



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/01786/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

Heard on 8th August 2017

On 29th August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR BERNARD EGBE AIWUYO
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ikeh, Solicitor

For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

The Proceedings

1. The Appellant is a citizen of Nigeria born on 5th of May 1980. He appeals against a decision of Judge of the First-tier Tribunal Lingam sitting at Taylor House on 21st of November 2015 in which she dismissed the Appellant's appeal against a decision of the Respondent dated 12th of October 2015. That decision was to refuse to issue the Appellant with an EEA family permit as a family member/extended family member of an EEA national exercising treaty rights in the United Kingdom. The Appellant stated in his application form that he had entered into a marriage by proxy with his spouse a Spanish citizen ("the Sponsor").

2. The Respondent refused the application because the Appellant had failed to show that he was the spouse of the Sponsor or in a durable relationship with her. The validity of the proxy marriage under Nigerian law was not accepted for the lengthy reasons given in the refusal letter and it was not accepted that the Sponsor was exercising treaty rights.
3. The Appellant appealed that decision arguing that his proxy marriage with the Sponsor was valid as it met the requisite law where the marriage was performed. The marriage had been registered in accordance with local specifications and the marriage certificate was issued by a competent authority in Nigeria. There was no bar to the Sponsor entering into a proxy marriage with him. She was in gainful employment when the application was lodged on 1 May 2015. By August 2015 she had left her employment and was now engaged in self-employment.

The Proceedings at First Instance

4. There was no appearance on behalf of the Appellant at the hearing at first instance. The Presenting Officer relied on the Upper Tribunal decision in the case of **Sala [2016] UKUT 411** in which the Upper Tribunal held that there was no statutory right of appeal against the decision of the Respondent to refuse to grant a residence card to a person claiming to be an extended family member under Regulation 8 of the Immigration (European Economic Area) Regulations 2006, now 2016. At paragraphs 8 to 13 of her determination the Judge considered whether she had jurisdiction to hear the appeal in the light of **Sala** and concluded that she did not noting at paragraph 9 that the Appellant failed to fall within Regulation 7 of the 2006 Regulations as a family member of an EEA national (which still did carry a right of appeal).
5. The Judge was satisfied that the Appellant had not applied under the immigration rules as a dependent spouse of his partner but had made an application for a residence permit as an extended family member. As the Tribunal could not accept a notice of appeal where there was no appealable decision the Judge found that there was no statutory right of appeal and in effect dismissed the Appellant's appeal, although the wording of the determination does not say so in so many words.
6. The Appellant appealed this decision arguing that the Judge had not considered the Appellant's appeal on the basis of his proxy marriage to the sponsor. The Court of Appeal had recently given guidance in the case of **Awuku [2017] EWCA Civ 178** that a proxy marriage could be recognised in the United Kingdom provided it was conducted in accordance with the laws of Nigeria. As it had been argued by the Appellant in the grounds before the First-tier Tribunal that he was married, by proxy marriage, he did have a right of appeal and the Judge did have jurisdiction to hear the appeal. **Sala**, it was contended had been wrongly applied by the First-tier Tribunal. Consideration by the Judge of the evidence before her might have affected the outcome of the appeal.

7. The application for permission to appeal came on the papers before First-tier Tribunal Judge Robertson on 26th of June 2017. She granted permission to appeal on the basis that the points raised in the grounds (which I have summarised above) are arguable. The Respondent replied to the grant of permission by letter dated 13th of July 2017. The Respondent opposed the Appellant's appeal and would submit that the Judge of the First-tier Tribunal had directed herself appropriately. It was accepted that there had been a significant period between the determination in this case and the subsequent grant of permission during which time there had been developments in the case law on the validity of proxy marriages. The Appellant had applied on the basis that he was in a durable relationship and it was unclear what evidence was provided to indicate that it was a valid marriage under Nigerian law. I pause to note here that that last submission is incorrect as a careful reading of the Appellant's application on Form EEA(FM) indicates. The Judge, it was said in the letter, was correct to apply the principles in **Sala**.

The Hearing Before Me

8. Following the grant of permission to appeal the matter was listed before me on 8th of August 2017 to determine whether there was a material error of law in the Judge's determination and whether the decision should be set aside and the appeal re-heard. For the hearing the Appellant had submitted further submissions relying on the case of **Awuku**. The production of an affidavit and a customary marriage certificate were prima facie evidence that the marriage had been performed in accordance with the laws of Nigeria, the country where it was conducted. The Appellant met the requirements of the 2016 Regulations and was entitled to a right of appeal. The Appellant and Sponsor were in a durable relationship as their relationship started in 2014.
9. The Appellant also relied on an earlier decision of the Upper Tribunal in the case of **CB [2008] UKAIT 80** in which it was held that the United Kingdom recognised marriages if they were valid under the domestic law of the country in which they took place provided that they had been executed properly. The validity of the marriage was not governed by the law of either party's domicile. The customary marriage certificate was issued after compliance with the requirements of section 42 of the Nigerian Birth, Deaths etc (Compulsory Registration) Act 2004. There was an affidavit from a witness that the consent of the families of both sides were obtained and the local procedures followed. The country of origin information report of June 2013 indicated that a traditional marriage registered by way of affidavit was sufficient proof of the existence of such a marriage and thus would serve the same purpose that a marriage certificate would serve. Although proxy marriages could not be contracted in the United Kingdom this country would recognise proxy marriages if they were valid under the law of the country in which took place. Copies of the documents referred to in the further submissions were enclosed.

10. In brief oral submissions, the Appellant's solicitor noted that the Appellant had not been represented on the day as he had wanted the matter decided on the papers but in fact there had been an oral hearing in which the Respondent had made submissions. In my view there was nothing wrong with that procedure, it was a matter for the Tribunal whether to permit submissions in any given case in which an Appellant had asked for his case to be dealt with on the papers.

Findings

11. The Judge decided the case on the basis that she was dealing with a Regulation 8 (extended family member) appeal. The Sponsor in this case was a citizen of Spain, born in Equatorial Guinea. Following the earlier Upper Tribunal decision in **TA (Kareem explained)** there would have needed to be evidence before the Tribunal that proxy marriages were recognised in Spain in order that the Appellant could claim a right of appeal under regulation 7. It does not appear from the file that there was such evidence beyond the bare assertion of the Appellant. However, the decision in **TA (Kareem explained)** was overruled in **Awuku**. Where, as in this case the Appellant was claiming to be in a valid marriage conducted by proxy, the appeal potentially engaged Regulation 7. The absence of evidence of Spanish law was irrelevant and there was thus a right of appeal.
12. As the Respondent pointed out in her response to the grant of permission, the law had changed since the First-tier Tribunal decided the matter but since decisions of the Court of Appeal are retrospective in operation there was potentially a right of appeal for the Appellant. That being so it was a material error of law for the Judge to find that no right of appeal existed. This was not a **Sala** case. I indicated that I set aside the decision of the First-tier Tribunal as it involved a material error of law. I canvassed submissions on whether the case should be remitted back to the First-tier, the Appellant submitted that it should, the Respondent was neutral on the matter. There had not been a substantive hearing of the Appellant's appeal in this case against the Respondent's decision to refuse to issue a family permit. In accordance with the Senior President's Practice Direction it was not appropriate for the Upper Tribunal to proceed to determine the matter, the case should be remitted back to the First-tier.
13. At that re-hearing the First-tier will be able to consider those matters which I refer to in paragraph 2 above. All such matters are more properly dealt with by the First-tier rather than by the Upper Tribunal. I allowed the Appellant's appeal at the hearing indicating I would give written reasons which I have done so in this determination. The case will be remitted back to the First-tier Tribunal to be heard de novo at Taylor House by any Judge save Judge Lingam.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I direct that the appeal be remitted back to the First-tier Tribunal to be reheard de novo.

Appellant's appeal allowed to the extent stated.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 24th day of August 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The issue of a fee award must be decided afresh by the First-tier at the de novo hearing. I set aside the previous decision making no fee award.

Signed this 24th day of August 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge