



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

Appeal Number: IA/27500/2012

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 2 August 2013, 2 October 2013 and  
23 January 2014.**

**Determination**

**Promulgated**

**On 6 February 2014**

**Before**

**UPPER TRIBUNAL JUDGE LATTER**

**Between**

**OKEOWO OLUWATOYIN BOSE NEMACK**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr L Nwosu of DCK Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer (2 August  
2013 and 2 October 2013)  
Mr T Melvin (23 January 2014)

**DETERMINATION AND REASONS**

1. This is an appeal against a decision of the First-tier Tribunal dismissing an appeal by the appellant against the respondent's decision dated 7 November 2012 refusing her a residence card as confirmation of her right to reside in the UK.

**Background**

2. The appellant is a citizen of Nigeria born on 21 December 1973. She entered the UK in July 2008 and on 3 May 2012 applied for a residence card as the spouse of an EEA national exercising treaty rights. She

claimed that she had met her husband (the sponsor) Mr Uwe Nematik, a German citizen currently residing in the UK, in November 2008. They decided to get married on 16 December 2010 by proxy in Nigeria under native laws and customs and since then, they have continued to live together as man and wife. The respondent was not satisfied that their marriage was conducted in accordance with Nigerian law and did not accept the marriage certificate as lawfully issued or as evidence of their relationship. She went on to consider whether the appellant was entitled to a residence permit as an extended family member but, on the basis of the information provided, she was not satisfied that she was in a durable relationship as Mr Nematik's partner.

### The Hearing Before the Immigration Judge

3. At the hearing of her appeal the judge heard evidence from both the appellant and Mr Nematik. It was argued that their proxy marriage was valid and that they were in a durable relationship. In his findings of fact and credibility at [7] the judge dealt first with the issue of the durable relationship. He noted that the utility bills produced in evidence were in the name of the sponsor, care of the appellant, that bank statements were in the name of the sponsor and that apart from photographs contained in the bundle, there was no evidence of cards or other demonstrations of devotion between them. He found that there was little evidence to persuade him even on a balance of probabilities that the parties were in a durable relationship.
4. The judge then turned to the question of the proxy marriage in Nigeria. There was evidence in an affidavit from a Mr Ajayi that he personally presided over the marriage ceremony which took place in proxy form. The judge commented that whilst proxy marriages may be accepted in Nigerian customary law, the parties would have to adhere to some procedure whereby both would have to be represented and often their interest such as by token dowries being made. The judge said that whilst he found that a proxy marriage had been conducted, but not fully in accordance with the expected procedure in Nigeria, it was a cosmetic exercise that the appellant relied on to enhance her immigration status. He concluded that the sponsor was not the putative husband of the appellant as claimed or that they were in a durable relationship. For these reasons the appeal was dismissed.

### The Grounds and Submissions

5. In the grounds it is argued that the judge failed to deal with the real issues in the appeal and that there was a preponderance of evidence pointing to cohabitation by the couple either as durable partners or as a married couple. There was no categorical statement in the respondent's decision that this was a marriage of convenience. Proxy marriage had been accepted by the judge as valid in Nigeria and it was therefore valid in the UK. The grounds then argue that married couples or indeed unmarried EU

couples did not necessarily have to live together and that the appellant as a family member of an EU national exercising treaty rights was entitled, in the absence of any inference that there was a marriage of convenience, to enjoy the rights conferred on her under EEA regulations.

6. Permission to appeal was granted by the First-tier Tribunal, on the basis that there was a wealth of evidence in the file that the judge had arguably failed to engage with adequately.
7. Mr Nwosu submitted that the appellant was able to meet the requirement of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”) as she had contracted a valid proxy marriage. In the alternative, she was in a durable relationship with the sponsor and the judge had erred by failing to take into account all the relevant evidence. Mr Walker made the point that the validity of proxy marriages in Nigeria was an issue still being considered by the Upper Tribunal and accepted that the judge’s findings on that issue were not satisfactory. He did not seek to challenge the assertion that the judge had not given proper consideration to all the evidence produced in support of the fact that there was a genuine relationship between the appellant and the sponsor.

#### The Error of Law

8. I am satisfied that the judge erred in law such that his decision should be set aside. It is not clear whether he found that a valid proxy marriage had been conducted in Nigeria: he commented that the marriage had been conducted but not fully in accordance with the expected procedure. There was no clear finding on whether the marriage was valid in Nigerian law. He then commented that it had been a cosmetic exercise to enhance the appellant’s immigration status. This conclusion follows his finding that he was not persuaded that the parties were in a durable relationship but I am satisfied that on this issue he erred in law by failing to take into account the substantial documentation produced in support of the assertion that the relationship was genuine and durable. Although he dealt with some of the documents, he has not dealt with their cumulative effect.
9. Both representatives accepted that in these circumstances the proper course was for the decision to be set aside to be re-made by the Upper Tribunal at a further hearing. I made the following further directions:
  - (a) If it is proposed to call further oral evidence, an application must be made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 supported by witness statements drawn in sufficient detail to stand as evidence-in-chief no later than 14 days before the date of the resumed hearing, a copy being served on the other party.

(b) Any further documents to be relied on by either party are to be filed with the Tribunal and served on the other party no later than 14 days before the date of the resumed hearing.

10. The hearing was adjourned until 2 October 2013 when I heard further submissions from Mr Nwosu and Mr Walker. No further evidence was filed by either party and no oral evidence was called on behalf of the appellant. By that stage the Tribunal determination on the validity of proxy marriages in Nigeria referred to in [7] above had not yet been decided. The appeal was adjourned part heard and relisted on 23 January 2014 shortly after the decision in Kareem (Proxy marriage - EU law) [2014] UKUT 0024 was issued. At this hearing Mr Melvin also sought to rely on an unreported Tribunal decision, Igbede (IA/10669/2012) but this adds nothing to the reported decision in Kareem. Mr Nwosu relied on the bundle of documents (A) before the First-tier Tribunal and produced a skeleton argument.

### Further Submissions

11. In his submissions on 2 October 2013 Mr Nwosu relied on his original grounds of appeal at A12-18. He submitted that a valid marriage had been contracted between the appellant and her sponsor in December 2010 and that a marriage by proxy was recognised by the UK courts if it was valid in the country where it took place. Taking into account the documentary evidence submitted, there was clear evidence, so he argued, to show that the requirements for a valid marriage in Nigeria had been met. Customary marriages were recognised under the relevant legislation in Nigeria and the marriage was properly evidenced. On the issue of whether the appellant and sponsor were in a durable relationship within reg 8(5), he submitted that this had been established on a balance of probabilities. There was no indication that this was a marriage of convenience and the fact of the relationship was amply evidenced by the documents produced in support.

12. Mr Walker submitted that there was insufficient evidence to establish that a valid proxy marriage had been contracted and no evidence about the position in German law. Although submissions had been made about the position under Nigerian legislation, it was clear that there had been amendments to the Nigerian Marriage Act 1990. He submitted that there was inadequate evidence to show that there was a durable relationship between the parties. The documentary evidence did not discharge the onus of proof. The parties had been invited to a marriage interview but neither had attended. There were no statements from friends and at the hearing no further evidence had been put in about the relationship.

13. At the hearing on 23 January 2014 after Mr Nwosu had been given an opportunity of considering the determination in Kareem, he submitted that the evidence already produced provided a sufficient evidential basis for a finding that a valid marriage had been made. He referred to the

certificate of registration at A32 and the confirmation of customary marriage at A33. The marriage had been registered within 60 days as required by Nigerian law and there was further evidence at A34 from the appellant's uncle who was also a legal practitioner and at A35 confirmation from the appellant's father that the marriage had taken place and was conducted with the consent of both parents.

14. Mr Nwosu submitted that it would be harsh in the absence of any tangible contrary evidence to hold that these documents were not authentic and it was onerous for the appellant to try and prove the position under German law. The fact that the marriage was valid in Nigeria should be regarded as the overwhelming factor. He argued that if the marriage was accepted as valid in a non-EEA state, the marriage should be accepted as valid in absence of proof that the formal requirements were not met. He relied on the submissions previously made on the issue of durable relationship arguing that the preponderance of evidence was such that the only proper inference was that there was such a relationship.
15. Mr Melvin submitted that the appellant could not show that a legal marriage by proxy under customary law in Nigeria had taken place. Neither the appellant nor sponsor had been present. There was no evidence of the sponsor having family present or of their consent, a dowry being paid or that the marriage would be regarded as valid in Germany. He accepted that the appellant had supplied BT bills including her name from May 2011 to July 2012 at her sponsor's address and a medical card indicating that she resided at that address but these documents, together with the other documents submitted, did not amount to sufficient evidence to show that the couple had been or were in a durable relationship such that they could meet the requirements of reg 8(5) of the 2006 Regulations. There was very little evidence that the appellant actually resided with the sponsor. Her name did not appear on the tenancy agreement which stated that the gas/electricity/water and TV licence were all payable by the tenant. There was no explanation why, if the couple married in December 2010, no application had been made to regularise her stay until the application in May 2012. He submitted that the appellant could not show that the proxy marriage was valid in accordance with the principles set out in Kareem and that there was insufficient evidence to show that there was a durable relationship.

### Assessment of the Issues

16. The first issue which arises is whether the appellant is able to show that she is a family member of the sponsor, a German citizen exercising treaty rights in the UK. In order to show that she is his spouse, she has to show that there has been a valid marriage. She relies on a proxy marriage which she says was entered into in Nigeria on 16 December 2010. In Kareem the Tribunal held that in the light of the connection between the rights of free movement and residence and the nationality laws of the member states, in a situation where a marital relationship was disputed,

the question of whether there was such a relationship was to be examined in accordance with the laws of the member state from which the Union citizen obtained nationality and from which therefore that citizen derived free movement rights [17]. In summarising its conclusions the Tribunal said at [68(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.”

17. In the present case there has been no evidence produced to show whether the sponsor’s marriage would be regarded as valid under German law. Further, there is no adequate evidence to show that the marriage is valid under Nigerian law. In Kareem the Tribunal gave guidance on assessing firstly whether a marriage certificate had been issued by a competent authority at [33]-[44] and secondly, whether the marriage in that appeal was otherwise valid in Nigerian law at [45]-[62]. The Tribunal emphasised the need for proper evidence to show where a marriage certificate was relied on that it had been issued by an authority with legal power to create or confirm the facts attested. In the present case there is no adequate evidence to show that the documents relied on by the appellant at A32 and A33 are what they purport to be i.e. documents issued by an authority with the legal power to create or confirm what is attested. More generally, as the Tribunal in Kareem said at [68(g)] the mere production of legal materials from the country where the marriage took place would normally be insufficient evidence because they rarely show how the law is understood or applied in those countries. For these reasons I am not satisfied that the appellant has shown that she entered into a valid marriage by proxy in Nigeria.
18. I now turn to the issue of whether the appellant has shown that she is an extended family member as the partner of an EEA national who can prove to the decision maker that she is in a durable relationship with that EEA national: reg 8(5). The First-tier Tribunal Judge heard oral evidence which he did not find to be credible. However, that decision has been set aside and I must re-make it on the basis of the evidence before me. I make it clear that I do not take into account the judge’s credibility findings. However, the fact remains that I must deal with the issue on the basis of the documentary evidence in the absence of any further oral evidence. Directions were given enabling the appellants to file further oral evidence and it was open to them to give evidence before me but there has been no such evidence.

19. The appellant's witness statement is at A23-24. She says that she first entered the UK on 27 July 2008 and has remained since then. Shortly afterwards she met her partner and they entered into a relationship leading to marriage on 16 December 2010. She had previously been married to a man who had abandoned her and she refers to the decree nisi and decree absolute (A36 and 37). She says that she has lived with her husband since 2010 and it has continued to mature into a loving relationship. At [7] of her statement she adds that she has built up a close group of friends since living in the UK and enjoys a close relationship with them.
20. Mr Nemack's witness statement is at A25-26. He confirms that he is a German citizen and therefore an EEA national residing in the UK. He runs a business, Mackboss Resources, which sells second-hand goods including computers, televisions, kitchen equipment, shoes and toys. He says that he does not wish to be separated from his wife because they have built up a beautiful life together and he loves her very much. He then refers to the documents submitted in support of the application.
21. These documents are set out at A37-158. They include a tenancy agreement for the property at 9 Boxley House, E5 where the sponsor is identified as the tenant. There is a photocopy of the appellant's medical card issued on 12 April 2011 giving 9 Boxley House as her address. The appellant's name does not appear on the tenancy agreement or on any other bills save for the BT account which is addressed to the sponsor care of the appellant and on the TalkTalk monthly bills which are in the appellant's name. There are photographs of the appellant and the sponsor at [153]-[158], some showing them wearing traditional Nigerian dress and others western dress.
22. This evidence has to be assessed in the absence of oral evidence before me from the appellant, the sponsor or any of the close friends the appellant refers to in her statement, the absence of explanation why, if the couple married in December 2010, no attempt was made to regularise the position until May 2012 and the fact that having made their application, they failed to attend an interview on 20 September 2012 as requested by the respondent.
23. On the evidence before me the appellant fails to satisfy me that she has discharged the onus of showing on a balance of probabilities that she is or has been in a durable relationship with the sponsor. The documentary evidence without more does not satisfy me that they have been in a durable relationship. It follows that the appellant is unable to meet the requirements of reg 8(5). In the light of these findings I am not satisfied an appeal can succeed on article 8 grounds. The appellant has failed to show that there is any family life falling within article 8. In so far as she has private life in the light of the length of her residence in the UK, there was no adequate evidence to show that she can meet the requirements of

para 276ADE or that there are any sufficiently compelling or exceptional circumstances not covered by the rules which merit further consideration.

Decision

24. The decision of the First-tier Tribunal was erroneous in law and has been set aside. I re-make the decision by dismissing the appeal both under the EEA regulations and under article 8.

Signed:

Date: 4 February 2014

Upper Tribunal Judge Latter