IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003707
First-tier Tribunal No:
EA/02225/2021

THE IMMIGRATION ACTS

Heard at Field House
On 23 November 2022

Decision & Reasons Promulgated
On the 01 February 2023

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MEDOUNE NDIAYE
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Chowdhury, Counsel
For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First Tier Tribunal Judge Parkes ('the Judge') promulgated on 27 June 2022. For

ease we refer to the parties as they were before the First Tier Tribunal ('the FTT').

2. The appellant is a citizen of Senegal born on the 22 November 1972. On the 7 July 2020 he made an application under Appendix EU for settled status on account of his marriage to an EEA national. This was refused on the 4 February 2021 and it is against this that he appealed.

3. The appeal came before Judge Parkes who allowed the appeal.

Background

4. The appellant married his wife Isatou Mbye on 13 October 2013 by proxy in Gambia. She is a German citizen. He applied for a residence card on 9 May 2014. This was refused on the basis that the respondent considered it was a marriage of convenience. The appellant appealed and in a decision of 31 March 2015 First Tier Tribunal Judge Hillis allowed the appeal on the basis that the respondent had not provided any evidence capable of meeting the burden on her to show that the marriage was one of convenience. The evidence relied on by the respondent at that point in time was a report from an Immigration Officer that a home visit had been carried out and there was little evidence that the appellant lived in the house where his wife did.

5. Judge Hillis in allowing the appeal concluded that the evidence produced by the respondent "is not reliable evidence upon which I can place any significant weight". Notably the Judge highlighted "the Appellant and his wife should have been interviewed as they were given the impression they would be by the Immigration Officers who attended".

6. Judge Hillis further noted that the respondent had not turned her mind to whether the marriage was even valid given it had been carried out by proxy. We consider that Judge Hillis must have had in mind Kareem (Proxy marriages - EU law) [2014] UKUT 24(IAC) although it is not explicitly cited.

7. Judge Hillis allowed the appeal on the basis that the decision "is not in accordance with the law and the applicable immigration rules and EEA Regulations".

8. Following this decision, the respondent issued the appellant a residence card on 11 May 2016.

9. The respondent then says that she was notified by the appellant's wife in March 2016 that the couple had divorced in December 2015. On the basis of this evidence the respondent revoked the residence card on 6 July 2016. The appellant appealed against this.

10. In the intervening period the appellant and Ms Mbye were invited to an interview at Weetwood Police Station to be undertaken on 16 January 2017. Both attended and an interview was carried out.

11. The appellant's appeal was heard by First Tier Tribunal Judge Samimi on 10 September 2018. The appellant and his wife did not attend. In her decision Judge Samimi noted that the appellant was granted a residence card as an unmarried partner of an EEA national in accordance with Regulation 8(5) of the EEA Regulations 2006. The Judge goes on to find that in light of the hand written and typed copy of representations made to the Home Office by Ms Mbye confirming she no longer lives with the appellant and has no intention of doing so in the future concluded that they had ceased to be in a relationship. The Judge concluded that the respondent had satisfied her that the residence card should be revoked under Regulation 20(2). There was no challenge to her decision.

12. The appellant then applied in July 2020 for settled status as the spouse of an EEA national under appendix EU.

The respondent's decision

13. The application was refused on the basis that the respondent considered that the marriage was one of convenience. The respondent relied on the marriage interview undertaken in 2017 and what was said to be inconsistencies within the interview, as well as the previous visits.

14. The respondent further noted a divorce certificate from 2015.

15. The respondent made further submissions in writing in the form of relying on the above but also submitting that, in any event, the appellant could not bring himself within the scope of Appendix EU on the basis that he did not have a residence card which was a mandatory requirement under the provisions of Appendix EU.

The First Tier Tribunal's decision

16. Having heard evidence from the appellant, and submissions from the two parties, Judge Parkes allowed the appeal on the basis that:

    (i) The proxy marriage was genuine

    (ii) That Judge Hillis had not ruled on the validity of the marriage

    (iii) That the respondent did not either challenge that decision or did not take the opportunity to take the matter of the validity of the marriage further, and granted the appellant a residence card.

    (iv) He proceeded on the basis that the marriage was genuine and he has not had "any further evidence presented" and the Home Office have proceeded on the basis of the Gambian proxy divorce

    (v) The grant of a residence card must have been on the basis that he and his wife were lawfully married.

(vi) The issue was whether it was a valid divorce. The Judge found that it was not. The proxy divorce was not valid on the basis that the appellant and his spouse were not domiciled in Gambia and therefore under the provisions of The Family Law Act 1986 the overseas divorce was not recognised in the UK.

(vii) The appellant was aware of the 2018 appeal hearing however buried his hand in the sand.

(viii) The Judge concluded by saying as there was no divorce, and "on the assumption that the proxy marriage is valid, remains the spouse of an EEA national in the UK exercising treaty rights and accordingly meets the provisions of the regulations".

The appeal

17. The respondent was dissatisfied and appealed. In grounds settled on 4 July 2022 she submitted:

(i) The Judge had materially erred by failing to make any findings on a material matter, namely whether the appellant's marriage was one of convenience or not;

(ii) No finding was made on the matter as to the significance, or otherwise, of the appellant not having a residence card

(iii) The Judge materially erred by considering the matter through the lens of the 2016 EEA Regulations rather than under Regulation 8 of The (Immigration Citizens' Rights Appeals) (EU Exit) Regulations 2020.

18. Permission was granted on all grounds by Judge Boyes on 29 July 2022.

19. There was no rule 24 response filed by the appellant.

The hearing

20. We heard submissions from the two representatives. On behalf of the respondent Ms Ahmed submitted that the Judge simply failed to make any findings on the question of whether the marriage was one of convenience. That was a central tenet of the respondent's case and without a conclusion on this the Judge's decision was simply incomplete.

21. She further submitted that because the appellant did not have a residence card, following Judge Samimi's dismissal of his appeal in 2018 then he cannot satisfy the provisions of appendix EU. It is a material matter and without a residence card the appeal is doomed to fail.

22. Ms Chowdhury in her submissions focussed on paragraphs 2 – 8 of the Judge's decision in which she identified that the Judge was well aware of the issues. The lack of express findings was not fatal to the decision because the Judge referred to Judge Hillis' decision from 2015 where he

found the respondent had not produced sufficient evidence capable of showing that the marriage was one of convenience.

23. She further submitted that Judge Samimi's decision had been determined on the misapprehension that the issue before her was whether the appellant and his wife's relationship was durable or not. The couple were married, and the divorce certificate produced by the respondent does not show that their marriage had been lawfully dissolved. As such Judge Samimi proceeded on a misapprehension and her decision itself was therefore unlawful.

24. She submitted that the Judge, in a tricky case, made the material findings he needed to, and in doing so concluded that the appellant and his wife did not lawfully divorce. That meant that the appellant remains married to an EEA national and as the Judge found she was exercising treaty rights, the Judge's decision was sound.

25. In response Ms Ahmed relied on her previous submissions, and noted that the appeal was academic given the lack of any residence card. She did not accept that it was immaterial until a finding was made on the question of the marriage, and the lack of a document was fatal to this appeal.

Discussion

26. We have no hesitation in finding that the Judge materially erred in his disposal of the appeal. The legal issues before him were complex as we discuss below, however the critical factual dispute between the two parties which had to be resolved in the first instance was whether the appellant's marriage was one of convenience or not. The Judge makes no findings at all on this.

27. Ms Chowdhury sought to argue that the Judge implicitly found that the marriage was not one of convenience and in any event by relying on Judge Hillis' decision that was sufficient from a Devaseelan perspective to determine the matter. We reject these two submissions.

28. Firstly whilst on occasion a finding could, in principle, be inferred by implication, on this instance we are satisfied that the Judge did no such thing. He makes no mention in his findings of the marriage interview, and crucially whether the answers between the appellant and his wife were sufficiently discrepant that the respondent can show, on a balance of probabilities, that the marriage was one of convenience. This was a critical matter which required resolution and, which required express findings of fact and law.

29. Secondly, we do not accept that Judge Hillis' decision was the start and end point of the marriage of convenience issue. In his decision Judge Hillis is clear as to the reasons why the appeal is being allowed. It was due to the respondent not providing evidence capable of showing that the relationship was one of convenience. In the decision Judge Hillis does not

scrutinise any oral evidence, and makes no positive findings as to the relationship. In the decision under appeal the respondent relied on evidence in the form of the marriage interview which post-dated Judge Hillis' decision. The test set out in Devaseelan makes it clear:

> *(1) The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time was made. In principle issues such as whether the appellant was properly represented or whether he gave evidence, are irrelevant to this.*
>
> *(2) (2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.*
>
> *(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.*

The interview therefore was plainly evidence that arose after the decision from Judge Hillis, was new evidence which on the face of it showed the appellant and his wife giving contradictory accounts as to their life together. This required analysis and findings of fact which are wholly lacking from the Judge's decision.

30. For the above reasons we conclude that Judge Parkes materially erred in law.

31. The Judge further errs in considering the appeal entirely under the EEA Regulations 2016. This was erroneous. The decision under appeal had been taken under Appendix FM, not the EEA Regulations. The Judge's entire decision is predicated on this basis which was clearly wrong. The appeal was brought under Regulation 8 of The (Immigration Citizens' Rights Appeals) (EU Exit) Regulations 2020 and not the EEA Regulations.

32. The above findings are sufficient to dispose of the appeal, but there are three residual matters which require short discussion. The final paragraph of Judge Parkes' decision says as follows:

> *"36. From that information it appears that the Appellant's wife has been earning up to £* and paying tax in the UK for the past * years. The level of earnings are such that it appeared to be genuine and effective employment and accordingly she remains in the UK exercising treaty rights. There being no divorce the Appellant, on the assumption that the proxy marriage is valid, remains the spouse of an*

EEA national in the UK exercising treaty rights and accordingly meets the provisions of the regulations"

33. Firstly, it is clear that Judge Parkes was distracted in his decision by the issue of whether the appellant and his wife had lawfully divorced or not. These findings are only relevant if the marriage was not one of convenience, and then if the proxy marriage was valid or not. Judge Samimi noted in her decision that the basis upon which the appellant was granted his residence card was because of his relationship, not his marriage. The basis for the grant of the residence card is unexplained, however it *may* be due to the respondent considering the matter in 2015 after the judgment in Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC) but before that of Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178.

34. As a consequence of the above, *if* the appellant and his wife were not in a marriage of convenience then some analysis as to the status of their marriage may be required. In our view Judge Parkes' findings on the divorce must necessarily be set aside because he did not undertake any analysis of the validity of the Gambian proxy marriage. Instead, he proceeded on the basis that it was assumed that the marriage was valid. This was, in our judgment, quite wrong. The Judge had, correctly, identified a potential issue. It was incumbent on him to resolve that one way or the other. Proceeding on an assumption was no lawful basis to dispose of the issue. If the marriage itself was not valid, then the lawfulness and/or validity of the subsequent divorce is irrelevant. This will require determination once the factual dispute regarding whether the marriage is one of convenience is resolved.

35. Secondly, Judge Parkes found that the appellant's wife was exercising treaty rights. It must be said that the basis for this in his decision is unclear, no figures are in the decision as to her earnings or for how long she has been earning for. As can be seen from the quoted paragraph 36 above the Judge does not include such figures, instead inserting a * which we presume has been overlooked in the final draft of the decision.

36. Thirdly, Ms Ahmed sought to argue that the appeal was academic given the appellant does not have a residence card. This does not appear to us to be an argument which can be resolved without the above issues being addressed. The reason for this is that in Appendix EU it is in our view at the very least arguable that someone applying for pre-settled or settled status as a spouse does not require a residence card. It would on the face of it self-defeat the intention of Appendix EU being introduced in the broad terms and categories of qualification that is found in the definitions were it to require a residence card to have been issued in all cases.

37. The lack of a document may very well become a live issue were the appellant to be found not to have been in a relationship of convenience but that the proxy marriage itself was not valid for whatever reason.

However, at this stage it is simply impossible to come to any conclusion on that.

38. For the above reasons we consider that Judge Parkes materially erred in law. His decision is set aside and no findings of fact are preserved.

39. We heard short submissions on disposal, however given the above, and the complete failure of the First Tier Tribunal to resolve a central issue to the case, we consider the only fair outcome is that the matter is remitted to the First Tier Tribunal to be heard *de novo* before a differently constituted tribunal.

Notice of Decision

The appeal is allowed. The decision of the First Tier Tribunal is set aside.

No anonymity direction is made.

T.S. Wilding

Date 24th November 2022

Deputy Upper Tribunal Judge Wilding