Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/02175/2019
EA/02163/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 July 2021	**On 16 August 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

O A O (FIRST APPELLANT)
M V T O (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: unrepresented
For the Respondent: Mr S Kotas, Home Office Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The Appellants have been anonymised by Upper Tribunal Judge Keith on 26 March 2020. There is no reason for me to interfere with that direction. The first named Appellant is the father of the second, a minor. Their respective dates of birth are 11 December 1980 and 24 April 2014. I shall refer to the first Appellant as the Appellant.

2. On 8 December 2018 the Appellant made an application for a residence card as a family member of a European Economic Area (EEA) national exercising treaty rights in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations). The Appellant's application was based on his marriage by proxy to a Portuguese national, JPG. The application was refused by the Secretary of State on 6 February 2019. He appealed. His appeal was determined on the papers at the Appellant's request. The First-tier Tribunal (Judge Foudy) dismissed the appeal.

3. The Appellant was granted permission to appeal against the decision of the First-tier Tribunal on 14 February 2020 by First-tier Tribunal Judge Welsh. Thus, the matter came before me to determine whether the First-tier Tribunal erred.

The decision of the SSHD

4. The Secretary of State's refusal letter states as follows:-

> "The Secretary of State has therefore considered whether a marriage contracted by proxy is lawful and valid within Nigeria and whether the evidence of the marital relationship provided is sufficient to demonstrate it was properly executed as to satisfy the requirements of the law of the country in which it took place.
>
> The Nigerian Country of Origin Information (COI) Report, dated 14 June 2013, states that legal advice in Nigeria confirms that customary marriage performed by proxy in Nigeria is "legally binding where celebrated in accordance with the native law and custom of the particular community". However, polygamy, whilst permissible under Nigerian native and customary law, is not accepted under Nigerian civil law.
>
> As clearly stated in the fourth schedule to the 1999 Constitution of the Federal Republic of Nigeria
>
> The main functions of a local government council are as follows:
>
> (i) registration of all births, deaths and marriages;
>
> Section 63(g) of the Local Government Edict, 1976 ("LGE") empowers local government to register customary marriages. As a result, some local governments have bylaws for the registration of customary law marriages and some of these bylaws make registration of customary law marriages compulsory and prescribe a penalty for failure to register such marriage.
>
> In addition to the foregoing, the Birth, Death, etc. (Compulsory Registration) Decree No. 69 1992 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 contracted in or dissolved in Nigeria shall immediately after the commencement of this Act, be registered within 60 days in the area court or customary court where the marriage was contracted or dissolved.

This means that customary marriages contracted in Nigeria must be registered within 60 days and must be in accordance with the relevant local government bylaws. Part VI, Section 42 of the same Act lays out the provisions for registration of customary marriages.

(i) The solemnisation of a customary marriage in any part of Nigeria shall be registered within 60 days in the area court or customary court where the marriage was contracted.

(ii) Whenever a customary marriage is to be registered, the chief registrar will require the following information, that is –

(a) in respect of the bridegroom –

(i) his full names;

(ii) his marital status;

(iii) his occupation;

(iv) his age;

(v) the state of origin;

(vi) the address of his usual place of residence;

(vii) his nationality;

(viii) the name of the person who has consented to the marriage; and

(ix) his relationship with the bridegroom,

(b) in respect of the bride;

(i) her name;

(ii) her marital status;

(iii) her occupation;

(iv) her age;

(v) her state of origin;

(vi) the address of her usual place of residence;

(vii) her nationality;

(viii) the name of the person who has consented to the marriage; and

(ix) the relationship with the bride,

(c) such other information as the registrar may deem necessary for the registration of the marriage.

(iii) The form CM.1 set out in the first schedule to those Regulations or any similar form as may be used for giving the information required under paragraph (2) of this Regulation.

You have provided evidence of your marriage by proxy in Nigeria in the form of a marriage certificate dated 15 September 2018. As you have been issued a marriage certificate, it is considered that you are also asserting that your marriage was registered in Nigeria within the local state of Lagos on 20 September 2018.

In consideration of whether your proxy marriage has been properly executed as to satisfy the requirements of the law of the country in which it took place, the following has been noted; as evidence of your claimed legal registration you have provided a sworn affidavit or statutory declaration signed by your uncle and by your EEA Sponsor's uncle dated 20 September 2018 stating [OAO] and [JPG] married on 15 September 2018 and the marriage was conducted with the consent of both family members.

You have provided a document claiming to be from the customary court dated 20 September 2018 stating your uncle moved an oral motion on that day the marriage occurred and was supported by the affidavit submitted to the court.

It is noted the claimed customary court document that states an oral motion was provided by only one family member would be considered as insufficient evidence that your customary marriage was registered correctly in accordance with the Birth, Death Etc. (Compulsory Registration) Decree Number 69 1992 Act CAP.B9 laws of the Federation of Nigeria, 2004, as incomplete information was submitted to legally register your customary marriage with the area court or customary court based in the area that you claim your marriage to (sic) place. Moreover by providing this document it indicates that the claimed court registrar is not aware of the requirements of the Birth, Death, Etc. (Compulsory Registration) Decree Number 69 1992 Act CAP.B9 laws of the Federation of Nigeria, 2004 and therefore casts significant doubt on the genuine nature of this document. On that basis and without significant verification evidence to the contrary, it is deemed that the claimed court registrar stated is not a competent authority with legal power to create or confirm the facts it attests.

The marriage certificate you have provided has been stamped and signed by a claimed registrar, but no evidence has been provided to confirm that the person stated has the authority with legal power to create or confirm the facts it attests. On the basis of the evidence provided this department does not accept that the claimed marriage certificate has been issued by a competent authority.

It is also noted that the claimed registrar has signed both the marriage certificate and the customary court document. It is a requirement that the customary court document is issued by an independent third party to the marriage. As this claimed registrar has signed and issued both documents this information further leads this department to doubt that these documents have been issued by a competent authority.

You have not provided any evidence that your marriage certificate has been issued by a competent authority in Nigeria and it is not therefore accepted that your marriage certificate is a validly issued document.

On the basis of the above, the Secretary of State cannot be satisfied that your claimed marriage by proxy has been properly executed as to satisfy the requirements of the law of the country in which it took place and that the claimed marriage certificate has been issued by a competent

authority in Nigeria. Your application is refused with reference to Regulation 7 of the EEA Regulations 2006 …".

The decision of the First-tier Tribunal

5. The judge stated as follows:

> "7. The marriage that took place between the first Appellant and [JPG] was a proxy marriage that was registered in Lagos on 20 September 2018. In order to prove that the registration complied with Nigerian civil law, the first Appellant has produced a document from the customary court dated 20 September 2018 stating that the Appellant's uncle [AO], had himself moved an oral motion that day. It appears to have been signed by the customary court registrar, one [BSA]. However the same [BSA] is the official who has signed the proxy marriage certificate itself and who has registered the marriage with the Lagos state government. It appears strange indeed that the same official would be responsible for all aspects of the proxy marriage; this would appear to undermine the whole registration process.
>
> 8. In the Appellants' bundle [pages 26 and 27] is a letter written by the Appellants' representatives to the customary court registrar seeking further information. It singularly fails to address the real issue raised by the Respondent, namely the fact that the customary court registrar went on to formally register the proxy marriage at state level. [BSA] therefore failed to deal with the point in issue in her replies, merely asserting that proxy marriage is allowed in Nigeria and the marriage was registered.
>
> 9. I am not satisfied on the evidence before me that the marriage is properly registered in accordance with Nigerian civil law, that recognises proxy marriages only in certain circumstances.
>
> 10. Taking all of the above into account, the Appellant has failed to discharge the burden of proving that he is married to an EEA national and entitled to a residence card under the 2016 Regulations. It follows that both appeals fail".

The grounds of appeal

6. The grounds of appeal that were before Judge Welsh assert that the judge erred in law as he misdirected himself as to the relevant law and failed to make the relevant assessment as to what constitutes a valid foreign marriage recognised in the UK. They state as follows about the judge:-

> "Failed to appreciate the fact that it is outside his jurisdiction for him to ascertain how a country should have conducted a marriage, and as such it is only the relevant competent authority of that country that could establish if a marriage is valid or not, and that once those authority ascertain that the said

> marriage is valid, the lexi-loci principle applies and such marriage must be recognised in the United Kingdom as valid".

7. The case of Awuku and Secretary of State [2017] EWCA Civ 178 is relied on, specifically paragraphs 15.

8. It is asserted that the Appellant provided an adequate marriage certificate and the judge failed to attach due weight to this and the other cogent documents. It is asserted that the judge took irrelevant matters into account. It is asserted that the judge "misguided himself."

9. It is asserted that the decision is ill-founded, flawed and unlawful. The judge is misguided when he finds that the letter at page 26 of the AB fails to deal with the issue (at para 8). It is not correct because pages 24 and 26 of the AB confirm that the that registration was properly done pursuant to relevant law. The judge failed to "avail himself of the detailed grounds of appeal" which give a detailed legal explanation of what constitutes a customary marriage in Nigeria. The judge created a supposedly (sic) rule on how the Nigerian customary marriage should have been conducted. The following is asserted in the grounds:-

> " …case further turned upon the IJ at paragraph 6 where he asserts that it is The Appellant's duty to adduce before him reliable evidence, this was what the Appellant placed before the IJ but unfortunately, the IJ was not interested in according due weight despite the fact that the response from the customary court lends credence to the Appellant's marriage to a spouse".

10. It is asserted that the Appellant successfully discharged the burden of proof however the Respondent failed to "proof (sic) its case." It is asserted that there has been a "serious mishandling of his case and the use of assumptions and hearsay by the Respondent and its agents".

Written submissions

11. The written submissions are similar to the grounds in content and tone.

12. It is asserted that the judge erred in "overlooking material evidence re marriage certificate and confirmation from the relevant authority in Nigeria". It is asserted that the Appellant provided a valid marriage certificate and in addition the registrar who is the authorised person to register marriages wrote a confirmation letter enclosing the form MCM1 and affirming that the marriage had indeed complied with all the requirements and had been registered as required by the relevant law.

13. The grounds state that the Appellant's solicitors wrote to the customary court on 28 June 2019 (post the date of the decision) in preparation for the appeal. The following is stated,

> "It is submitted that the FtJ had no jurisdiction to rule on the procedure of 'how' and 'why' the marriage certificate was issued if there is no counter evidence

> before him from the Respondent asserting that there is an issue with the documents or that the said customary court had denied issuing any of the documents contained in pages 13 to 27 of the Appellant bundle showing the Appellant's valid marriage certificate and confirmation letters from the relevant registrar who registered the marriage".

14. It is claimed that the judge made an error of law at paragraph 7 for the following reasons:-

> "In creating his own law in regards to how the marriage should have been registered, the law as it is applied in Nigeria is not in the jurisdiction of the IJ and in the absence of any counter evidence from the Respondent, the IJ has acted ultra vires and taken irrelevant matters into account".

15. It is claimed that the finding made by the judge "is erroneous, exaggerated, and uncalled for". It shows that the judge did not "understand the marriage process and failed to review the papers before him adequately". The relevant registrar did not do all aspects of the proxy marriage, he only conducted his part of it which is to register the marriage on 20 September 2018 and confirm he did so in a letter. The judge failed to adequately determine the matter before him. The judge did not have regard to the evidence.

<u>The evidence before the First-tier Tribunal</u>

16. There was a bundle before the First-tier Tribunal which contains a witness statement from the Appellant and one from the Sponsor. In addition there is a document (AB/14) which is a certificate from Lagos state government purporting to certify that the Appellant was married to the EEA national and that the marriage was performed according to native law and custom. There are two dates on the bottom of this document, one 15 September 2018 (which is the date of the marriage) and the second 20 September 2018 (which is the date of issue). The document is stamped and signed by the registrar, Billy Sherifat Abosede.

17. There is a document (AB/15) dated 20 September 2018. This document is similarly signed by the court registrar, Billy Sherifat Abosede. It is from Mushin Local Government and it purports to be confirmation of a traditional marriage under the native law and customs between the Appellant and the EEA Sponsor. The document states as follows

> "We hereby confirm that, above captioned persons married under the native law and customs on the 15th day of September, 2018 at 83, Oriokuta, Ikorodu, Lagos state of Nigeria.
>
> The groom's uncle Mr [AO] moved an oral motion in the court on 20th day of September 2018 to this effect suitably supported by seven paragraphs affidavit and completed form MCM.1 submitted to the court by himself.

The traditional marriage conformed with the native law and customs of the land …".

18. There is a form MCM.1 (registration of native law and customs marriage (AB/16). This document is dated 20 September 2018. It is signed by the uncle and stamped and signed by Billy Sherifat Abosede, the registrar.

19. There is a document (AB/18) dated 20 September 2018 and entitled "in the Magistrate Court of Lagos state of Nigeria Holden at Ogba". It is a sworn affidavit from the Appellant's uncle, comprising seven paragraphs. There is a sworn affidavit in similar terms from PGI the uncle of the EEA Sponsor. There is a document (AB/23) which is described as a decree absolute supporting that the Appellant is divorced.

20. There is a document (AB/24) from Mushin Local Government dated 3 July 2019 (after the date of the decision). It is an affidavit from the court registrar Billy Sherifat Abosede and it attests that the registration of the marriage was properly done "pursuant to the relevant laws stated above and duly signed by the authorised official of this honourable court". There is a document of the same date (AB/25) from Mushin Local Government signed again by Billy Sherifat Abosede the court registrar which attests to the marriage being conducted under the native law and custom of Lagos state, Nigeria. These documents (AB/24 and AB/25) are a response to a letter to the registrar from Chris Alexander Solicitors (AB/26) dated 28 June 2019 asking for confirmation that the marriage certificate was issued and valid and that the marriage was duly and fully registered as required by the relevant customary law of Mushin Local Government of Lagos state and that this was duly attested by the relevant authorised offices and that either party to the marriage and/or their family member.

The hearing before the UT

21. The Appellant did not attend the hearing before me. The solicitors on record were contacted by the clerk. They said that they had written to the Tribunal to ask to come off the record one week before the hearing. There was no record of this before me. In any event, I was satisfied that Appellant had been sent a notice of hearing. It had been sent to his solicitors before they came off the record and to his home address. The Apppellant chose not to attend the hearing before the First-tier Tribunal. He has not responded to directions issued by the UT. Applying Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the 2008 Rules), I concluded that it was fair and just to proceed with the hearing in the Appellant's absence.

22. Mr Kotas, representing the Secretary of State, submitted that there was no error of law. There was a Rule 24 response from the Secretary of State of 13 May 2020. The thrust of it is that the judge was faced with a paper hearing and the evidence before her. The judge concluded that given the same person who signed the register formally registered the marriage at state level and replied to the replies to the representative's letter (AB/24/25 and 26) undermines the process. The judge was

not given any expert evidence that this is permissible under Nigerian law. The burden of proof is on the Appellant.

23. Mr Kotas submitted the burden of proof rests on the Appellant and the Appellant did not produce evidence to engage with the issues raised in the Reasons for Refusal Letter or indeed to address or explain the requirements of the Nigerian law.

Awuku and Secretary of State [2017] EWCA Civ 178

24. In Awuku the Court of Appeal considered proxy marriages in the context of the EEA Regulations and confirmed the formal validity of a marriage is governed by *lex loci celebrationis;* namely; that a marriage celebrated in the mode or according to the rites or ceremonies required by the law of the country where the marriage takes place is, as far as formal requisites go, valid. In general the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted.

25. To summarise, if the Appellant's proxy marriage is recognised in Nigeria, the marriage is valid under the law of England and Wales and, as a consequence, the relevant requirements of the EEA Regulations are met.

Findings and reasons

26. The judge correctly identified the burden of proof at paragraph 3. He properly stated that it was for the Appellant to prove that any document upon which he sought to rely is reliable and he acknowledged that he must consider the evidence in the round.

27. The issue before the judge was whether the marriage had been conducted in accordance with Nigerian law. To suggest that the judge did not understand this does not reflect a proper reading of the decision and ignores what is clearly stated by the judge. The decision discloses a clear understanding that Awuku applied.

28. It is for the Appellant to establish that the marriage was properly registered in accordance with Nigerian civil law. I have considered the grounds of appeal before the First-tier Tribunal and it is fair to say that there was no coherent legal argument setting out the requirements under Nigerian Law and how the Appellant met them. There was no proper analysis of Nigerian law. Similarly, there was no expert evidence relied on by the Appellant. Bare assertions were made in the grounds and Nigerian caselaw cited without proper or clear explanation or analysis. The grounds of appeal were of little, if any, assistance to the judge concerning the legal requirements of a marriage to be valid under Nigerian law.

29. The grounds before me are an attempt to re-argue the case. They are overly argumentative. The judge was not under any obligation to accept the documents at face value as reliable, despite the misplaced indignation expressed in the grounds and written submissions. The judge was entitled to conclude that the evidence relied on by the Appellant was not sufficient to discharge the burden of proof. A

proper reading of her decision indicates that she did not find that the documentary evidence was reliable or sufficient to discharge the burden of proof. She found that the Appellant had not engaged with the issues in the decision letter. The judge relied on a point raised by the SSHD about the documents having been signed by the same person. It was a point on which the judge was entitled to rely. The Appellant did not at any time seek to address this. Further documents were obtained from Nigeria, signed by the same person.

30. The is no error of law properly identified in the grounds. The decision of the judge to dismiss the appeal is maintained.

31. In any event, if I were to set aside the decision and remake the decision on the basis of the evidence that was before the First-tier Tribunal Judge, I would conclude that the Appellant had failed to discharge the burden of proof to establish that the marriage was lawful under Nigerian law. While the decision of the SSHD does not make for easy reading, issues were raised which the Appellant failed to address. Furthermore the burden is on the Appellant to establish that he meets the requirements of Nigerian law. He has failed to do so.

32. The judge did not make a finding in respect of the durability of the relationship, a matter which is raised in the grounds of appeal before the First-tier Tribunal. However this is not an issue raised in the grounds of appeal before me. In any event, the evidence before the judge was in my view skeletal. There are witness statements from the Appellant and his partner which comprise two pages and there are a number of photographs showing a couple together. The evidence is not sufficient to discharge the burden of proof. It does not establish that there is a durable relationship. The Appellant chose for the matter to be determined on the papers before the First-tier Tribunal. The judge did not have the benefit of hearing oral evidence from the Appellant or his partner.

33. There is no error of law in respect of the judge's decision as it concerns the appeal under Regulation 7 of the 2006 Regulations. The decision to dismiss the appeal is maintained. I further dismiss the appeal under Regulation 8.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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Signed *Joanna McWilliam* Date 27 July 2021

Upper Tribunal Judge McWilliam