Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02433/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype	**Decision & Reasons Promulgated**
On 23 October 2020	**On 3 November 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ADEOLUWA OLREWAJU AKANDE
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ojukotola of SLA Solicitors.
For the Respondent: Mr C Bates Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Trevaskis ('the Judge') promulgated on the 19 November 2019 in which he dismissed the appellant's appeal.

Background

2. The appellant is a citizen of Nigeria born on 2 June 1983. He appealed the respondent's refusal, dated 7 May 2019, to recognise his right to reside in the United Kingdom as the spouse of an EEA national pursuant to the Immigration (EEA) Regulations 2016.
3. The application for a residence card was refused as the respondent was not satisfied that the appellant was lawfully married to a qualified EEA national as he had not proved that the claimed proxy customary marriage was legally accepted in Nigeria.
4. The Judge's findings are set out between 17 – 21 of the decision in the following terms:

> "17. The appellant has addressed the reasons for refusal in his witness statement. He has used his birth certificate, identifying his father whose name is the same as the maker of the affidavit of attendance at the marriage ceremony. I am satisfied to the required standard that the appellant was represented by his father at the ceremony.
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> 18. No affidavit has been provided by the representative of the bride who attended the wedding, and no explanation has been provided for the lack of such evidence. No evidence has been provided to confirm that the validity of the customary proxy marriage is recognised in the country of domicile of the sponsor, the Netherlands.
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> 19. With regard to the registration marriage, appellant has not addressed the concern of the respondent arising from the fact that the registration of the marriage and the confirmation of the traditional marriage under native law are signed by the same person. Since the appellant relies on documentary evidence in support of his appeal, it is not in his interests failed to address concerns regarding those documents.
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> 20. The appellant and the sponsor failed to attend marriage interviews on both occasions, and no explanation has been provided for those failures. Bearing in mind the burden of proof, I find that the unexplained failures damage the appeal.
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> 21. Accordingly I find that does not meet the requirements for recognition in **CB (validity of marriage; proxy marriage) Brazil [2008] UKAIT 00080**."

5. The appellant sought permission to appeal which was refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal, the operative part of the grant being in the following terms:

> "1. It was arguably erroneous to state at paragraph 18 of the decision that no explanation had been provided for the lack of an affidavit from a representative of the bride when, arguably, an explanation was given, which is that Nigerian law only required one affidavit.
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> 2. It was arguably erroneous for the judge to state at paragraph 20 that no explanation was given for not attending two

marriage interviews when, arguably, the appellant gave an explanation, which was that he had not been made aware of the interviews.

3. It was arguably inconsistent with Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178 to (in paragraph 18) treat as relevant that there was no evidence provided confirming the validity of the marriage in the Netherlands."

6. In her Rule 24 response dated 8 September 2020 the respondent writes:

"2. The respondent opposes the appellant's appeal. In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal (FTTJ) appropriately and there is no material error of law that would alter the outcome of the appeal.

3. Whilst it is accepted at [18] the FTTJ refers to the lack of evidence from the Netherlands that the marriage was recognised there, it is clear that the FTTJ recognised this as not being required at [16] in line with the findings in **Awuku**. The FTTJ within [10–16] clearly directs himself to the legal focus being on the recognition of the marriage within the contracting state rather than an EEA member state. It is simply a reference to the absence of evidence on this point and in the context of an absence of persuasive evidence overall.

4. As noted at [6] the burden of proof remains on the appellant to show that the customary marriage was recognised in law.

5. As noted above, the FTTJ was entitled to note the Tribunal's consideration and findings with Kareem since they related to the recognition of customary marriages in Nigeria. As set out in Kareem at para 68 of the headnote:

> "g. *It should be assumed that more 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. The production of legal material from the EEA country or country where the marriage took place will be sufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertion as to the effect of such laws will, for similar reasons, carry no weight."*

6. As observed by First-tier Judge Froom in the refusal of permission to appeal to the First-tier Tribunal, the documents referred to in the grounds and notice of appeal were not extracts of law, or indeed independent evidence about the recognition of the marriage. As such they were mere assertions that as per Kareem and thus carry no weight.

