Upper Tribunal
(Immigration and Asylum Chamber)

Kareem (Proxy marriages – EU law) [2014] UKUT 00024(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 October 2013	.....

Before

Mr C.M.G. Ockelton, Vice-President

Upper Tribunal Judge McKee

Deputy Upper Tribunal Judge McCarthy

Between

SAHEED GBADEBO KAREEM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms C Callinan, Counsel instructed by Owoyele Dada & Co Solicitors, London

For the Respondent: Mr S Allan, Home Office Specialist Appeals Team

a. A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.

b. The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.

c. A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.

d. In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.

e. In such an appeal, the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.

f. In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.

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

h. These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships.

DETERMINATION AND REASONS

1.
The appellant is a Nigerian citizen. He says he is married to a Dutch citizen who is working in the United Kingdom. Although the Secretary of State accepts that the person the appellant describes as his wife is a qualified person for the purposes of the Immigration (European Economic Area) Regulations 2006, she does not accept that the appellant is married as claimed.

2.
The appellant states that he married his wife on 26 November 2011 in a ceremony that neither of them attended. The ceremony took place in his father's home in Mushin, Lagos State, Nigeria by proxy. The appellant says that his marriage was conducted in accordance with customary law and was subsequently registered by the local customary court, which issued a marriage certificate. In support of his claim, the appellant has produced an affidavit from his father, a court order, the marriage certificate and statements from the appellant and others.

3.
The Secretary of State's reason for disputing that the appellant is married is, in essence, that she does not believe that the evidence produced is sufficient to establish that the appellant is married according to Nigerian law. If the appellant is not married according to the laws of the country in which the marriage is said to have taken place, then he is not married according to English law.

4.
Within the Secretary of State's reasoning is an assumption that, for the purposes of EU law, a Member State can use its own legal order to determine whether or not a person is married to another. We are aware that the same assumption was presented and adopted without discussion by the Tribunal in CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080 and that a number of unreported Upper Tribunal decisions have done likewise.

5.
We have found no legal basis in EU law for such an assumption. We recall that a Member State cannot use its own legislation to determine whether a person is a family member (cf Jia (C-1/05) [2007] Imm

AR 439, para 36) because doing so has the potential of restricting the exercise of rights of free movement and residence. Therefore, we do not adopt this assumption and turn instead to EU law to determine the proper approach to the legitimate question posed by the Secretary of State.

The meaning of spouse in EU law

6.
The Member States do not share a common definition of spouse, each state defining marital relationships for itself. For example, in several Member States a person cannot be a spouse if of the same sex as the partner whilst the laws of other Member States describe such a person as a spouse. Similarly, whilst many Member States refuse to describe any person in a polygamous relationship as a spouse other than the person first married, the laws of other Member States may recognise all partners as spouses in certain circumstances. In terms of EU law, the law of marriage can be said to be within the competence of the Member States.

7.
The Court of Justice of the European Union (CJEU) has found that in EU law spouse refers solely to the question of whether a marriage has been contracted (cf Diatta (C-267/83) [1985] ECR 567, para 20; Reed (C-59/85) [1986] ECR 1283, para 15) but this does not help us identify who is a spouse for the purposes of EU law because, as we have shown, marital relationships are not defined in the same way in each Member State.

8.
EU law affords the Charter of Fundamental Rights the same legal value as the Treaties and has regard to the human rights convention (ECHR) as part of the common tradition of the Member States (see Treaty on European Union, article 6). Article 9 of the Charter mirrors article 12 ECHR in recognising that the right to marry is guaranteed by national law.

9.
We mention at this juncture the fact that in this appeal we are only concerned with the question of whether the appellant has contracted a marriage. We are not considering whether he is in a registered partnership or a durable relationship. These issues do not arise in this appeal, the appellant never having argued that he is in a registered partnership and having produced no evidence of cohabitation. These are different types of relationships and, as confirmed in the European jurisprudence just cited, cannot be regarded as marital relationships for the purposes of EU law. Of course, marriage is special kind of contractual relationship recognised by law as effecting a change in civil status. Unlike a non-marital ‘durable relationship’, it cannot be established merely by proof of facts, for example of cohabitation: establishing a marriage requires both proof of relevant facts and demonstration that a relevant legal order regards those facts as constituting a marriage.

