Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02270/2015

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On Wednesday 31 October 2018	**On Wednesday 28 November 2018**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE SMITH

Between

MR GBENGA SOLANKE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Hussain, Counsel instructed by OA solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge B A Morris promulgated on 5 December 2017 ("the Decision"). The Judge dismissed the Appellant's appeal against the Respondent's decision dated 20 October 2015 revoking his residence card which was issued following an earlier appeal. In that earlier appeal, by a decision promulgated on 12

February 2014, Judge Hindson found that the Appellant was not married but nevertheless in a durable relationship with a Slovakian national, Ms Rafajova.

2. The Respondent's decision revoking the residence permit had been made on the basis that the Appellant was married to Ms Rafajova but that the marriage had been one of convenience. The action taken by the Respondent followed an interview of Ms Rafajova in the course of an enforcement visit on 20 August 2015 in which Ms Rafajova said that she was married to another Slovakian, Miroslav Rafaj and had been for 25 years. She denied knowing the Appellant or having been in a relationship with him. Following checks made by the enforcement officers, it was discovered that Ms Rafajova had sponsored not only the Appellant but another Nigerian national to who it had also been claimed she was married.

3. At the start of the hearing before Judge Morris, the Respondent indicated that the case was no longer pursued on the basis of a marriage of convenience because of Judge Hindson's earlier finding. Instead, it was argued that, since the durable relationship no longer subsisted (on the Appellant's own case it had ended), the residence permit could be revoked on that basis. The Judge accepted that change of position. The Appellant's representative submitted that the Respondent's revocation decision was incorrect in law as there had been no marriage and therefore the whole basis of the decision was legally incorrect. He later submitted that, if it were accepted that the Appellant had been legally married to Ms Rafajova, then the Appellant had a retained right of residence.

4. Judge Morris proceeded on the basis that all documents before her were also before Judge Hindson. Since the finding of Judge Hindson had not been overturned, she concluded that there was no basis on which to disturb the previous finding that the proxy marriage had not been validly entered into under Nigerian law and accordingly that there was no legal marriage. Since the Appellant could not claim to be legally married to Ms Rafajova, he could not claim a retained right of residence. On his own case, the relationship had ended and consequently, the Judge found that the decision did not breach the Appellant's rights under the EU Treaties.

5. We do not need to refer to the pleaded grounds as the appeal was argued before us on a narrow basis. It is though convenient to set out the basis on which permission was granted by UTJ Perkins on 14 September 2018 (permission having been refused previously by First-tier Tribunal Judge Grimmett):

> "1. This needs to be looked at again and I give permission on each ground.
>
> 2. The Appellant challenges a decision of the First-tier Tribunal to dismiss his appeal against the revocation of his residence card confirming his right to reside in the United Kingdom as the husband of an EEA national.
>
> 3. The Respondent was satisfied that the Appellant's marriage was one of convenience.

> 4. The problem with that finding is that the First-tier Tribunal had decided that there was no marriage at all but there was a durable relationship.
>
> 5. At the hearing before the First-tier Tribunal the Respondent changed his case and argued that the card should be revoked because the durable relationship no longer endured.
>
> 6. Clearly this is in some ways a different decision from the one that was appealed. However the First-tier Tribunal Judge established that the same rules were relied upon and the Appellant was not able to indicate what he needed to do to present his appeal that he had not already done. The Judge then decided to continue with the hearing and dismissed the appeal.
>
> 7. It might be that the Judge was right but it is clearly arguable that the Respondent should not have been allowed to change his case at the hearing of the appeal."

6. The matter comes before us to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

Discussion and conclusions

7. As is evident from what is said by Judge Perkins at [7] of his decision, the challenge found to be arguable is based on a procedural error by Judge Morris permitting the Respondent to change his case at the hearing. Mr Deller indicated that this is the case which he had expected to have to meet. That though is not the way in which the case was pursued before us. Mr Hussain accepted in reply to Mr Deller's submission that whilst an adjournment request could and perhaps should have been made to allow the Appellant to address the revised case as put forward by the Respondent, this did not happen. The Appellant was legally represented before Judge Morris. No objection was taken on his behalf about the Respondent's change of position.

8. Mr Hussain's case was put forward instead on a revised version of [2.3] and [2.4] of the pleaded grounds in which it was said that Judge Morris should not have taken Judge Hindson's decision as her starting point; she should have focussed instead on the evidence that the proxy marriage was registered in Nigeria and considered the relationship in that light.

9. Mr Hussain accepted that, following Devaseelan, Judge Hindson's decision was the appropriate starting point. He pointed out however that Judge Morris's observation that there was no challenge to Judge Hindson's decision failed to take into account that the Appellant's appeal had been allowed by Judge Hindson albeit on a finding that there was a durable relationship. The Appellant did not therefore consider it necessary to appeal Judge Hindson's decision further.

10. Mr Hussain submitted that in those circumstances, Judge Morris should have gone on to consider for herself the evidence about the validity of the marriage and should have considered whether that was reason to depart from Judge Hindson's finding. The difficulty with this submission, as Mr

Deller pointed out, is that both the Appellant and his legal representative were "adamant" that the registration certificate at page [4] of the Appellant's bundle was before Judge Hindson when he reached his decision (see [21] of the Decision).

11. The other difficulty with Mr Hussain's submission is, as we pointed out to him, if Judge Morris intended to revisit the issue of whether there was a legal marriage or not, she would also have to take into account the evidence of the enforcement officer's minute to the effect that Ms Rafajova was already married. Unless there were evidence before us that Nigeria permits polyandrous marriages (which there is not), even if we found that the Judge had committed an error by failing to consider the registration certificate for herself, the evidence before us strongly suggests that the marriage could not be lawful because Ms Rafajova was not free to marry at that time. Mr Hussain did point out that there is no statement from the enforcement officer and the minute is not signed but it cannot sensibly be suggested that the minute is not a genuine document and, absent any evidence to the contrary, that document, at the very least, meets the evidential burden of proving its contents.

12. We note that the Appellant said at the hearing before Judge Morris that he was unaware that Ms Rafajova was already married. Mr Hussain also drew our attention to documents which tend to show that she and the Appellant lived at the same address and there were photographs of them together. However, absent evidence from Ms Rafajova herself that she lied to the enforcement officer or evidence that the person who the Appellant married was wrongfully using Ms Rafajova's identity (which would not assist his case in any event), it is difficult to see how the Appellant can show that he was legally married to Ms Rafajova. He may well have been duped by her but that does not affect the legal position.

13. For those reasons, any error by Judge Morris in failing to consider the registration certificate is immaterial. We add though that, as a result of what is said at [21] of the Decision, we do not accept that Judge Morris did err in that regard. Once she had been told that the evidence relied upon had been before Judge Hindson and no further evidence was put forward, she was entitled to conclude that there was no reason to disturb the earlier finding.

14. We observe for completeness that Judge Hindson did not, or says he did not, have that registration certificate before him ([13] of his decision). We also observe that Judge Hindson was asked to determine the earlier appeal on the papers and without submissions or oral evidence. The written decision of Judge Hindson was not however before Judge Morris and in fact we only received it because Mr Deller recognised its relevance and produced it to us. On the basis of what Judge Morris was told by the Appellant and his advocate she cannot be faulted for not knowing that Judge Hindson either did not have that certificate or did but failed to notice it because of a failure to draw it to his attention. As we have already

pointed out, though, none of this matters in light of the evidence that Ms Rafajova was already married when she purported to marry the Appellant.

15. We end as we started with the basis on which permission was granted in this case namely the potential procedural error by permitting the Respondent to change his case at the hearing.

16. As Mr Deller pointed out to us, as a result of changes made to the Immigration (European Economic Area) Regulations in 2015[1], the sole ground of appeal in this case is whether the decision appealed against breaches the appellant's rights under the EU Treaties. It was the task of the Judge to consider that for herself. Whilst, as Mr Hussain accepted, it may have been preferable if the Appellant's representative had sought at least a short adjournment following the Respondent's change in position so that the Appellant could take stock and consider whether further evidence was required, the issue for the Judge thereafter remained the same. She had to consider whether there was reason to depart from Judge Hindson's finding that the marriage was not legally valid. If she had found that the marriage was a legal one, she would have needed to go on to consider what flowed from that in terms of retained rights. For the reasons we have already given, however, she was entitled (indeed bound on the evidence) to find that the marriage was not legally valid. Thereafter, since the Appellant accepted that any durable relationship had ended, she was bound to conclude that the appeal must fail.

17. For those reasons, we are satisfied that the Decision does not contain any material error of law and we uphold it.

DECISION

We are satisfied that the Decision does not involve the making of a material error on a point of law. We uphold the Decision of First-tier Tribunal Judge B A Morris promulgated on 5 December 2017 with the consequence that the Appellant's appeal remains dismissed.

Signed Dated: 21 November 2018
Upper Tribunal Judge Smith

[1] Schedule 1 to the Immigration (European Economic Area) (Amendment) Regulations 2015 amends Schedule 1 to the Immigration (European Economic Area) Regulations 2006 with effect from 6 April 2015