7. As set out in Kareem at paras 54 – 55, the recognition of a customary marriage requires a dowry and evidence of consent, capacity to marry and a formal giving away of the bride, and the presence of a member from both families present at the ceremony:

> *"54. The balance of the evidence before us is that a dowry is a requirement of a customary marriage in Nigeria, and indeed there appears to be no evidence to the contrary. Similarly, and to the contrary, we conclude on the balance of probabilities that a customary marriage will not be regarded as a marriage in Nigerian law unless there is evidence of the parties' consent, that they have the capacity to marry and that there has been a formal giving away of the bride (i.e. parental consent to the marriage). Unless evidence demonstrates that these requirements do not apply in the relevant community these criteria will be the usual starting point for deciding if a marriage has been contracted.*
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> *55. We recognise that this cannot be an exhaustive list because, as the Nigerian case law indicates, the requirements for a marriage to be accepted as having been contracted by custom and native law varies within Nigeria. We are aware from other sources that the parents or at least a member of both the bride and groom's families should be present at the proxy marriage ceremony because a customary marriage is a union between two families rather than just two individuals. But this point has not arisen in the appeal before us and we merely mention it as an observation that the list in the preceding paragraph should not be regarded as exhaustive."*

8. There is no evidence of a dowry - the reference to 'assorted gifts' on form MCM.1 - Registration of Native Law and Customs Marriage, a form completed and signed by the person claiming to be the father of the appellant is not in itself evidence of a dowry. Nor is it evidence of capacity to marry or that there has been a formal giving away of the bride. Indeed the same form refers to 'Non Applicable' in the section 'date of betrothal'. There is no evidence in relation to the person who is declared as being representative of the bride, no indication that Ms Priscilla Hooker is related to the bride, or was present at the marriage ceremony. Whilst the decision letter of the SSHD refers to an affidavit from the bride's family the purpose of any affidavit would be to attest these matters, namely consent to marriage and evidence of a formal giving away of the bride. A parallel can be drawn with the appellant in Kareem, where it was claimed at the proxy marriage was valid having been conducted in Lagos State, likewise there was an absence of detailed evidence of a dowry, and consent. Certainly there is no evidence emanating from the bride's family which is surprising given as identified above the marriage is considered a union of two families rather than just two individuals. An explanation of there being no need for an affidavit does not eradicate the requirement to show that the marriage was conducted in accordance with the law.

9. In relation to the matter of not attending the two interviews as requested, it is noted that the email address detailed for the appellant as per the grounds lodged is 'slasolicitors@hotmail.co.uk'. This being the same email address provided to the SSHD as part of the application for a Residence Card and detailed on the representative's letter. The invitations to interview were sent to this address, therefore it is rather surprising that the representative on the behalf of the appellant assert that the invitations for both the

appellant and sponsored to attend an interview were not received, since it was sent to the representatives acting on their behalf. It is not clear if the evidence in relation to the interview invitations was before the FTTJ, but for convenience they are attached to this correspondence. If the Tribunal were to conclude that this evidence was not before the FTTJ, and the FTTJ materially erred an application is made under Rule 15 (2A) for it to be admitted into evidence. It is submitted therefore that the claim to have not received the invitations is not considered persuasive.

Error of law

7. On behalf of the appellant Mr Ojukotola argued, inter alia, that as the customary marriage undertaken by the appellant was registered in Nigeria under the valid rules of law it should have been accepted by the Judge that all relevant requirements of the law had been met as evidenced by the documentation provided.
8. In relation to the issue of bridal consent it was submitted the evidence included relevant marriage documents including those showing the father of the groom had moved a motion in the High Court to the effect that all the formal requirements had been satisfied. It was also argued that the fact the proxy customary marriage had been registered meant the Registrar would have been satisfied that all the requirements of the law had been met. It was submitted the Registrar would have dealt with all relevant issues and that there was no formal requirement for there to be a sworn affidavit filed by the appellant's wife or her family as the same is not needed.
9. Mr Ojukotola submitted that it was not for the Secretary of State to say that the documentary evidence was not sufficient.
10. In relation to the dowry, Mr Ojukotola submitted that the entry in form MCM.1 did refer to an item with a tangible value namely 'assorted gifts'. It was argued that the requirement varies from one community to another and that the rules relating to the dowry had changed that in the south-west of Nigeria referring to 'assorted gifts' was sufficient, no matter how small. It was submitted the change came about so as not to dissuade people from marrying by saying that something had to be given. It was argued that the gift was in the form completed before the marriage was registered and that the Registrar was the person with the competent authority to register the marriage and so the Registrar would have been satisfied.
11. It was argued if the respondent wished to raise issues they must be within the ambit of Nigerian law and that it was not open to the Secretary of State to raise issues without setting out which parts of the law have been violated.
12. The submission made by both parties are noted.
13. The reference in the refusal notice to the lack of an affidavit is not an assertion that Nigerian law requires an affidavit from both parties but a reflection of the fact that the only evidence provided with the application was an affidavit purportedly sworn by the appellant's father with nothing from the bride or the bride's family.

14. There are a number of formal requirements for a valid customary marriage in Nigeria. It is not disputed such marriages can be recognised as valid within Nigeria whether conducted by the bride and groom being present or by proxy, provided the requirements have been satisfied. Those requirements are, in summary, (a) parental consent to reflect the status of marriage as an alliance between two families, (b) consent of the parties as it will be contrary to natural justice if a person was compelled to marry, (c) capacity to marry (d) Dowry/ bride price, item or items to reflect the tangible value being placed upon the woman transferred from her family to that of the groom, (e) formal handing over of the bride at the marriage ceremony.
15. The Secretary of State in the refusal did not accept that the documents relied upon by the appellant established this was a valid proxy marriage. It is specifically stated in the refusal that the decision-maker was not satisfied that the proxy marriage had been carried out in accordance with Nigerian Law.
16. Despite this clearly having been a matter of concern which would have been known to the appellant, the Judge's finding that insufficient evidence had been provided to address the respondent's concerns is a finding within the range of those available to the Judge on the evidence. Nothing further had been provided to show whether the bride's family had consented. Providing the documents relied upon by the appellant did not arguably discharge the burden upon him to prove the marriage was valid. Before the Judge the appellant relied upon the same documents he provided with the application without provided anything further which, if the marriage was valid and had been registered as such, must have been provided to the Registrar to prove the requirements of a customary marriage had been complied with. The failure to provide what should have been readily available supports the Judge's concerns.
17. In relation to the submissions made before the Upper Tribunal concerning changes in local practice concerning the dowry, there was no evidence that such a claim was made known to the Judge and indeed Mr Ojukotola conformed that such evidence had not been provided. As shown above, the issue of the dowry is a relevant matter when considering the validity of a customary marriage and the evidence provided to the Judge did not establish that the formal requirements had been met.
18. The assertion by Mr Ojukotola that the respondent should have made a clear reference to Nigerian law if believing the document signed by the competent authority was not sufficient is noted, but it was not made out the respondent was unable to raise concerns on the basis of the material provided to her in support of the application. The appellant claimed to have been married to his wife. This claim was rejected in the refusal and the appellant clearly put on notice of the concerns that arose in the mind of the decision-maker. Despite that nothing further was provided and the finding by the Judge that insufficient evidence had been provided to establish that the requirements of a valid customary marriage had been complied with has not been shown to be a finding

outside the range of those available to the Judge on the evidence. The weight to be given to the evidence was a matter for the Judge.

19. Mr Ojukotola did not address the question of the appellant's failure to attend the marriage interview on three occasions in his submissions. There was no challenge to the statement in the Rule 24 reply that the invitations were sent to the email address of Mr Ojukuotola's firm and no indication that they were not passed on to the appellant. The respondent's guidance makes it clear that failure to attend an interview will not, in isolation, justify refusal but it is clearly a material factor that the appellant and the woman he claims to have married failed to avail themselves of the opportunity to attended the marriage interview where any concerns could have been put to them, giving them the opportunity to reply. The fact the appellant also elected to have the merits of the appeal determined on the papers, whilst an option open to him in law, also prevented the Judge being able to discuss his concerns with him.
20. I find the appellant has failed to establish the Judge's decision is outside the range of those reasonably open to him on the evidence. The reference to the marriage not being recognised in the Netherlands at [18], whilst an error of law, has not been shown to be material to the decision to dismiss the appeal.

Decision

21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson Dated the 28 October 2020