10.
We conclude that in EU law the question of whether a person is in a marital relationship is governed by the national laws of the Member States. In other words, whether a person is married is a matter that falls within the competence of the individual Member States.

11.
In addition to these points, the CJEU has established that a Member State can expect persons claiming to be family members to establish that they meet the requirements of EU law (cf Jia (C-1/05) [2007] Imm AR 439, para 37ff). Article 10(2)(b) of the Citizens Directive (2004/38/EC) [1] indicates that non-EEA nationals can establish that they are family members by the production of a document

attesting to the existence of a family relationship. We are also aware that the jurisprudence of the CJEU just cited indicates that in the absence of a document attesting to the existence of a family relationship, other evidence may be considered.

12.
From this we infer that usually a marriage certificate issued by a competent authority will be sufficient evidence that a marriage has been contracted. Of course, a document which merely calls itself a marriage certificate does not have any legal status. A certificate will only have legal status if it is issued by an authority with legal power to create or confirm the facts it attests, that is, by an authority that has such competence. Where a marriage document has no legal status or where such status is unclear, other evidence may be used to establish that a marriage has been contracted. However, once again we find that these principles do not help us determine whether a person is a spouse because it will depend on identifying the authority with legal power to create or confirm that a marriage has been contracted.

13.
Whilst considering the issue of evidence of marriage, we remind ourselves that the proof of the law of another country is by evidence, including proof of private international law of that other country. Such evidence will not only have to identify relevant legal provisions in the other country but identify how they apply in practice. A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail.

14.
In light of the preceding considerations, the question we must answer is how we might identify which national legislation applies in a particular situation and how the relevant national legislation applies to the facts of the present case.

15.
To answer this question, we start from the fact that the rights of free movement and residence stem directly from Union citizenship. According to the Treaties, a person having the nationality of a Member State is a Union citizen. It follows from these provisions that a Union citizen’s rights of free movement and residence are intrinsically linked to that person’s nationality of a Member State. Judgments of the CJEU indicate that where there are issues of EU law that involve the nationality laws of Member States, then the law that applies will be the law of the Member State of nationality and not the host Member State (cf Micheletti (C-369/90) [1992] ECR I-4239, para 10 & 14). This is because nationality remains within the competence of the individual Member States.

16.
Spouses’ rights of free movement and residence are derived from a marriage having been contracted and depend on it. In light of the connection between the rights of free movement and residence and the nationality laws of the Member States, we conclude that, in a situation where the marital relationship is disputed, the question of whether there is a marital relationship is to be examined in accordance with the laws of the Member State from which the Union citizen obtains nationality and from which therefore that citizen derives free movement rights.

17.
The same conclusion may readily be reached by a different route. Within EU law, it is essential that Member States facilitate the free movement and residence rights of Union citizens and their spouses. This would not be achieved if it were left to a host Member State to decide whether a Union citizen has contracted a marriage. Different Member States would be able to reach different conclusions

about that Union citizen's marital status. This would leave Union citizens unclear as to whether their spouses could move freely with them; and might mean that the Union citizen could move with greater freedom to one Member State (where the marriage would be recognised) than to another (where it might not be). Such difficulties would be contrary to fundamental EU law principles. Therefore, we perceive EU law as requiring the identification of the legal system in which a marriage is said to have been contracted in such a way as to ensure that the Union citizen's marital status is not at risk of being differently determined by different Member States. Given the intrinsic link between nationality of a Member State and free movement rights, we conclude that the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted.

18.
Although we adopt this approach in order to determine this appeal, and although we believe that it will apply in all situations we can envisage, we recognise that it may not apply in every situation. For example, we are aware of the judgments of the CJEU that explain that a Member State cannot apply its competence in a way that would restrict the rights a person has as a Union citizen even where EU law does not provide a harmonised approach that is applicable throughout the Union (cf Garcia Avello (C-148/02) [2003] ECR I-11613; Rottmann (C-135/08) [2010] 3 CMLR 2). A Member State must always have regard to fundamental rights, including equal treatment and decisions must always be proportionate.

19.
In addition, we have not examined whether this approach would apply where a Union citizen derives Union citizenship from more than one nationality (for example a dual Irish-British citizen, as in McCarthy (C-434/09) [2011] Imm AR 586), or where a British citizen may be returning to the United Kingdom having exercised rights of free movement in another Member State. These are not matters that arise in this appeal and we reach no conclusion on them.

20.
In addition to the issues discussed in paragraphs 6 to 17 above, we recall that a Member State may refuse to admit or may expel a Union citizen or a family member where it would be contrary to public health, public policy or public security. In relation to marital relationships, issues of social order that relate to public policy may arise, such as in relation to forced marriages and polygamous marriages (cf COM(2009) 313/4 [2] , ss. 2.1.1, 3.1). In such situations, however, there is no question as to whether a marriage has been contracted but what is necessary to maintain social order. Similarly, where there is an allegation of a marriage of convenience, the question is not as to whether there is a legal marriage but whether there has been an abuse of rights.

Is the appellant the spouse of a qualified person?

21.
We return to the question of whether the appellant is the spouse of a qualified person for the purposes of EU law. In light of our discussion, we must first seek to determine the legal system in which we have to establish whether the appellant is in a marital relationship and only then can we examine the evidence.

22.
The appellant says he is married to a Dutch national and that he derives a right of residence from her. It is accepted she is resident in the United Kingdom. There is no reason to regard her residence here as requiring us to treat her as being more connected to the laws of the United Kingdom for EU law purposes than to the laws of the Netherlands. We therefore turn to Dutch law.

23.
The appellant’s claimed marriage did not take place in the Netherlands. The claim is that the ceremony took place in Nigeria whilst the appellant and his claimed spouse remained in the United Kingdom. We do not know whether according to Dutch law the marriage would be regarded as having been celebrated in Nigeria or the United Kingdom, the appellant and his claimed spouse having been present in the United Kingdom. As indicated above, we have no basis on which to impose the approach to this question adopted in the United Kingdom.

Extracts from the Dutch Civil Code

24.
The appellant’s evidence includes extracts from the Dutch Civil Code. Although this is presented as evidence, there is no indication as to whether the version provided is up to date. Furthermore, we have been given no assistance as to how it should be interpreted or as to whether the appellant’s marriage ceremony would be regarded as a lawful marriage under the Dutch Civil Code.

25.
The extracts from the Dutch Civil Code that we have been given are English translations of articles 1:31 to 1:80 and 10:27 to 10:59. We have not been provided with the original Dutch version or confirmation that the translation is either authorised or certified. Nevertheless, we examine the documents before us.

26.
Article 10.31 is headed, Recognition of foreign marriages . It provides:

Article 10:31

(1) A marriage that is contracted outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State is recognised in the Netherlands as a valid marriage.

…

(3) For the purposes of paragraph 1 and 2, the word ‘law’ includes rules of private international law.

(4) A marriage is presumed to be valid if a marriage certificate has been issued by a competent authority.

27.
The following article contains a restriction on this general rule:

Article 10:32

Irrespective of what is provided for in Article 10.31, a marriage that is contracted outside the Netherlands shall not be recognised in the Netherlands where such recognition obviously would be incompatible with Dutch public order.

28.
The passages we cite are silent on whether a proxy or customary marriage would be recognised in the Netherlands or whether such a marriage would be incompatible with Dutch public order. We do recognise, however, that article 1:66 permits marriage by representation in certain circumstances, which would suggest that marriage in the absence of one of the parties would not be contrary to

Dutch public order. However, as we have indicated, we have not received evidence on these complex issues and have been given no help on how Dutch law might apply.

29.
In addition to this concern, we take note of article 10:27 which explains that section 10.3 of the Civil Code which addresses the contracting and recognition of the validity of marriages, of which articles 10:31 and 10:32 are part, is to implement the Convention on the Celebration and Recognition of the validity of marriages, concluded at the Hague on 14 March 1978. The appellant has provided us with a copy of that Convention. We recognise that the Netherlands is among a very short list of countries to have ratified this Convention and mention that it cannot be regarded as being applicable across the EU. However, even insofar as it applies to the Netherlands, we note that article 8 of the Convention, which addresses the recognition of the validity of marriages, specifically excludes proxy marriages and informal marriages from its scope.

30.
Notwithstanding any of the above, and bearing in mind the provision contained in article 10:31(4), we have examined whether the appellant's marriage would be presumed because of the production of the document headed, Native Law & Custom Marriage Certificate. For marriage to be presumed, article 10:31(4) indicates that the marriage certificate must be issued by a competent authority.

31.
In order to decide whether the appellant's document is a marriage certificate issued by a competent authority we must examine Nigerian law, with particular reference to the laws relating to registration.

Was the appellant's marriage certificate issued by a competent authority?

32.
The Secretary of State has provided in evidence the Nigerian Births, Deaths, Etc (compulsory Registration) Act 1992 and two letters from the British High Commission, Abuja which discuss how Nigerian law might be interpreted and applied, although perhaps not from the point of view of a person with legal expertise.

33.
The two letters from the High Commission are dated 4 February and 22 May 2013. They explain that the information they contain has been obtained from Nigerian lawyers and given that the Secretary of State relies on their observations it can be assumed that she does not dispute the accuracy of the information contained. In addition, the letters have been accompanied by various Nigerian legal sources.

34.
The letter of 4 February 2013 confirms that proxy marriages, including those where neither the bride nor groom are present, are fairly common and are recognised according to Nigerian customary law because such marriages are not merely the union of the couple but also the families. Such marriages will be legally binding where celebrated in accordance with the native law and custom of the particular community. The letter continues by describing the registration of such marriages. We examine those factors in detail below.

35.
The letter of 22 May 2013 contains further descriptions of Nigerian laws, identifying three different legal systems relating to marriage; native law and custom, statutory law and Sharia law. Proxy

marriages can only be accepted as valid in Nigerian law if conducted under customary law. Where legal requirements prescribe a marriage certificate to be presented, then only a certificate issued under the Marriage Act will be acceptable. Hence, most couples conduct “registry weddings” in addition to their customary marriage.

36.
This letter also confirms amongst others the following points which are relevant to this appeal:

i.
A Nigerian citizen can marry a foreigner by proxy under customary law in a ceremony that is held in Nigeria.

ii.
The validity of a customary marriage in Nigeria does not depend on it being registered within 60 days.

iii.
No certificates are issued in respect of customary marriages by any recognised official body and no official records are kept.

37.
We turn to the Nigerian Births, Deaths, etc (Compulsory Registration) Act 1992. Part V of the 1992 Act relates to the registration of customary marriages or divorces. This legislation appears to have been amended and supplemented by a Statutory Instrument in 1996. Part VII of the 1996 legislation indicates that there is a requirement that a customary marriage should be registered within sixty days and that certain details are to be provided and included in any certificate issued.

38.
The details required for registration are the names of the bride and groom, their marital status, their occupations, their ages, their States of origin, the address of their usual place of residence, their nationalities, the name of the persons who consented to the marriage and the respective relationship of those persons to the bride and groom. The certificate should include most of these details together with the registration number, the date of marriage, the date of registration and the signature of the court registrar.

39.
We recognise that these provisions appear to give a different picture to that provided by the High Commission about whether a customary marriage could be registered and whether certificates could be issued. We do not know the reason for this difference. It may be something as simple as the relevant legislation never having been brought into force. This reflects the difficulties that arise in the absence of independent and reliable evidence regarding how the laws of a country are applied. We are unable to resolve this conflict on the basis of the information available to us but this is not material in this appeal for the following reasons.

40.
The certificate provided by the appellant does not include many of the elements required by the statutory provisions. For example, it does not give the background details of the appellant or his claimed wife. We also note that although we are advised that the customary marriage ceremony occurred on 26 November 2011, the marriage certificate was issued on 1 March 2012, well outside the sixty day period stated in Nigerian law.

41.

In addition to these points, we are aware that the same Nigerian laws make provision about who can be a registrar. We have no evidence that the person who signed the certificate or the court order was a registrar. The court order, for instance, is silent on whether the marriage has been registered according to Nigerian law. In considering these issues we have not found the 1966 academic source supplied by the appellant, Keay, E A and SS Richardson The Native and Customary Courts of Nigeria to assist on these issues, although we consider it in relation to other points below.

42.
In light of these considerations we are wholly unpersuaded that the certificate has been issued by a competent authority in Nigeria. The document is no more than a written note of a statement made by a person with no legal authority. In other words, the document is not the emanation of an authority with legal power to create or confirm what it attests; it adds nothing to the case. This is the same conclusion we would have reached had we merely adopted the information provided by the British High Commission which suggested that no official certificates were issued to confirm customary marriages.

43.
Bearing in mind the provisions of the Dutch Civil Code that we have cited, the absence of a marriage certificate that has been issued by a competent authority in Nigeria, the “Native Law & Customary Marriage Certificate” not meeting that requirement, means that on the face of the Dutch law we have seen, no presumption under Art 10.31(4) arises from the production of this document.

Is the marriage otherwise valid in Nigerian law?

44.
This does not mean, however, that the marriage would not be recognised in Nigeria, the primary question apparently posed by Dutch law. The legislation provided by the Secretary of State relates to Nigerian federal law and not to customary law. The appellant’s original grounds of appeal included detailed argument about the plurality of laws in Nigeria. That argument is well presented and evidenced and we accept that there are three types of law that relate to marriage in Nigeria; federal law, native law and custom (i.e. customary law) and Sharia law.

45.
We are aware that customary law is respected under the Nigerian Constitution, copies of which have been provided by both parties. We have been provided with two scholarly authorities about customary marriages in Nigeria together with some Nigerian jurisprudence. They are consistent on the fact that although customary marriages are recognised as lawful marital relationships in Nigeria, it is often difficult to establish that an actual marriage has taken place.

46.
The academic authority relied on by the appellant is a book; Kasunmu, Alfred B Nigerian Family Law (Butterworths, London, 1966). At the end of chapter 4 there is a short section on proof of customary marriages. It recommends, in the absence of any official registration, the calling of witnesses to prove a customary marriage. This approach is approved by the Nigerian courts and various authorities are cited. The article by Harinder Boparai, “The Customary and Statutory Law of Marriage in Nigeria”, published in The Rabel Journal of Comparative and International Private Law 46 Jahrg., H.3 (1982) pp 530-557 (published by Mohr Siebeck GmbH & Co. KG) agrees, but in addition refers to there being an incomplete registration system of customary marriages in certain provinces through a system of bye-laws.

47.
We have no evidence that the State of Lagos has introduced bye-laws for the registration of customary marriages. The article by Keay and Richardson does indicate that bye-laws have been adopted by most states in western Nigeria for "greater certainty as to the fact of marriage and amount of dowry paid if any, to obviate protracted litigation." However, no details are given with regard to the situation in Lagos State. The lack of evidence on this point further undermines the appellant's claim that he has produced a marriage certificate issued by a competent authority. However, at this juncture we are considering the other evidence of marriage that has been provided.

48.
We have been provided with the Supreme Court of Nigeria's judgment in Abisogun v Abisogun and others 1 (1963) All Nigeria LR 75. It dealt with the situation where a person claimed to inherit from her late husband because she was his first wife, having been married by Native Law and Custom. The Supreme Court not only confirmed that it was for the appellant to establish that such a marriage had taken place but that it "must be established with a high degree of certainty." Although the appellant in that appeal had relied on the testimony of a witness, her elder brother, that evidence was considered insufficient because of the passage of time and the close connection of the witness to the appellant, particularly where there was strong evidence that the appellant's late husband had contracted another marriage under the Marriage Ordinances.

49.
In addition to this authority, Ms Cullinan refers us to Abidoun v Soluade and Beckley [1943] 17 NLR 59. In its judgment, the Supreme Court of Nigeria referred to the fact that a customary marriage ceremony among Yorubas would seem to be inseparable from the legal incident of the marriage payment. Of course, we recognise the limitation of this authority in that it relates to Yoruba customary marriages. However, it is an indication of the significance of dowry in customary marriage law in Nigeria.

50.
Amongst the Secretary of State's papers is reference to another Nigerian authority, Lawal v Younan (perhaps Lawal v Younin [1961] All Nigeria LR 245 but we were given neither the reference nor a text of the judgment). It is mentioned in a webpage attributed to Online Nigeria but without a citation. The commentary suggests that in order to establish that a valid customary law marriage has been contracted, a person will need to provide the customary law of marriage of the locality concerned and the essentials of such marriage, together with evidence to show that the essentials of marriage were met, including by witness evidence. There are other references to how the weight to be given to witness evidence might vary depending on whether that evidence was challenged.

51.
We have also been provided with the Lagos High Court's judgment in Okpanum v Okpanum and another (1972) All Nigeria LR 201, which held in relation to Ibo customary law that:

"In order to constitute a valid customary marriage there must be parental consent and mutual agreement between the parties, coupled with the payment or part payment of dowry; alternatively, coupled with such ceremonies as are recognized by the community as constituting a valid marriage."

Again, we recognise that this conclusion is specific to a particular area, referring to Ibo customary marriages. It would be wrong to draw conclusions from it that apply to all customary marriage practices in Nigeria.

52.
We can, however, infer from these authorities that in a number of the customary marriage systems in Nigeria, the payment of a dowry is an important element for establishing whether such a marriage occurred. Although, as suggested by Keay and Richardson, some practices are changing, there is no evidence that there has been a significant change in the traditional bases for establishing a customary marriage. For instance, Keay and Richardson made their observations in 1966, yet in relation to customary marriages among the Ibo people, in 1972 the Lagos High Court still found that a dowry was an essential element.

53.
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.

54.
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.

55.
It is with these points in mind that we have to consider whether it is more likely than not that the appellant has shown that his marriage would be treated as a valid marriage in Nigeria.

56.
The appellant has provided a number of letters from people who say they are friends or family and who say they attended the ceremony on 26 November 2011. There is no evidence in the letters that the parents of the bride gave consent. There is reference to a dowry being received on behalf of the bride's family but no details of the dowry are given. The affidavit provided by the appellant's father does not mention either dowry or parental consent.

57.
The appellant has provided two statements, one from him and one from his claimed wife. Neither statement has been signed. Both were written some time after the appeal had been dismissed by the First-tier Tribunal. We find that the contents of the statements do not carry any weight and do not, in any event, provide any useful evidence regarding whether the marriage is valid according to Nigerian law.

58.
We find the evidence overall is extremely weak and that it would be insufficient to discharge the standard of proof indicated by the Supreme Court of Nigeria. Even if we were to assume the capacity of the parties to marry, which is unchallenged, the absence of these other essential elements means

we can only conclude that the parties fall a long way short of demonstrating that they would be regarded as being married according to Nigerian law

59.
At the hearing, Ms Callinan asked for permission to submit additional documents. Although we examined those documents we did not admit them as evidence because they had not been submitted in accordance with directions. We acknowledge, as Mr Allan observed, that this appeal relates to an EEA decision and there would be nothing preventing the appellant making a fresh application if his appeal were to be dismissed.

60.
Nevertheless, the request to admit the further documents fortifies us in our decision that the evidence available to the First-tier Tribunal was insufficient to establish that the appellant's customary marriage would be recognised in Nigeria. This is because the additional evidence was the first time that the appellant attempted to confirm that a dowry was paid and that the parents of the bride consented to the marriage. We regard this as an acknowledgement that the documents previously submitted were inadequate.

61.
We record one further observation about the additional evidence we saw but did not admit. Among those documents was a letter from the father of the appellant's claimed wife in Dutch together with another letter signed by the same person but in English. We were advised that the second letter was intended to be a translation of the first. We noted that it was not a translation, our ability in reading Dutch identifying that it did not contain the same information as in the English letter. We had no information about the English language ability of the signatory of those letters and do not know if he signed the English version believing it to have the same content as the letter in Dutch. If we had admitted these documents, we would have had serious concerns about their reliability.

The relevance of United Kingdom marriage law in this appeal

62.
We return to the question of whether Dutch law would regard the appellant as having married in the United Kingdom or Nigeria. We have no means of answering this question because we do not know how Dutch law applies in such circumstances. However, in light of the factual finding we have made, we consider that the question would be irrelevant.

63.
The relevant law of the United Kingdom that would apply to this appeal were it not a matter of EU law would be the law of England and Wales (the laws of marriage in the United Kingdom being different in its constituent jurisdictions). The proper approach under the law of England and Wales has been set out by the Tribunal in CB (Brazil) and there is no need for us to repeat it. In summary, a proxy marriage would be regarded as valid under English and Welsh law if it was valid according the law of the place where it took place, recognising that the marriage took place where it was celebrated.

64.
The fact that the evidence does not support the view that the appellant's proxy marriage would be regarded as a marriage in Nigeria means that it would not be regarded as a marriage under the law of England and Wales.

Conclusions

65.
In light of our findings, we are not satisfied that the appellant has shown that he is in a marital relationship with a qualified person and therefore he cannot benefit from EU free movement and residence rights on that basis. We have reached our conclusion on the basis that the appellant's marriage is not one that would be recognised in the laws of the Netherlands because it would not be recognised under the law of Nigeria, and insofar as relevant, nor in England and Wales.

Final remarks

66.
The re-making of the decision in this appeal arose from the finding of Deputy Upper Tribunal Judge S J Hall on 28 February 2013 that the determination of First-tier Tribunal Judge Suchak contained an error on a point of law and had to be set aside. It is well known that in addition to addressing the appellant's own circumstances, this appeal would seek to give general guidance as to how similar appeals – those involving proxy customary marriages – might be considered.

67.
We make the following general observations.

a.
A person who is the spouse of an EEA national who is a qualified person in the United Kingdom can derive rights of free movement and residence if proof of the marital relationship is provided.

b.
The production of a marriage certificate issued by a competent authority (that is, issued according to the registration laws of the country where the marriage took place) will usually be sufficient. If not in English (or Welsh in relation to proceedings in Wales), a certified translation of the marriage certificate will be required.

c.
A document which calls itself a marriage certificate will not raise a presumption of the marriage it purports to record unless it has been issued by an authority with legal power to create or confirm the facts it attests.

d.
In appeals where there is no such marriage certificate or where there is doubt that a marriage certificate has been issued by a competent authority, then the marital relationship may be proved by other evidence. This will require the Tribunal to determine whether a marriage was contracted.

e.
In such an appeal, the starting point will be to decide whether a marriage was contracted between the appellant and the qualified person according to the national law of the EEA country of the qualified person's nationality.

f.
In all such situations, when resolving issues that arise because of conflicts of law, proper respect must be given to the qualified person's rights as provided by the European Treaties, including the right to marry and the rights of free movement and residence.

g.

It should be assumed that, 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. Mere production of legal materials from the EEA country or country where the marriage took place will be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight.

h.
These remarks apply solely to the question of whether a person is a spouse for the purposes of EU law. It does not relate to other relationships that might be regarded as similar to marriage, such as civil partnerships or durable relationships.

Decision

The determination of First-tier Tribunal Judge Suchak contained an error on a point of law and it is set aside.

We re-make the decision and dismiss the appeal against the EEA decision of 7 September 2012.

Signed Date

John McCarthy

Deputy Judge of the Upper Tribunal

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[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/ EEC , 68/360/ EEC , 72/194/ EEC , 75/34/ EEC , 75/35/ EEC , 90/364/ EEC , 90/365/ EEC and 93/96/ EEC .

[2] COM(2009) 313/4 is the Communication from the Commission to the European Parliament on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States .