IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004896

First-Tier Tribunal No: EU/52596/2023
LE/00394/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22nd April 2024

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

JUDITH NAKAYIZA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Akohene, Aminu Aminu Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 12 April 2024

DECISION AND REASONS

1. The appellant is a citizen of Uganda born on 17 September 1973. She appeals against the decision of First-tier Tribunal Judge Sangha dated 20 September 2023 dismissing her appeal against the refusal of leave to remain under the EU Settlement Scheme ('EUSS').

2. The appeal came before me on 19 January 2024 and I found there was an error of law in the decision of the First-tier Tribunal ('FTT') for the reasons given in my decision dated 23 January 2023 (see Annex A). The FTT decision was set aside and the appeal was adjourned for remaking.

3. In response to directions, the respondent served further evidence in the form of an email from the Ugandan High Commission dated 1 March 2024 (see Annex B)

which confirmed the marriage was valid and the appellant was legally married to the EEA sponsor on 30 October 2015.

4. As a result, the appellant made written submission dated 12 March 2024 in which she stated:

> "The respondent has indicated that they are no longer defending the case. I am very grateful for this. In the light of the above it is the appellant's submission that the honourable judge rule that the appellant has made out her case and that the Respondent has conceded the case. The defence is therefore dismissed, and the appeal upheld.
> That this honourable court direct the respondent to issue the appellant and her children namely Miss [MGKN] and Mr [TMBM] Permanent residence or indefinite leave to remain as the case may be. This status backdated to 2022 when it ought to have been granted.
> I and my children have spent so much on this case in terms of time, emotion and all. May I ask for a cost of £10,000 against the respondent.

5. On 13 March 2024, I issued a notice to the parties in the following terms:

> "Accordingly, the appellant has shown that her marriage had lasted 3 years. This was the only issue
> on appeal. It appears that the appellant satisfies the requirements of EU11 or EU14 Appendix EU.
> It is directed that the respondent notifies the Upper Tribunal and appellant by 4pm on 28 March 2024 of any reasons why the appeal cannot be decided on the papers and allowed. If no response is received by that date the Upper Tribunal will proceed to determine the appeal as indicated."

6. In response, the respondent submitted a position statement ('RPS') dated 28 March 2024 in which he accepted the appellant had been married for the required period of 3 years under the EUSS and that she was a family member with a retained right of residence who satisfied paragraph EU14 of Appendix EU. The appeal is allowed on that basis.

7. However, the respondent did not accept that the appellant satisfied paragraph EU11 of Appendix EU as defined in Annex 1 on the grounds that, on the evidence provided, the appellant had failed to show a continuous qualifying period (i.e. a period without any disqualifying gaps, as defined) of at least five years.

8. In addition, the respondent takes issue with the concession recorded at [10] of the error of law decision ('EOL') dated 23 January 2024 which states

> "Mr Lindsay accepted on behalf of the respondent that the children were dependent on the appellant and their status would be considered in line with the appellant's."

9. The respondent submitted that this does not accurately reflect his position which was that the appellant's minor children who are included as dependents in the application for leave to remain would normally be considered in line with the appellant, the main applicant. The respondent submitted the concession had to be viewed in context and the substance of the indication was that, although the appellant's children did not have appeals linked to the appellant's, their circumstances could still be considered. The respondent also submitted that it was not possible to be satisfied the children were dependent as no information was available.

10. The respondent submitted that the appellant's son was included in her application, but the appellant's daughter was not, although the respondent accepted that both children were named on the application for administrative

review. The respondent submitted the appellant's daughter was an adult at the date of her application in June 2021.

11. Further and alternatively, if the concession was made in the terms stated at [10] of the EOL, it did not accurately reflect the respondent's policy or practice and the respondent seeks to withdraw it in accordance with the principles identified in AK (Sierra Leone) v SSHD [2016] EWCA Civ 999 at [32]-[38]. It was submitted that the concession has not caused any prejudice to the appellant and there would be a strong public interest in permitting the concession to be withdrawn.

12. In response to the appellant's submissions of 12 March 2024 the respondent stated:

> "It is not accepted that any order for wasted costs should be made in favour of the appellant. No schedule of costs has been provided. The respondent has anyway not acted unreasonably. Further, no causal nexus has been established between the (unspecified) conduct in question and the (unparticularised) wasted costs claimed.
>
> The respondent notes that the concession that this appeal falls to be allowed could not have been made before 1st March 2024, as the evidence on which it was based (the email from Uganda High Commission, London) did not exist before that time. It is submitted that both the refusal decision and administrative review decision were correctly made on the evidence then available. The appellant's request that any grant of leave to remain be 'backdated to 2022 when it ought to have been granted' is, with respect, misconceived."

13. A transcript of the part of the hearing in which the concession was made was sent to the parties on 9 April 2024 (see Annex C). The appeal was listed to be heard on 12 April 2024. The appellant submitted further evidence in response to the further directions. There was no further evidence or written submissions from the respondent.

14. There are two outstanding issues in this appeal. Firstly, whether the appellant has shown a continuous qualifying period of 5 years and satisfies paragraph EU11. Secondly, whether the appellant's children are dependent on her application and entitled to a grant of leave in line with the appellant. It is necessary to consider whether the respondent made such a concession and whether it should be withdrawn in respect of the second issue.

Appellant's evidence

15. The appellant relied on a handwritten statement dated 12 April 2024 as evidence-in-chief. In summary, the appellant entered the UK on 6 November 2015 on a Tier 5 temporary worker visa with her two children as dependents. The appellant and her children went to stay with her husband, the EEA Sponsor, until 2018 when the marriage ran into difficulties. The appellant moved out and lived with friends and in temporary accommodation in Kettering where they now have a permanent home. The appellant's children have always lived with her and the family has remained in the UK since 2015. The appellant made a joint EUSS application for herself and her children but there was a technical issue which resulted in her daughter's application being made at a later date.

16. In cross-examination, the appellant explained that the EUSS application was made with the assistance of a lawyer who engaged with the Home Office about the technical error. There was an issue with the UAN number which was rectified by the Home Office resulting in her daughter's application being recorded as

made at a later date. The appellant produced copies of emails to show that the applications were linked together by the Home Office. The cover letter (at page 57 of the respondent's bundle before the FTT) showed that the EUSS application was made in respect of the appellant and her two children for settled status on the grounds of 5 years' continuous residence. The appellant produced copies of the entry stamps to the UK in her passport and those of her children.

17. The appellant confirmed she entered the UK on a temporary work permit and she made an application under the Immigration (EEA) Regulations 2016 but did not pursue it when the marriage ran into difficulties. She stated she had contacted the Tribunal asking for her children to be included in the appeal but she did not know what happened. She forwarded emails from her MP and from the Home Office to the respondent to support her oral evidence. The appellant stated that she has been in the UK with her children since 2015 and the last time the children talked to their father was about 4 years ago. He was in Uganda and was not involved in the children's lives. He had not lived in the UK at any point.

18. The appellant was asked about the gaps in the documentary evidence and stated that she was homeless in 2018 and lived at Bath Road from 20 June 2019 to May 2023. The lawyer who assisted her with the EUSS application picked out the bills to be included in the bundle. More could be provided if required. Her children were with her at the time of the divorce in July 2020. Her son was at Kettering Science Academy and her daughter at Tresham College at that time. The appellant did not have her passport or the children's passports with her but she was happy to submit them. She stated there were no stamps in the passports to show they had left the UK. There was no re-examination.

Appellant's submissions

19. Mr Akohene made his submissions first and was given a right of reply. Mr Akohene referred to the three administrative review decisions and submitted the appellant's children were family members of a spouse who had a retained right of residence and therefore they met the requirements under Appendix EU. The children were under the age of 21 at the date of application and dependency was not relevant. On the balance of all the evidence, the appellant had shown that she entered the UK with her children in 2015 and they had not left. If the appellant's appeal succeeded the children should do so on the same basis. They all had continuous residence from 2015 to 2020 and the appellant had given a good explanation for the gaps in the documentary evidence.

20. In response to a question from me, Mr Akonene submitted the appellant was married to an EEA national at the time she entered the UK and had an EU right of residence notwithstanding it was not documented. She had shown she had a retained right of residence since the divorce and it was not relevant in what capacity she entered the UK. She satisfied the requirements of paragraph EU11 and was entitled to settled status.

21. Mr Akonene submitted there was sufficient evidence to show the appellant's children had lodged appeals and the concession should not be withdrawn. In response to the respondent's submission set out below, Mr Akonene accepted that the documentation was sparse and submitted the appellant had given forthright, credible and plausible evidence which, when considered with the documentary evidence, was sufficient to show she had 5 years' continuous residence. Her children met the same test and had always lived with her.

Respondent's submissions

22. Mr Lindsay submitted the appellant's children could not satisfy the definition of 'child' in Appendix EU because the appellant was not an EEA citizen. The had to show that they were a family member with a retained right of residence and that they were resident in the UK at the time of the divorce. There was insufficient evidence to support this conclusion.

23. Mr Lindsay relied on the RPS and submitted the concession was not correctly set out in [10] of the EOL. The paragraph in the transcript had to be read in context. The respondent was not aware until the day of the EOL hearing that it was the appellant's case her children had been included in her application and appeal and therefore he could not have formed a view on it. Mr Lindsay had given a provisional view predicated on what the appellant claimed. He had no opportunity at that stage to know if that was the correct position.

24. Mr Lindsay submitted that no concession was made but in any event it was not material to the appeal which could not succeed at the date of the EOL hearing because there was no evidence to show the marriage was valid and had lasted for 3 years. He relied on AK (Sierra Leone) v SSHD [2016] EWCA Civ 999 and submitted it was in the interests of justice that the respondent be permitted to withdraw the concession. It was in the public interest that the respondent should be able to consider the issue of the appellant's children properly and the appellant had not been prejudiced since she had not done anything in reliance on what was said at the EOL hearing when Mr Lindsay had given a preliminary indication to an unrepresented appellant on an appeal which could not at that stage succeed.

25. Mr Lindsay accepted, and it was apparent on the administrative review letter of 11 April 2023, that the appellant's son was included in her EUSS application, but he submitted there was insufficient evidence to show that the appellant's son met the requirements of Appendix EU. It was common ground the appellant's daughter applied at a later date. The appellant stated the applications were linked by the Home Office and had produced an email from her MP during her oral evidence which the respondent had been unable to verify. The appellant had failed to produce sufficient documentary evidence to show she had 5 years' continuous residence or that her children were resident in the UK at the time of her divorce. Mr Lindsay submitted he had been flexible in considering the evidence produced at this hearing and it was for the appellant to show that the documents she produced were reliable. He did not accept the evidence that the applications were linked and had only conceded the appellant was entitled to pre-settled status. There was no evidence that the appellant's children were parties to this appeal, but in any event there was insufficient evidence to show they met the requirements for pre-settled status.

26. Mr Lindsay referred to the appellant's covering letter on her EUSS application and the new material submitted by the appellant for this hearing which supported the appellant's oral evidence. He submitted the assertions made at the hearing should have been made some time ago. The documentary evidence to show that the appellant's children were in the UK at the time of the divorce was minimal. This evidence was easy for the appellant to produce and the Tribunal should direct the appellant to produce it. The documentary evidence had been

produced late in the day and the respondent had no opportunity to check it. The lack of evidence was capable of undermining the appellant's credibility.

27. In response to a question from me, Mr Lindsay accepted that the respondent had the opportunity to refuse the appellant's and her children's applications on the basis there was insufficient evidence to show continuous residence for the qualifying period.

Appendix EU

28. It is accepted the appellant satisfies the definition of a family member who has retained a right of residence set out in Annex 1 of Appendix EU. Under Rule EU11 (indefinite leave to remain) the appellant also has to satisfy the following paragraph (my emphasis):

> (a) The applicant:
> (i) is a relevant EEA citizen; or
> (ii) is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen; or
> (iii) is (or, as the case may be, for the relevant period was) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or
> (iv) is a person with a derivative right to reside; or
> (v) is a person with a Zambrano right to reside; or
> (vi) is a person who had a derivative or Zambrano right to reside; and
> (b) **The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories**; and
> (c) Since then no supervening event has occurred in respect of the applicant

29. Continuous qualifying period is defined in Annex 1 as a period of residence in the UK during which none of the following occurred: "absence(s) from the UK and Islands which exceeded a total of six months in any 12-month period". There has been no supervening event in respect of the appellant.

30. Child is defined in Annex 1 of Appendix EU as "the direct descendant under the age of 21 years of a relevant EEA citizen (or, as the case may be, of a qualifying British citizen or of a relevant sponsor) or of their spouse or civil partner."

Conclusions and reasons

31. I find the appellant to be a credible witness. She gave clear and cogent evidence which was supported by documentary evidence. It is apparent from the covering letter dated 20 January 2021 (at page 57 of the respondent's bundle before the FTT) that the appellant applied for settled status under the EUSS on the basis of 5 years' continuous residence for herself and her two children. I accept there was a technical issue which resulted in her daughter's application being recorded at a later date. I place reliance on the email she produced from her MP Philip Hollobone that the Home Office linked the appellant's and her children's applications together. The appellant relied on correspondence from the same MP in her appeal before the FTT (page 167 of the respondent's bundle). I see no reason to doubt the authenticity of the email linking the applications.

32. It is apparent from the three administrative review decisions dated 11 April 2023 that the appellant's and her children's applications were linked and considered together. The original refusal decisions were withdrawn and their applications were refused on the alternative ground that the appellant's marriage had not lasted for 3 years. It was the respondent's case that the appellant had

not retained rights of residence based on her marriage to an EEA citizen and was not eligible to sponsor her children's applications.

33. I am not persuaded by Mr Lindsay's submission that the assertions made in oral evidence should have been made at an earlier date. The appellant's EUSS application was refused because the respondent did not accept the marriage was valid. It was open to the respondent to also refuse the application on the grounds the appellant and her children had failed to provide sufficient evidence to show 5 years' continuous residence. The respondent did not do so. The appellant submitted her passport and those of her children with the application and it would have been apparent from any stamps in the passport if the appellant and her children had left the country. The respondent did not take that point and therefore the appellant, who was unrepresented until two days before this hearing, cannot be criticised for failing to address this issue at an earlier date.

34. I accept the appellant's evidence for the gaps in the documentary evidence she provided to the FTT. She had no utility or council tax bills for the period when she was homeless and the lawyer who assisted her in making the application submitted a selection of documents to cover the required qualifying period. On the balance of probabilities and looking at all the evidence in the round, I accept the appellant's oral evidence and find there is sufficient documentary evidence to support her account.

35. On the evidence before me I make the following findings of fact. The appellant came to the UK with her children in November 2015. She has remained in the UK with her children since then. She made applications for settled status under the EUSS for herself and her children which are based on the same facts. The appellant's son was born on 2 April 2008 and her daughter was born 26 January 2003. They were both under the age of 21 at the date of their applications under the EUSS.

36. Unfortunately, the appellant's children were not included in her appeal to the FTT. The grounds of appeal were not submitted in evidence and the digital file records only an appeal by the appellant. I accept that she contacted the Tribunal to enquire about appeals by her children and she may have believed they were included but they were not. The appellant's children are not parties to this appeal and it is open to them to make an application to appeal the refusal decisions of 11 April 2023 out of time. The respondent accepts in the RSP that the children's circumstances can be considered in this appeal notwithstanding their appeals were not linked.

The Concession

37. In the RPS, the respondent set out [10] of the EOL decision and stated:
"It is respectfully submitted that this does not accurately reflect the respondent's position. The indication given at the EOL hearing was that minor children who are included as dependants on the LTR application will normally be considered in line with the main applicant.

38. For the reasons given above, I am satisfied that the appellant's children were minor children who were included on the appellant's application for indefinite leave to remain under the EUSS. Therefore, even if [10] does not reflect what the respondent stated at the hearing, it was not material because the respondent's position stated in the RPS would result in the appellant's children being

considered in line with the appellant. Any misstatement on my part was irrelevant given the respondent's policy and/or practice.

39. I am not persuaded by Mr Lindsay's submission that the respondent was not aware until the day of the EOL hearing that it was the appellant's case her children had been included in her application because it is apparent from the covering letter of 20 January 2021 that the application was made on behalf of the appellant and her children. The respondent was well aware of the appellant's case and could have formed a view on it.

40. Accordingly, I find the respondent did concede that the appellant's children would be considered in line with the appellant's application. In the circumstances, it is not in the public interest to allow the respondent to withdraw the concession. The appellant has proceeded on the basis that her children's applications will be considered in line with hers.

EU11

41. It is accepted the appellant is a family member who has retained the right of residence by virtue of her relationship with a relevant EEA citizen. This was the only issue taken in the refusal letter, the review before the FTT, the hearing before the FTT and the EOL hearing before the Upper Tribunal.

42. I accept the appellant's evidence and find there is sufficient documentary evidence to show the appellant has been resident in the UK since 2015. It was her evidence before the FTT that she came to the UK in November 2015. The appellant submitted her passport with her EUSS application in 2021. A copy of one page appears in the respondent's bundle showing that the appellant's passport was issued in 2013 and was valid for 10 years. There was no evidence to contradict the appellant's account that she has been in the UK since November 2015.

43. Accordingly, on the evidence before me, I find the appellant has shown that she has 5 years' continuous residence in the UK. The appellant was married to an EEA citizen when she came to the UK. It is accepted she has a retrained right of residence since her divorce. I find the appellant satisfies paragraph EU11 of Appendix EU. The appellant's appeal is also allowed on that basis.

Costs

44. The Upper Tribunal has no power to award costs in a statutory appeal and I am not satisfied that a wasted costs order should be made against the respondent. Mr Lindsay has not acted improperly, unreasonably or negligently. As a result of his diligence the appellant has been able to show her marriage was valid and lasted for 3 years.

Notice of Decision

The appellant's appeal is allowed.

J Frances
Judge of the Upper Tribunal

Immigration and Asylum Chamber
18 April 2024

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140 for the following reason. The appellant has succeeded on all grounds and the respondent conceded the appeal in part.

J Frances
Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 April 2024

ANNEX A – EOL DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004896

First-tier Tribunal No: EU/52596/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE FRANCES

Between

JUDITH NAKAYIZA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 19 January 2024

DECISION AND REASONS

1. The appellant is a citizen of Uganda born on 17 September 1973. She appeals against the decision of First-tier Tribunal Judge Sangha dated 20 September 2023 dismissing her appeal against the refusal of leave to remain under the EU Settlement Scheme ('EUSS').

2. The appellant applied under the EUSS as a family member who has retained the right of residence by virtue of her relationship with an EEA national on the basis she was previously the spouse of Olivier Bruno Toussaint ('the sponsor'). Her application was initially refused because she did not provide an identity document for the sponsor. On administrative review, the appellant provided evidence of her attempts to obtain this document from the sponsor without success. The respondent accepted this alternative evidence and refused the application for the reasons given in the letter dated 11 April 2023.

3. The respondent stated that the application was also refused because there was insufficient evidence to show the sponsor was resident in the UK at the time of the divorce. The respondent stated, "Although this reasons is still valid, I have not sought to ask for any further evidence as it cannot change the decision to refuse you still, based on the new reason explained below." The respondent went on to state:

> "It is noted that you provided a document dated 30 October 2015 as evidence that you were married in 2015. However, as per your previous EEA Regulation refusals, Ugandan proxy or customary marriages are not consider (sic) valid under Ugandan law unless both parties were in attendance at the marriage ceremony, It is noted that you converted this into a lawful marriage that was registered in Uganda on 07 June 2018. Therefore, it is considered that you were legally married to your sponsor from 07 June 2018. It is also noted from the divorce certificate you provided that your marriage to your sponsor was terminated on 22 January 2020. Therefore, as your marriage to your sponsor had not lasted for at least three years, you do not meet the requirement of the scheme as a family member of an EEA national who has retained rights of residence."

The judge's findings

4. The judge heard evidence from the appellant who maintained that her customary marriage which took place on 30 October 2015 was valid under Ugandan law. The appellant submitted the registration of the marriage on 7 June 2018 was an administrative task. The judge found at paragraph 9 of his decision that the appellant was present at the marriage ceremony and her sponsor was in London. The judge considered the Ugandan Customary Marriage (Registration) Act 1973 ('the 1973 Act') and found at paragraph 11:

> "I have not been able to find any section in the 1973 Act to indicate that a proxy marriage would not be valid in Uganda or that customary marriages which are conducted with just one person being present and the other person being abroad are not considered to be valid. However what I have noted from the 1973 Act is that the "date of marriage" means the date of the "registration" of the marriage. In this particular case it is clear that although the customary marriage took place on 30 October 2015 it was not registered by the Appellant until 7 June 2018. Therefore, in my assessment of the evidence before me and the laws relating to marriages in Uganda the date of marriage for this particular Appellant is 7 June 2018 because that was when the customary marriage was registered."

5. The judge found that the relevant date of the marriage was 7 June 2018 and it ended on 16 July 2020. He concluded the marriage had not lasted for 3 years and the appellant could not satisfy Rule EU11 or EU14 of Appendix EU.

Grounds of appeal

6. The appellant appealed on the grounds the judge had wrongly interpreted the 1973 Act. The phrase "unless the context otherwise requires" in section 1 (interpretation) demonstrated the diverse nature of Uganda's customs. It was submitted that the context in 2015 was different to that in 1973 and the 1973 Act had been amended by subsequent legislation in 2005, 2014 and 2017. The context and amendments were explained in the case law submitted on appeal.

7. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 11 December 2023 for the following reasons:

> "The central issue in contention before the First-tier Tribunal was whether, as a matter of Ugandan law, the appellant's marriage commenced in October 2015 or June 2018. The judge appears to have reached a view on the position under Ugandan law on the basis of a textual interpretation of a PDF print out of a

document headed Uganda's Customary Marriage (Registration) Act 1973. This was arguably legally erroneous because foreign law is a matter of fact to be proved by expert evidence directed precisely to the to the question under consideration. See paragraph 9 of Hussein and Another (Status of passports: foreign law) [2020] UKUT 00250 (IAC)."

8. Paragraph 9 of Hussein states: "Those grounds cannot be accepted. First, foreign law is a matter of fact and must be proved by evidence. It is not sufficient to produce Tanzanian statutes and assert that the statute represents the whole of the law on the subject. A moment's consideration shows why that is so: it is absurd to suggest that a person who had access to the Queen's Printer's copy of the British Nationality Act 1981 would be able to deduce reliably from it the status of any postulant for nationality: it has been subject to numerous amendments, and it says nothing about the operation of policy or prerogative. **Foreign law needs to be proved by expert evidence directed precisely to the questions under consideration, so that the Tribunal can reach an informed view in the same way as anybody taking advice on an unfamiliar area of law.** It is surprising that this well-known principle has apparently escaped the notice of the appellant's professional advisers: if authority is needed it can be found in CS [2017] UKUT 00199 (IAC).; see also R(MK) v SSHD [2017] EWHC 1365 (Admin) at [5]-[8]. There is no evidential basis in the present case for any of the arguments about Somali, Kenyan or Tanzanian law that were made before the First-tier Tribunal or in the grounds." (My emphasis).

Submissions

9. The appellant submitted the judge had considered the definition of 'date of marriage' in section 1 of the 1973 Act but failed to take into account other considerations in the 1973 Act or that it had been amended and that traditional institutions had evolved. The appellant submitted there was expert evidence in the form of a letter from a Ugandan lawyer at page 65 of the appeal bundle and two court judgments at page 70 onwards. The appellant relied on this case law and submitted the date of the marriage was the date the ceremony took place. The certificate of customary marriage issued by the government clearly stated the date of the marriage was 30 October 2015. She submitted the respondent had failed to comply with directions, given in the First-tier Tribunal, to show otherwise.

10. In response to a question from the appellant about why her children's appeals were not linked to this appeal, Mr Lindsay submitted this did not make a difference to the decision because this was an EUSS appeal not an Article 8 appeal. I noted the refusal decision of 11 April 2023 considered the children. Mr Lindsay accepted on behalf of the respondent that the children were dependent on the appellant and their status would be considered in line with the appellant's.

11. Mr Linsday accepted the respondent had failed to comply with directions and submitted this was not material to the outcome for the following reasons. The appellant was relying on Ugandan law and the 1973 Act had been amended. The First-tier Tribunal was not an expert and the date the marriage commenced was potentially complicated and unclear. The respondent relied on Hussein in which the Upper Tribunal held that foreign law was a matter of fact to be proved by expert evidence. He submitted there was no expert evidence before the First-tier Tribunal and therefore the appellant's appeal was bound to fail. Notwithstanding the judge's findings at paragraph 11 of the decision, the judge was bound to find on any view that the appellant had not proved her case. The appeal could not succeed in the absence of expert evidence. The respondent submitted there was no material error of law.

12. In response, the appellant relied on a letter from the Ugandan High Commissioner (page 392 of the appeal bundle and page 195 of the appellant's bundle before the First-tier Tribunal) and a letter from the Kingdom of Buganda (page 397 appeal bundle/page 200 appellant's bundle). Both letters stated the marriage certificate was valid. The marriage certificate stated the date of the marriage was 30 October 2015. The appellant submitted there was expert evidence before the First-tier Tribunal and the judge had misinterpreted the 1973 Act. The appellant was unable to obtain evidence that the sponsor was in the UK at the time of the divorce because the relationship had been abusive and she no longer had contact with the sponsor for her own well-being and that of her children. The appellant had provided an explanation to the Home Office in relation to the sponsor's identity and place of work.

Appendix EU

13. Under Rule EU11 (indefinite leave to remain) or EU14 (limited leave to remain) the appellant has to show that she is a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen.

14. The definition of a family member who has retained a right of residence is set out in Annex 1 of Appendix EU. The provisions relevant to this appeal are set out below.

> " … a person who has satisfied the Secretary of State, including by the required evidence of family relationship, that the requirements set out in one of sub-paragraphs (a) to (e) below are met and that since satisfying those requirements the required continuity of residence has been maintained:
>
> (d) the applicant ("A") is an EEA citizen (in accordance with sub-paragraph (a) of that entry in this table) or non-EEA citizen who:
>
> (i) ceased to be, as the case may be, a family member of a relevant EEA citizen (or of a qualifying British citizen), or a joining family member of a relevant sponsor, on the termination of the marriage or civil partnership of that relevant EEA citizen (or, as the case may be, of that qualifying British citizen or of that relevant sponsor); for the purposes of this provision, where, after the initiation of the proceedings for that termination, that relevant EEA citizen ceased to be a relevant EEA citizen (or, as the case may be, that qualifying British citizen ceased to be a qualifying British citizen, or that relevant sponsor ceased to be a relevant sponsor), they will be deemed to have remained a relevant EEA citizen (or, as the case may be, a qualifying British citizen or a relevant sponsor) until that termination; and
>
> (ii) was resident in the UK at the date of the termination of the marriage or civil partnership; and
>
> (iii) one of the following applies:
>
> (aa) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had been resident for a continuous qualifying period in the UK of at least one year during its duration; or
> (bb) A has custody of a child of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor); or
> (cc) A has the right of access to a child of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant

> sponsor), where the child is under the age of 18 years and where a court has ordered that such access must take place in the UK; or
> (dd) the continued right of residence in the UK of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence or abuse whilst the marriage or civil partnership was subsisting; or ….

Conclusions and reasons

15. There was no dispute that the principle in Hussein applied in this case: Foreign law needs to be proved by expert evidence directed precisely to the questions under consideration, so that the Tribunal can reach an informed view in the same way as anybody taking advice on an unfamiliar area of law.

16. It is apparent from paragraph 10 and, in particular, the last sentence of paragraph 11 of the judge's decision that he failed to apply Hussein. The judge erred in law in assessing the laws relating to marriages in Uganda and finding that the date of the marriage was the date of registration on 7 June 2018.

17. I am not persuaded by the appellant's submission that the letters at pages 65, 392 and 397 of the appeal bundle (pages 198, 195 and 200 of the appellant's bundle before the First-tier Tribunal) amount to expert evidence. There is nothing on the face of the letters to show that the author is legally qualified or an expert on Ugandan law. The letters are lacking in detail and fail to address the date of the marriage.

18. After the hearing the appellant submitted a declaration from her brother dated 22 April 2016 and a further certificate of marriage from the Uganda Registration Services Bureau dated 6 November 2015. She submitted these documents were sent to the respondent in 2016 and 2017.

19. The letters and further documents are not directed precisely to the questions under consideration in this case, namely:
    (i) Whether the appellant's customary marriage was valid given the sponsor was not present at the ceremony in Uganda; or
    (ii) Whether under Ugandan law both parties had to be present at the customary marriage ceremony; and
    (iii) If the customary marriage was valid, notwithstanding the sponsor's absence, whether the date of the marriage was the date of the customary marriage ceremony or the date of registration under the 1973 Act as amended.

20. The appellant is unrepresented and ably presented her case. However, the documents referred to above and the judgments of the High Court in 2014 and Supreme Court in 2015 were insufficient to satisfy the principle in Hussein for the reasons given above.

21. I am not persuaded the appellant's appeal is bound to fail because there is no requirement in the EUSS to show the sponsor was present in the UK at the time of the divorce. The issue in this case is whether the appellant's marriage was valid and lasted for 3 years. The interpretation of Ugandan law is a matter of fact and it is in the interests of fairness and justice to give the appellant the opportunity to obtain expert evidence which deals with the questions in paragraph 19 above.

22. In relation to calling oral evidence, the appellant should be aware of the requirement for permission: Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC). Permission is not required for written evidence or submissions (oral or written): Presidential Guidance, dated 27 April 2022, entitled 'Taking oral evidence by video or telephone from persons located abroad'.

23. Accordingly, I find the First-tier Tribunal materially erred in law and I set aside the decision dated 20 September 2023. None of the judge's findings are preserved. I have considered paragraph 7 of the Practice Statements of 25 September 2012 and adjourn the appeal to be reheard before the Upper Tribunal.

Notice of Decision

The appellant's appeal is allowed and is adjourned to be reheard before the Upper Tribunal.

DIRECTIONS

1. The respondent to serve on the Upper Tribunal and the appellant any further evidence upon which he intends to rely no later than 4pm on 8 March 2024.
2. The appellant to serve on the Upper Tribunal and the respondent any further evidence upon which she intends to rely no later than 4pm on 15 March 2024.
3. Both parties to submit brief written arguments no later than 4pm on 22 March 2024.
4. The appeal to be relisted before Upper Tribunal Judge Frances on 12 April 2024.

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2024

ANNEX B – EMAIL 1 March 2024 from UGANDAN HC

UI-2023-004896 – EU/52596/2023

In the matter of:

JUDITH NAKAYIZA v SECRETARY OF STATE FOR THE HOME DEPARTMENT

The respondent SSHD provides the further evidence below, in compliance with the directions issued by Upper Tribunal Judge Frances on 2nd February 2024.

From: Email dated 1st March 2024 from Uganda High Commission, London

> You will be aware that there are five types of marriages recognized in Uganda, which include Civil, Church, Customary, Moslem and Hindu marriages.
>
> Accordingly, the laws of Uganda recognize customary marriage as one of the five types of marriage in Uganda, and customary marriage is usually celebrated according to the tribal rites of that community and one of the parties should be a member of that community/tribe.
>
> Whereas it is usually ideal for both parties to the customary marriage to be physically present during the ceremonies, however, it is also acceptable and lawful for the tribal marriage ceremony to be conducted in the absence of the would-be groom. In the event where the would-be groom is not present, usually the head of the groom's delegation would present his photograph/portrait, explaining the absence of the groom, and if the reason for absence is acceptable by the elders, and the photograph or portrait of the groom is confirmed by the bride, the customary marriage rituals would be concluded, and the customary or tribal marriage certificate would be issued accordingly.
>
> However, the Uganda law requires parties to a customary marriage to register the marriage with the Registrar of Marriages at the Uganda Registration Service Bureau (URSB). Ideally, the registration should be done as soon as is possible, but in any event not less than 6 months after completion of the customary marriage ceremonies. It is also important to take note that failure to registrar the marriage within the stipulated 6 months does not invalidate the marriage but may attract a penalty or a fee for out of time (late) registration.
>
> In light of the above, the marriage described in your email of 9th February 2024 is considered as valid and is consistent with the laws of Uganda, even where the sponsor was not present at the ceremony in Uganda. Following the customary marriage on 30th October 2015, the parties were henceforth legally married as of this date.

[End]

ANNEX C – TRANSCRIPT OF PART OF EOL HEARING

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004896

First-tier Tribunal Nos: EU/52596/2023

THE IMMIGRATION ACTS

Issued:

.....

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

Ms Judith Nakayiza
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Heard at Field House on 19 January 2024

SHORT TRANSCRIPT OF PART OF THE HEARING

Ms Nakayiza: Could I also, could I also point out that, erm, my case was first presented to Judge Groom of Nottingham Court and the judge requested the Home Office to respond to the, erm, to give a response to the, err, expert evidence that I provided. That's number one, but it also asked, she also asked, erm, Home Office and the Tribunal to attach the other two appeals because there were three appeals within one. Me and my children, erm, and they were given a month, so that was 12th, from 12th, erm, July until August of last year and there was no response from Home Office and also, erm, the names of my children, who are my dependants, were not included

Judge Frances: Are not included?

Ms Nakayiza: No

Judge Frances: Erm, did they appeal to the First-tier Tribunal?

Ms Nakayiza: Yes, yeah

Judge Frances: Because they are not a party to your first appeal

Ms Nakayiza: Yeah, they appealed ……

Judge Frances: They appealed separately?

Ms Nakayiza: Erm, because we did everything online and was attached, erm, within the, the, the appeal

Judge Frances: Yeah

Ms Nakayiza: So, so, it all came, went as one appeal, so

Judge Frances: And you're just wondering why they're not

Ms Nakayiza: Yeah

Judge Frances: They haven't got their own number?

Ms Nakayiza: Yeah, yeah

Judge Frances: Erm, I don't know the answer to that, but

Ms Nakayiza: Yeah

Judge Frances: They are your dependants

Ms Nakayiza: Yes

Judge Frances: So you have to succeed

Ms Nakayiza: Yeah

Judge Frances: In order for them to succeed

Ms Nakayiza: Yeah, …….

Judge Frances: Erm, so, erm

Ms Nakayiza: Issue

Judge Frances: Right, ok. So, they haven't been added. And have you received anything from the Tribunal to say why the appeals haven't been linked?

Ms Nakayiza: No, I sent an email, erm, and asked about that but, my appeal was just re……. to a different judge and, erm, I didn't get a response for it

Judge Frances: Right, ok, thank you. Anything further? We'll hear from Mr Lindsay and then you can respond to what Mr Lindsay says as well

Ms Nakayiza: Ok, alright

Judge Frances: So, if you think of anything in the meantime, make a note of it and after Mr Lindsay has finished we, will look at that as well

Ms Nakayiza: Alright, thank you very much

Judge Frances: Err, yes, Mr Lindsay

Mr Lindsay: Erm, thank you judge. The appeal was resisted. I'll deal with the points that Ms Nakayiza has raised in reverse order, if I may. Erm, I wasn't aware of any issue about, erm, applications or appeals of Ms Nakayiza's children. Erm, I have looked again at the CCD platform, that's the First-tier Tribunal's online case management platform, erm, website, if you will, erm, and it's obviously got a tab that sets out all directions that have been issued. I can't see anything about children there. Erm, **so I wasn't aware of that point but, because this is an EUSS appeal, erm, it is not an Article 8 or a human rights appeal, erm, it, it seems to me on the face of it that it wouldn't have made any difference to the way Ms Nakayiza's case was decided, erm, if the children had been, erm, able to appeal as well, erm, I, I think as the Tribunal has already noted, erm, they would be, erm, dependants of Ms Nakayiza and, erm, in any event, it seems likely that, erm, that they would be granted leave in line however I don't quite know the details, erm**

Judge Frances: And, and also, the, the actual, the refusal letter of the 11th of April 2023, which is after an administrative review does deal. It's not as if the children are ignored there.

Mr Lindsay: Yes

Ms Nakayiza: Yes, yes

Judge Frances: The refusal letter does deal with the children there. So

Ms Nakayiza: Yes it does

Mr Lindsay: That, that's right. But erm, and because of that, just, just to make clear, that I, I don't think that there's any chance of a situation where, if Ms Nakayiza's appeal succeeded, the Home Office wouldn't then be saying oh but the children need to leave us, erm

Judge Frances: Right

Mr Lindsay: We are not there obviously, erm, at this stage because what we have is a situation where, erm, Ms Nakayiza's appeal has been dismissed by the First-tier Tribunal in any event. Erm, just on the, just on the other point that was raised, erm, about the directions of the Home Office, erm, to respond further, erm, to Ms Nakayizar's case in the First-tier

Tribunal, I can, I can see that that was a direction set to the Home Office, erm, I don't think that the Home Office complied with that direction, erm, the direction was set by, erm, the Tribunal on the 10th of July 2023. The response from the Home Office was due by the 9th of August

Judge Frances: These are the standard directions issued?

Mr Lindsay: Erm, no, this was a clarifying question, it's raised as, erm, set by Judge Groom and, and what it says is this. Erm, the Respondent is to file and serve a further review of the Appellant's appeal by 4pm on, sorry I misidentified the date a little earlier, by 4pm on 26th of July 2023. Erm, the review must clarify the basis upon which the Respondent asserts that Ugandan proxy or customary marriages are not considered valid under Ugandan law unless both parties were in attendance at the marriage ceremony and then there was provision for the Appellant which has gone further. Erm, so that was a clear direction set for the Home Office to comply with it, erm, I don't think that the Home Office did ever comply with that direction. Erm, in, in my submission, that is not material and didn't make any difference to the outcome of the appeal, erm, and, and the reason why I say that I, I think, will become hopefully more clear as I, erm, address the grounds of appeal.