



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/45155/2013

THE IMMIGRATION ACTS

Heard at Field House, London
On 09 October 2014

Determination Promulgated
On 30 October 2014

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Perkins

Between

MUHAMMAD SHAKIL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

[Approved ex tempore decision]

DETERMINATION AND DIRECTIONS

Appellant: Mrs J Heybroek (of Counsel), instructed by Khans Solicitors.
Respondent: Mr I Jarvis, Senior Home Office Presenting Officer.

INTRODUCTION

1. This is an appeal by the Appellant, Mr Muhammad Shakil, against the decision of the First-tier Tribunal (hereinafter the "FtT") which dismissed his appeal. He was

appealing against a decision of the Secretary of State whereby his application for permanent residence was refused.

2. In the grounds of appeal to the FtT it was stated on behalf of the Appellant that his wife having left him around July 2012 there had been no subsequent contact between them, with the result that, it was said, it was extremely difficult for him to demonstrate evidentially that she was working on the important date of 29 April 2013. This may be linked to the summary of the background provided in paragraphs 10 and 11 of the grounds of appeal, relating to evidence of the Appellant's estranged wife's working activities on certain dates and between certain periods, together with the direction sought from the FtT in paragraph 15 of the grounds of appeal. The Appellant was putting his case in the alternative. He was contending that either he had demonstrated that the relevant period was proven, or if not, he sought a direction from the Tribunal that the Secretary of State obtain evidence from the Department of Work and Pensions and/or HMRC to ascertain whether his wife continues to work and pay taxes and national insurance contributions in the United Kingdom.

3. As the determination of the FtT demonstrates, the Judge was immediately alert to this issue. It is clear from paragraphs 2 and 3 that the hearing began with an application on behalf of the Appellant for the making of an appropriate direction by the Tribunal and a consequential adjournment. The Judge records that the arguments on behalf of the Appellant, *inter alia*, relied upon the decision of the court of appeal in the case of Amos v Secretary of State for the Home Department [2012] EWCA Civ 55. The Judge specifically noted the directions sought in paragraph 15 of the grounds of appeal. He recorded, in passing, that the application for the direction had obviously been overlooked in the system. He took into account the following:

"I also accept that potentially that there may not have been a significant delay if the Tribunal had considered the matter at an earlier stage and had been able to make a direction".

He then stated that he was refusing the application.

4. The first reason for the Judge's refusal is difficult to understand. He said there was a significant amount of documentary evidence that had not been provided and he elaborated thereon. That was really nothing to the point because the whole purpose of the application for a direction was to fill the evidential void which the Appellant said he was not capable of addressing without assistance from third party agencies. At the heart of the Judge's reasoning is the following passage:

"This is a First-tier Tribunal and despite what the Court of Appeal say [the FtT] can only make directions to ensure the smooth running and timeliness of the appeal. It is up to the parties to bring evidence to the Tribunal".

In thus ruling the Judge did not make any reference of any kind to the material provisions of the FtT procedural rules. These are contained in Rule 45. While on behalf of the Appellant Mrs Heybroek drew to our attention Rule 45 (4)(a), the gravamen of her argument was that the operative provision in this context was Rule 45 (d)(iii) and that the Judge had erred in law in either disregarding or misconstruing this Rule. This rule specifically empowers the FtT to give a direction requiring a party “..... to provide further details of his case, or any other information which appears to be necessary for the determination of the appeal”.

5. The first error of law that we identify in the determination is the Judge’s failure to give any consideration whatsoever to Rule 45. That is a rather fundamental error. The second is that the Judge has in any event misconstrued the powers available to the FtT. The directions which the FtT is empowered to give include specifically a direction providing for a party to provide any information which appears to be necessary for the determination of the appeal. The criterion governing the exercise of this power was plainly satisfied in the present case, having regard to the resumé provided at the outset of this judgment. We consider the Judge’s refusal to be irreconcilable with both the rule and the binding authority of Amos.
6. We would add that the rationale of the Rule is clear. Every court or Tribunal in every litigation context should be as fully informed as possible in adjudicating. Secondly, there is a fair trial issue in play: fairness dictates that where one party is able to provide material information or documents, such provision should be made in fulfilment of the other party’s’ right to a fair hearing. As Mr Jarvis has correctly acknowledged, the issue is here is not whether the Secretary of State could necessarily have provided the information: the issue, rather, was whether a direction from the tribunal appeared to be necessary for the determination of the appeal. In passing, having regard to the experience of this Tribunal it seems likely that the Secretary of State would be able to access information of this kind. It is common case, and we take judicial notice of this fact, that such information is routinely requested of the two agencies concerned and is routinely provided. That, however, is not to prejudge what might happen in the present case.

Decision

7. For the reasons articulated we find that the decision of the FtT is contaminated by material errors of law. Accordingly we set aside the determination. Since the effect of these errors was to deprive the Appellant of a fair hearing at first instance, the correct course is to remit the case to a differently constituted FtT.

Directions

8. We direct as follows:
 - (i) The Respondent shall make such investigations as necessary with Her Majesty’s Revenue and Customs, the Department for Work and Pensions

and such other government agencies as appropriate to ascertain the extent to which the Appellant's former spouse was a "qualified person" for the purpose and within the meaning of Regulation 6 of the Immigration (European Economic Area) Regulations 2006, in respect of the period 25th August 2007 to 29th April 2013 inclusive.

- (ii) Such investigations will begin within 14 days of this order and will be completed within six weeks thereafter.
- (iii) The Respondent shall file and serve the results of her investigations within eight weeks of the date hereof.
- (iv) Liberty to apply.

The relevant details, to assist in the investigations directed, are as follows:

Full Name: Elsa Maria Delgado Afonso
Nationality: Portuguese
Date of Birth: 04.08.1984
Last known address: 38 Clarendon Court, Sidmouth Road
London NW2 5HB
National Insurance no: SC 53 44 58 B

Signed:

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
13 October 2014