



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/07538/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 23<sup>rd</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

SYED IMRAN KHALID  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Gajjar, Counsel

For the Respondent: Ms Pal, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, Syed Imran Khalid, was born on 20<sup>th</sup> October 1979 and is a citizen of Pakistan. He appealed to the First-tier Tribunal (Judge Watson) against the decision of the Respondent dated 13<sup>th</sup> March 2016 to refuse to issue him with a permanent

residence card as confirmation of a right of residence as the former spouse of an EEA national exercising treaty rights (the Sponsor). The First-tier Tribunal in a decision promulgated on 8<sup>th</sup> February 2018, dismissed his appeal.

2. The Appellant now appeals with permission to the Upper Tribunal. At the outset of the proceedings before the Upper Tribunal, the Appellant sought permission to adduce further evidence in accordance with Rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The further evidence comprised a supplementary witness statement of the Appellant dated 9<sup>th</sup> May 2018, together with documentary evidence concerning a lease on property in Tankerville Road SW16, at which it is said the Appellant and the Sponsor resided. Ms Pal raised no objection to this evidence being admitted. I find it was in the interests of justice that the Rule 15 evidence be admitted.
3. There are six listed Grounds of Appeal. The first and most important ground complains that there was procedural unfairness in the FtTJ's decision in relation to adverse findings made by her at [29]. The adverse findings are made in respect of apparent discrepant evidence concerning email addresses on invoices tendered in evidence, the purpose of which was to show that the Sponsor was exercising treaty rights as a self-employed cleaner. The FtTJ noted that the email address on the invoices bore similarities to, but was different from, an email trail between the Appellant and Sponsor, wherein the Appellant was seeking photographs of their relationship together.
4. The FtTJ relied on the apparent discrepant evidence to make an adverse findings against the Appellant firstly by saying that reliance could not be placed on the invoices showing the Sponsor's business receipts and secondly by saying the different email addresses showed that the couple could not be residing together at the contact address. The complaint made asserting that the judge erred centres on the fact that these findings were made by the judge when no point had been taken on this evidence in the course of the FtT hearing by the Respondent, and more importantly the Appellant had never been given an opportunity to respond to it. Since the adverse finding related to key issues in the appeal, namely whether the Sponsor was exercising treaty rights as a self-employed person and whether the Sponsor and Appellant had resided together for a year as the EEA Regulations required, it could not be said that the Appellant had had a fair hearing.
5. Mr Gajjar's submissions continued that this error alone was sufficient to render the FtT's decision unsustainable, but he addressed me on two other grounds. He submitted that at [21] the FtTJ noted that part of the Appellant's evidence included a lodgings agreement dated 12<sup>th</sup> March 2015 for an address in Tankerville Road. This lodgings agreement was made and signed by both the Appellant and Sponsor, a factor which had been drawn to the FtTJ's attention in the Appellant's skeleton argument. This was evidence which arguably rebutted the conclusion that the Appellant and Sponsor were not living together and/or the Sponsor was not in the United Kingdom. The FtTJ failed to make a finding on this evidence. This failure went to the materiality of the decision.

6. The final factor that he wished to emphasised related to Ground 5. It is asserted that the FtTJ materially misdirected herself in departing from the findings made by a previous judge in a hearing on 12<sup>th</sup> December 2011. The Appellant had a previous appeal before FtTJ Eban. This appeal dealt with the question of whether the relationship between the Appellant and Sponsor was one of convenience. FtTJ Eban found that the Appellant's relationship with the Sponsor was not one of convenience, that the Sponsor was exercising treaty rights in the United Kingdom, and that the couple were expecting a baby.
7. FtTJ Watson in her decision at [30] effectively departed from the findings made by FtTJ Eban. The complaint raised is that she did so without good reason. It is accepted that a judge is entitled to depart from findings made in a previous decision, provided there is good reason to do so. The difficulty in the present matter is that the reason given for FtTJ Watson departing from the findings of FtTJ Eban was on the basis of the adverse findings that she had made, concerning the apparent discrepant email evidence. Mr Gajjar submitted therefore that taking these matters cumulatively, it is clear that the wrongly considered email evidence acts as a thread throughout the appeal and accordingly the decision was tainted throughout and should be set aside and remade.
8. Ms Pal on behalf of the Respondent served a Rule 24 response. The Rule 24 response opposed the grounds seeking permission saying:

"The grounds do not indicate what the appellant's explanation for the email discrepancy would have been had he been given the opportunity, so it has not been shown that the error, if there was one, was material. This discrepancy was, in any event, just one of a number of factors which led the Judge to find against the appellant."
9. Ms Pal drew my attention to [29] and drawing on what was set out in the Rule 24 response, said that there was evidence of other factors which had led the judge to find against the Appellant. She submitted that the judge had noted at [29] that there was a "lack of any entries in the bank statements produced in the name of the EEA national." Furthermore the national insurance payments apparently made by the Sponsor had in fact been paid by the Appellant himself. She also noted that no accounts for the business had been produced.
10. She then referred me to [26] and said that the judge had made a finding that the Appellant was evasive when questioned in detail about the various addresses in which it was claimed that he and the Sponsor resided. Those findings were sufficient to render the decision sustainable.
11. At the end of submissions I indicated to the parties that I was satisfied that the decision must be set aside for material error and I now give my reasons for this finding.

## **Consideration**

12. I find that I agree with Mr Gajjar's submission that the FtTJ has built her decision on making a key finding which had not been raised and to which the Appellant did not have an opportunity to respond. This relates to the evidence of the different email addresses.
13. A full reading of the decision shows that the FtTJ made this adverse finding, the starting point in her consideration [29]. I find she followed this through in [30] using the apparent discrepancy to draw an adverse inference on the question of whether the Appellant and Sponsor had resided together for a period of one year, without taking into account the evidence of the signed lodgings agreement. That issue of course was also a key issue in the Appellant's case. Therefore to make adverse findings on evidence which has never been put to the Appellant amounts to procedural unfairness.
14. Ms Pal's submissions were that other factors were available which led the FtTJ to find against the Appellant. Whilst that submission is correct on the face of it, nevertheless it is clear that the finding which the FtTJ made on the apparent discrepancies in the email accounts forms a significant part of her reasoning as to why she found against the Appellant.
15. I find therefore that this renders the decision tainted to the extent that there is no alternative other than to set the decision aside in its entirety. The decision will need to be remade.
16. In the light of the Presidential Practice Statements, I take into account that the effect of the error identified has been to deprive the Appellant of the opportunity for his case to be considered fully by the First-tier Tribunal. In view of the nature and extent of the judicial fact-finding which is necessary for the decision in the appeal to be remade, I find that it is appropriate to remit this case to the First-tier Tribunal for the decision to be remade in that Tribunal.

## **Notice of Decision**

The decision of the First-tier Tribunal contains material errors of law. I set aside the decision. The appeal is remitted to the First-tier Tribunal (not Judge Watson or Judge Eban) for a fresh hearing.

No anonymity direction is made.

Signed

C E Roberts

Date

21 May 2018

Deputy Upper Tribunal Judge Roberts