nigerian statutory law and (ii) that it was deemed that the claimed Court Registrar in Nigeria, confirming the marriage was in accordance with native and customary law, did not refer to statutory law and therefore the registration was not in accordance with Nigerian statutory law. The Court Registrar appeared not to be aware of the requirements and thus was not a competent authority with legal power to create or confirm the facts attested.

First-tier Tribunal Judge Lawrence decided the matter on the papers and set out the position of the respondent and referred to Section 42 Births Deaths etc (Customary Registration) Decree No 69 1992 Act Cap. B9 Laws of the Federation of Nigeria 2004 ('the 2004 Act'). He concluded that the Certificate of Marriage did not comply with the requirements of Section 42 of the 2004 Act namely that it did not include the EEA national's (the sponsor) relationship to the person who consented on her behalf to the marriage, the name of the person consenting, her nationality, her usual place of residence, State of origin, her age, marital status, the appellant's relationship to the person who consented to the marriage, the person who consented, the appellant's nationality, his usual place of residence, his state of origin, his age and marital status.

The judge concluded that the appellant had provided a 'to Whom It May concern' letter which was purposed to be issued by the Registrar of Marriages and found that a Registrar purporting to confirm that the marriage conformed with the 2004 Act did not mean it did conform and that conformation should be on the face of the document. Further there was no evidence of anyone consenting on behalf of the sponsor. The judge disagreed with the grounds of appeal at paragraph 16 and added that he had read the relevant Section 42, which provided the substance of what amounted to a proxy (customary) marriage but local governments had the duty to provide the procedure for the actual registration of the marriage. The judge found that those were two distinct matters.

The grounds of appeal advanced that

- (i) the judge erred because the document containing the details sought (form CM1) was already available and had been issued by the Customary Court
- (ii) the appellant had no control over how the local government issued the marriage certificate. There was enough evidence to show the marriage took place. Their relationship was genuine, and his wife was eight months pregnant.

The grant of permission noted that the judge made no reference to *Awuku v SSHD* [2017] EWCA Civ 178 and there were arguable errors of law. *Awuku* held at paragraph 23

'More fundamentally, I consider that in cases such as the present the application of the rules of private international law in the law of England and Wales would not, on any view, result in any incompatibility with EU law. The law of England and Wales recognises proxy marriage if valid by the lex loci celebrationis. Accordingly, a spouse of an EU national who has concluded such a marriage will qualify as a family member within Article 2 of the Directive'.

Analysis

The background to this appeal was that the appellant and his partner (the EEA national sponsor) had met at the University of Coventry in 2011, where they were both students. The appellant proposed to his partner in September 2017 after they had begun living together. They married under Nigerian customary law on 5th February 2018. The sponsor's mother ([RC]) and stepfather lived in the UK and gave their consent to the marriage which was arranged by the appellant's father. There was written evidence from the mother dated February 2018 that the couple had known each other for 7 years.

Both the appellant and his partner asserted they could not go to Nigeria for the marriage as the appellant at that time was pregnant. As set out in the witness statements, which were before the First-tier Tribunal judge, and dated 21st November 2018 the appellant's partner (the sponsor) had miscarried twice. She put it down to the stress she was suffering. There is medical evidence in the file which was before the First-tier Tribunal (antenatal reports naming the appellant), and thus confirming the relationship which was before the First-tier Tribunal. Those reports support the fact of a miscarriage on 11th November 2017. There is also medical evidence to show that the appellant was pregnant when she underwent the said proxy marriage in February 2018. It would appear from the reports that she experienced yet another miscarriage. Finally, a child was born on 25th June 2019.

The appellant made an application on 29th May 2018 for a residence card on the basis of a proxy marriage and in that application he set out when the relationship commenced, identified that the couple had commenced living together in September 2017 and that the sponsor was pregnant and expecting their first child. He noted that the sponsor was sick and could not travel. As the sponsor was (and is) employed and currently working (evidenced by a contract of employment and payslips in the bundle), no issue was taken with the issue of the sponsor exercising treaty rights. The appellant's partner has a residence card and is exercising treaty rights.

The Immigration (European Economic Area) Regulations 2016 set out as follows

"Family member"

7. - (1) In these Regulations, "family member" means, in relation to a person ("A")—

(a) A's spouse or civil partner;

...

“Extended family member”

8. - (1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).

...

(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker.

I find that the findings of the judge in relation to the proxy marriage itself were not subject to material error because although the appellant had maintained that not all documents had been considered, there was no record of a person consenting on behalf of the sponsor on the face of the marriage certificate itself.

Further to *AZ (error of law: jurisdiction; PTA practice) Iran* [2018] UKUT 00245 (IAC)

“Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:

(a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:

(i) for the original appellant ...”

The appellant had in his grounds of appeal challenged the decision of the respondent on the basis that the decision was not in accordance with the EEA regulations. At the hearing before me Mr Walker conceded that the First-tier Tribunal should have considered, and did not which was an error, whether there was a durable relationship under regulation 8. It was not a new matter but even so consented to its consideration. There was a wealth of documentation in the bundle which included witness statements, photographs, tenancy agreement, and antenatal medical reports, which indicated that the appellant and sponsor were in a durable relationship well before any proxy marriage. I accept that that was an obvious point on which the appellant did have, on the evidence, a strong prospect of success and that omission, with which Mr Walker agreed, was an error of law.

On that basis although I do not set aside the conclusions on the basis of the proxy marriage, I do set aside the dismissal of the appeal under the EEA regulations and remake the decision. There was an obvious omission in the reasoning and findings of the First-tier Tribunal.

A marriage certificate was produced which showed that the appellant and sponsor had married in the UK on 15th May 2019. The appellant sponsor and a child attended at court. A birth certificate was also produced which confirmed that the appellant and sponsor had a child born on 25th June 2019. With the agreement of Mr Walker, who conceded this was not a new matter as it related to the marriage, I admitted this evidence under rules 2 and 5 of The Tribunal Procedure (Upper Tribunal) Rules 2008. With reference to the EEA regulations I must consider the facts as they present at the date of the hearing, *Boodhoo and another (EEA Regs: relevant evidence)* [2013] UKUT 00346 (IAC). In the light of all the documentary evidence, including the UK marriage certificate (and the baby at court) I accept that the appellant and sponsor are married in the UK pursuant to the Marriage Act 1949 and this is not a marriage of convenience. The sponsor is an EEA national exercising treaty rights and I therefore allow the appeal under regulation 7 of the EEA regulations 2016.

For the reasons given above the Judge erred materially. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007

Decision

The appeal of Mr Ayoade is allowed under the Immigration (European Economic Area) Regulations 2016.

Helen Rimington

Upper Tribunal Judge

Dated 2nd August 2019

TO THE RESPONDENT **FEE AWARD**

Although I have allowed the appeal an I make no fee award because of the complexity of the matter.