Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19726/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 14th February & 4th December 2013	**On: 09th December 2013**

Before

Upper Tribunal Judge McKee
Resident Judge Conway

Between

LASISI ABUDU IBRAHIM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Clodaghmuire Callinan, instructed by Owoyele Dada & Co.
For the Respondent: Miss Alice Holmes of the Specialist Appeals Team

DETERMINATION AND REASONS

1. On 22nd March 2012 an application was made on behalf of the appellant, a citizen of Nigeria born 27th March 1972, for a residence card as the husband of a Portuguese national who was exercising 'Treaty rights' in the United Kingdom. The couple were said to have been married by customary law in Nigeria on 24th December 2011. The

evidence for this was an affidavit sworn by the appellant's father on 9th March 2012 at a Magistrate's Court in Lagos, a certificate of marriage by Native Law and Custom issued on 9th March 2012 by a registrar of the Mushin Local Government, and a letter of even date from a customary court of Mushin, issued by the same registrar and confirming that the couple were married in conformity with "*the Native Law and Customs of the land*." The groom's father had moved an oral motion in the court that day, supported by the affidavit sworn on the same day at the Magistrate's Court. None of these documents mention that the bride and groom were in England when the marriage took place.

2. The application for a residence card was refused on 29th August 2012, on the basis that there was no evidence that the couple were present at the marriage ceremony in Nigeria. It may not have been made clear, when the application was lodged, that the marriage had taken place by proxy. When the appeal against refusal came before the First-tier Tribunal, however, Judge Keith Brown took the view that "the issue in the appeal is whether proxy customary marriages are lawful in Nigeria." The background material before him indicated that "*customary marriages are recognised under the Nigerian civil law*" but that "*proxy marriages are not recognised under Nigerian civil law*", with the result that a proxy customary marriage "*is not a legal marriage in Nigeria*." The appeal was dismissed, and permission to appeal to the Upper Tribunal was granted on the basis that the judge had not taken account of the documents from Nigeria listed above. That is quite correct. Although the judge mentions the documents at paragraph 8 of his determination, he does not say what he thinks of them, and they play no part in his reasons for dismissing the appeal.

3. When the appeal came on before us on 14th February, we identified another error of law. It is simply wrong to say that a customary marriage celebrated by proxy cannot be a legal marriage in Nigeria. Statutory marriage under the Marriage Act 1990 exists side by side with marriage in accordance with Native Law and Custom, and both forms of marriage are lawful. The former does not allow marriage by proxy, but the latter does. The question therefore for the Upper Tribunal is whether in the instant case a proxy marriage took place on 24th December 2011 in accordance with Native Law and Custom.

4. Miss Callinan submitted for the appellant that we cannot go behind the documents issued by the customary court of Mushin. The registrar was satisfied that a valid customary marriage had taken place, and that should be the end of the matter. We are not so sure. When a customary marriage is celebrated in the absence of the bride and groom, we think that their parents must give their consent, that members of both families must be present (indeed they would have to be at a 'normal' customary marriage) and that dowry must be paid. There was no evidence before us that these incidents of a customary marriage were present in the instant case, save for the assertion in Azeez Ibrahim's affidavit that "*the marriage was conducted with the assent of both parents*."

5. We were minded to adjourn the case so that evidence could be obtained that these requirements had been met. But Miss Callinan told us that her instructing solicitors had thirty similar cases on their books, and that it would be very burdensome for evidence to be obtained for all of them when it might be that the certificate of a customary court was (contrary to our view) all that was needed to establish a valid

customary marriage. Many other appeals on exactly this point were currently going through the First-tier and Upper Tribunals, and we were aware that a test case was likely to come before a Presidential or Vice-Presidential panel in the next few weeks. We therefore decided not to direct at this point that further evidence be obtained, but simply to adjourn the case and re-list it 'for mention only' in six weeks' time. By then it should have become clearer what would be the best way of disposing of the instant appeal.

6. As it turned out, the test case was listed in June but adjourned in order for the parties to address an issue raised for the first time by the Vice-Presidential panel, namely whether the Union citizen spouse in such cases is permitted by the law of the Member State of which she is a national to contract a marriage by proxy, or a marriage which is potentially polygamous (as Nigerian customary marriages are). The hearing of the test case was not resumed until the end of October, and the determination has not yet been promulgated. In the meantime, the instant case has been listed twice 'for mention' only, and once for a substantive hearing, which was adjourned with directions this time for further evidence that the incidents of a customary marriage had been observed.

7. When the case finally came before the Upper Tribunal again on 4th December, I sat alone. The appellant was in attendance and Miss Callinan did her best for him on the basis of what evidence there was. The documentary evidence has not been greatly supplemented since the original hearing before the First-tier Tribunal last year. There is a letter dated 28th January 2013 from the Registrar of the Customary Court in Mushin, to confirm that "*this traditional customary marriage by proxy was conducted with the consent of the parties, families, dowry accepted and the marriage conformed with the Native Law and Customs of the Land*." Little weight can be attached to this letter. It was written at the behest of the appellant's father, from whom came all the information in the sentence just quoted. There is an Affidavit from the appellant's aunt, sworn on 26th March 2013, declaring that she was present at the proxy marriage ceremony, and that "*the marriage received the blessing of both families*." An identical declaration was made by the appellant's brother, in an Affidavit sworn on the same date. These declarations do not take matters any further. The manner in which the marriage was blessed by both families is left wholly, and perhaps deliberately, vague and unspecified. Finally, Miss Callinan handed up some colour photographs, which had been brought for the first time that morning. They depict a social gathering of Nigerian folk, the women in their traditional finery, and with local agricultural produce on display. One is asked to accept that the social gathering is the celebration of the appellant's customary marriage by proxy, and that the local produce is the dowry paid to the bride's family.

8. Even if these photographs were taken on 24th December 2011 ~ in which case, one wonders why they were not produced to the tribunal sooner ~ it is clear that no member of Anabela da Costa's family was present. So one essential ingredient of a proper customary marriage was missing. There was no one to give the dowry to. Nor is there any direct evidence from the bride's parents that they gave their consent to the marriage. So another ingredient of a valid customary marriage is missing.

9. It was not necessary to deal with the question posed in the forthcoming 'reported' decision of the Vice-Presidential panel about the ability of the Union citizen spouse to

contract a marriage of this nature. Nor was it necessary to do more than remark in passing that marriage certificates purportedly issued by registrars of customary courts are unlikely to be reliable evidence that a customary marriage has taken place, as there is apparently no official system in Nigeria for the registration of customary marriages. It suffices to say that the evidence adduced in the present appeal is insufficient to demonstrate on a balance of probabilities that a valid customary marriage has been celebrated in Nigeria between the appellant and Anabela da Costa. It follows that the appellant cannot be regarded as the 'family member' of an EEA national who is exercising Treaty rights in the United Kingdom.

10. When the appeal came before Judge Brown last October, he quite rightly rejected the possibility that there was a 'durable relationship' between the appellant and an EEA national. There was simply not enough evidence to support this alternative route into the EEA Regulations. If there now is good evidence of a durable relationship, it is open to the appellant to apply for a residence card on that basis. But for present purposes, although the First-tier determination must be set aside and the decision on the appeal re-made by the Upper Tribunal, the outcome is the same.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

5th December 2013