IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04999/2019

THE IMMIGRATION ACTS

Heard at Field House via Teams Video Link
On 24 May 2021

Decision & Reasons Promulgated
On 10 June 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR IBRAHIM MURITALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Tampuri, solicitor
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the Secretary of State made on 11 September 2019 to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the spouse of Anna Eriksson, a Swedish citizen exercising treaty rights in the United Kingdom. His appeal against that decision to the First-tier Tribunal was dismissed for the reasons set out in the decision of First-tier Tribunal Judge Head promulgated on 25 November 2019. That

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decision was set aside for the reasons set out in my decision of 14 December 2020, a copy of which was annexed to this decision.

2. The appellant's case is that he met his wife in the United Kingdom. They were married by a double proxy, that is, that neither of them were present but that the ceremony was conducted according to customary law by those appointed to do so in Nigeria. That marriage took place on 11 August 2018.

3. The appellant obtained a certificate from that and submitted it as application for a residence card. That was rejected by the Secretary of State on the basis that the certificate supplied was a civil, rather than a customary marriage certificate and thus was incorrect.

4. The appellant did not appeal the decision but contacted the registry who, he says, admitted to issuing the wrong certificate and then issued the correct, customary marriage certificate and the letter attesting to its validity.

5. The appellant made a fresh application for the residence card on the basis of the customary marriage certificate but, on 11 September 2019, the respondent refused that application on the basis that:-

   (1) the documents were insufficient evidence of a proxy marriage without the evidence of an affidavit signed by the family representatives and signed by a recognised official;

   (2) the appellant had supplied a civil marriage certificate and a proxy marriage certificate, only one of which could be valid thereby casting doubts over the validity of all certificates and documents relating to the marriage.

6. At the hearing before me, no oral evidence was called. I heard submissions from Mr Muritala and Mr Kandola having raised as an issue that there did not appear to be anywhere evidence showing that the affidavits in support of the marriage were necessary for it to be a valid marriage in Nigeria.

7. Mr Tampuri submitted that the customary certificate was valid, had been issued by a competent authority and was supported by a letter from the president of the customary court. He submitted that the Secretary of State had not taken any steps to check authenticity. He submitted that the certificate was validly issued and was valid under Nigerian customary law.

8. Mr Tampuri said that the initial civil certificate had been issued in error but he could not give explain why it appeared that the witnesses and parties had signed it, only that it had been acknowledged and it was a mistake and rectified.

9. Mr Kandola submitted that the issue of the civil certificate undermined the validity of all the documents and that the issue was not one of the affidavits, but it was for the appellant to show that the marriage was valid under the Nigerian law. He submitted that there was no valid explanation for the errors with regard to the civil certificate.

10. In reply, Mr Tampuri said it was unfortunate there was no evidence from the authorities as to what had occurred. He submitted that the appellant had provided all the necessary information for it to be shown the certificate was valid.

The Law

11. It is not in dispute that Miss Eriksson is an EEA national nor that she is in full-time employment. The issue is whether he the appellant and Miss Eriksson are validly married as, otherwise, he is not a family member of an EEA national as defined in the Immigration (European Economic Area) Regulations 2016.

12. In Awuku v SSHD [2017] EWCA Civ 178 at [23] the Court of Appeal held:

> "The law of England and Wales recognises proxy marriage is 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. A certificate of marriage is simply evidence, albeit usually compelling evidence, that the ceremony took place."

13. The Secretary of State has not shown even on a prima facie basis that the affidavits referred to are necessary as a formal requirement for the marriage to have been valid under Nigerian law. It is not in dispute that proxy marriages are valid under Nigerian customary law. The issue in this appeal is, however, whether the fact of the marriage taking place, is reliable as it is for the appellant to show that a valid marriage took place.

14. The initial, civil marriage certificate on which the appellant's first application was based, has been produced to me, albeit as a photocopy. It is not in the form of a copy extract from a register, rather it purports to be a copy of the original certificate and bears manuscript signatures purporting to be those of the witnesses to the marriage and, importantly, the parties to the marriage. There is no explanation forthcoming from the relevant Nigerian authorities as to how a certificate such as this bearing, apparently, the signatures of the parties, and the seal of the person before whom the marriage was solemnised could have come into being. I am not satisfied, in the circumstances, that any a clerical error could have occurred such that what purports to be signatures of the parties to the marriage appeared on the certificate. I discount the possibility canvassed in the grounds of appeal to the Upper Tribunal at [6] that the certificate could possibly have been sent to the United Kingdom for the parties to sign and return; there is simply no evidence to support that submission.

15. The appellant has chosen not to give evidence on this occasion, nor has Ms Eriksson. His witness statement of 23 October 2019 at [3] refers to the civil marriage certificate, saying:

> "[T]he Home office pointed out that the certificate I provided was an ordinance marriage certificate and so was not acceptable.
>
> 4. I decided to contact the registry for verification. The Local authority after investigating my concerns issued a proxy marriage certificate".

16. Ms Eriksson refers to the certificate also in her statement of 23 October 2019, but again provides no proper explanation.

17. That does not adequately explain how there are two certificates or how the fundamental error arose. It is odd, also, that neither Ms Eriksson nor the appellant noticed that the civil certificate purported to show (a) that they had been present and (b) bear their signatures.

18. I note that the appellant and Ms Eriksson state that the marriage did take place by proxy but, by definition, they were not present and so are reliant on other evidence to show that it did take place. There are not proper statements from the proxies to that effect, or other direct evidence of the ceremony having taken place beyond the impugned proxy certificate and letters confirming its authenticity which are, in turn, reliant on information provided to the authors of the various letters. Who the witnesses who signed the certificate of customary marriage are is not clear; their signatures are unreadable.

19. I consider that, in the circumstances, viewing the evidence as a whole, that the civil marriage certificate is wholly unreliable. I consider that its coming into being and use requires explanation. If, as is claimed, the marriage was conducted by proxy, no proper explanation has been given as to how there could have been such a confusion over the certificate. No proper explanation is given as to how the document could have been created with signatures from the parties to the marriage on it, giving the impression that the parties to the marriage had been present to sign the register and that is the opposite of what is said to have happened.

20. How then does this reflect on the certificate relating to the proxy marriage? These two certificates are mutually incompatible (presence of the parties as opposed to absence) yet purport to deal with the same event, a marriage between the appellant and Miss Eriksson.

21. In the absence of any proper explanation for the civil certificate on which the appellant sought to rely and for which he has provided no proper explanation, casts doubt on the reliability of the evidence and I consider, viewing the evidence as a whole that the documents relating to the proxy marriage are not documents on which I can rely and thus, that the appellant has not demonstrated that he is married to Miss Eriksson.

22. In reaching that conclusion I note the submission that the Secretary of State has not taken steps to verify the documents. With respect, it is not for the Secretary of State to prove the appellant's case for him. It was for him to show that the documents on which he seeks to rely are reliable and that he is properly married. Further, my conclusion is not based on the absence of affidavits as documents necessary for a marriage to be valid, but on the lack of reliable evidence as to the marriage having taken place.

23. Accordingly, for these reasons, I find that the appellant has not shown that he is married to Miss Eriksson. He has therefore failed to show that he is a family member of Miss Eriksson and thus I dismiss the appeal under the 2016 Regulations.

24. Mr Tampuri made no submission to me that, in the alternative, the couple are in a durable relationship akin to marriage. In any event, neither the appellant nor Ms Eriksson gave evidence before me, and I am not accordingly satisfied that they are currently in a durable relationship.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remake the decision by dismissing the appeal.

(3) No anonymity direction is made.

Signed Date: 26 May 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW

IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04999/2019

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing **Decision & Reasons Promulgated**
At Field House
On 27 November 2020 …………………………………

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

IBRAHIM MURITALA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Head promulgated on 25 November 2019 in which she dismissed the appellant's appeal against a decision made on 11 September 201 to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the spouse of Anna Eriksson, a Swedish citizen exercising Treaty rights in the United Kingdom.

2. The appellant's case is that he was married to his spouse by way of double proxy, that is, neither party being present. The respondent did not accept that the marriage

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was valid, although as she satisfied that Ms Eriksson was employed as claimed and exercising Treaty rights.

3. The judge heard evidence and submissions, noting [8] that the respondent's representatives had submitted that there were real concerns as to whether the relationship was genuine and therefore the appeal ought to be dismissed on that basis, even if the marriage were valid.

4. The judge noted [22] that concerns had been raised as the appellant had provided a civil marriage certificate and then, when that had been challenged, provided a customary marriage certificate, the explanation from the appellant being that the issue of the civil certificate had been an error and that when this had been discovered the correct, customary marriage certificate had been issued.

5. The judge found that the appellant and Ms Eriksson were not married as:

   (a) There were serious concerns about the civil certificate's reliability as it purported to have been signed by both parties, yet they were both in the United Kingdom, and thus their signatures could be on it only if it had been signed in the UK; and, if so, it was not a certificate issued in Nigeria which both spouses would have known[24];

   (b) The certificate of customary marriage was unreliable, given that it and the letter of attestation state that Ms Eriksson's father consented to the marriage yet Ms Eriksson's evidence was that her father knew nothing about the marriage, and so, could not have consented to it;

6. The judge also concluded that in any event, the couple were not in a genuine relationship, finding the evidence of the appellant and his spouse to be contradictory and unreliable [33], the attempted use of an invalid proxy marriage certificate being intentional and indicative of a propensity to deceive, the appellant not being a credible witness [36].

7. The appellant sought permission to appeal on the grounds that the judge had erred

   (a) In her approach to the signing of the marriage certificate;

   (b) In concluding that the respondent had shown reasonable grounds of suspicion about the marriage, that not having been raised by her, but instead being a matter raised by the judge;

   (c) In thus depriving the appellant of an opportunity to address suspicion as to the genuineness of their marriage;

   (d) In making findings of fraud against the appellant when that had not been alleged by the respondent; and,

   (e) In failing to make proper findings as to the validity of the customary marriage certificate.

8. On 17 April 2020 First-tier Tribunal Judge Bird granted permission to appeal on all grounds.

9. Subsequent to the grant of permission, Upper Tribunal Judge Frances made directions in this case, issued on 31 July 2020 and which provided amongst other matters:

   1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[1], I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:

   (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so

   (b) whether that decision should be set aside.

   2. I therefore make the following DIRECTIONS:

      (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);

      (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;

      (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.

      (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.

   3. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

10. There was no response from the appellant but in submissions dated 7 August 2020, the respondent stated that she did not oppose the application for permission to appeal, inviting the Upper Tribunal to determine the appeal at a fresh hearing

11. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. The appellant is legally represented. Given that no objection to there not

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

being a haring has been raised, given that the appellant is legally represented, and given that the respondent has (as is set out below) conceded that the decision of the First- tier Tribunal did involve the making of an error of law; and, bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case, that it would be right to reach a decision in the absence of a hearing, having had due regard to the decision of Fordham J in JCWI v The President of the Upper Tribunal [2020] EWHC 3103.

12. In the light of the concise and sensible concessions made by the respondent, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law in the errors identified in the grounds. It was unfair to raise at the hearing as a new issue whether the marriage, if it existed, was genuine or not. Equally, the respondent has in effect conceded that the findings with regard to the marriage certificates are flawed.

13. For these reasons, the decision involved the making of an error of law as claimed and I set it aside. I consider that in all the circumstances of this case, the appropriate course of action is for the decision to be remade in the Upper Tribunal and the parties are to prepare accordingly. The findings of the First-tier Tribunal that there was no valid marriage and that in any event the relationship was one of convenience are set aside.

Notice of Decision & Directions

1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2 The appeal will be remade in the Upper Tribunal on a date to be fixed

DIRECTIONS

1. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal can and should be held remotely, by Skype for Business on a date to be fixed within the period 31 October 2020 to 1 December 2020

2. No later than 7 days after these directions are sent by the Upper Tribunal:

(a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and

(b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

(i) contact/join-in details, were the hearing is to take place remotely by the means currently proposed; and

(ii) in that event, dates to avoid in the period specified.

3. The Tribunal will then give further directions, which will either be:

(i) to list the date and time of the remote hearing, confirming the join-in details etc and directing the electronic filing and service of documents in connection with the hearing; or

(ii) to give directions with respect to a face-to-face hearing.

(iii) give a timetable within which skeleton arguments are to be raised.

4. The respondent must notify the appellant and the Upper Tribunal in writing, at least 28 days before the hearing, if she intends to submit that the marriage between the appellant and Ms Eriksson is, if valid, nonetheless a marriage of convenience.

5. Any additional material must be served on the Upper Tribunal at least 10 working days before the hearing.

Signed Date 27 November 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul