



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00832/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reason

Promulgated

**On 26 March 2018
2018**

On 11 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**MUHAMMAD ASIM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:
solicitors

Mr G Lee (Counsel) instructed by Britain

For the Respondent:
Officer

Mr N Bramble, Senior Home Office Presenting

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Juss promulgated on 26 July 2017, which dismissed the Appellant's appeal against the respondent's refusal to issue an EEA permanent residence card.

Background

3. The Appellant was born on 12 October 1982 and is a national of Pakistan. On 27 January 2016 the Secretary of State refused the Appellant's application for confirmation of a permanent right to reside on the UK under the Immigration (EEA) Regulations 2006.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Juss ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 23 January 2018 Judge Kelly gave permission to appeal stating

It is arguable that the Tribunal erred by (a) applying a "shifting" burden with regard to proving that the appellant's marriage was one of convenience (the Judge refers to the respondent having "raised an issue" that had "not been met by the appellant"; s/he also refers to IS Serbia [2008] UKAIT 31, the reasoning of which was described as "seriously confused" by the Court of Appeal in Rosa [2016] EWCA 14 at paragraph 29, (b) confusing the concepts of a "sham" marriage with one that was not "genuine and subsisting", (c) failing to have regard to material evidence submitted on behalf of the appellant, and (d) basing its findings upon discrepant replies given to the respondent in a supposed interview with the appellant and his partner, the existence of which is not apparent from either the respondent's bundle of documents or the reasons for refusal letter. Permission to appeal is accordingly granted on all grounds.

The Hearing

5. (a) Mr Lee, for the appellant, moved the grounds of appeal. He told me that there are three material errors of law in the decision, but his submissions would focus principally on [9] of the decision. In the last sentence of [9] the Judge places emphasis on an interview in which, he says, the appellant and his wife demonstrated that they lacked the basic knowledge of details about each other. Mr Lee told me that the problem with that finding is that there is no such interview. He told me that that is not just an error, but it is a material error because the Judge identifies the erroneous finding about the contents of an interview (which did not take place) as most important.

(b) Mr Lee told me that the decision does not contain any meaningful reference to the evidence produced for the appellant. His third (and final) point was that although the Judge says the burden of proof shifts to the appellant, he does not explain which part of the evidence for the respondent he accepted so that the burden does shift to the appellant.

(c) Mr Lee's principal point was that the final sentence of [9] of the decision is an error of such significance that the decision is fundamentally flawed. He told me that the decision is undermined by material errors of law. He urged me to set the decision aside and to remit this case to the First-tier Tribunal to be determined afresh.

6. (a) For the respondent, Mr Bramble told me that he had examined the respondent's file and checked computer records maintained by the respondent. His investigations told him that the appellant has not been called to a marriage interview so that he concedes that the final sentence of [9] is an error, but he told me that the error is not material.

(b) Mr Bramble took me to the respondent's reasons for refusal letter. He told me that that letter set out in detail the factors which led the respondent to the decision, dated 27 January 2016, to refuse the appellant's application. He told me that the Judge deals with those reasons in detail in the first part of [9] of the decision. He told me that the final sentence of [9] is nothing more than a typographical error. He told me that at [8] of the decision the Judge clearly says that he has considered all of the evidence placed before him.

(c) Mr Bramble asked me to dismiss this appeal and allow the decision to stand.

Analysis

7. In the final sentence of [9] of the decision, the Judge refers to an interview which, parties' agents agree, did not take place. The Judge says that in that interview the appellant and sponsor failed to demonstrate a basic knowledge of one another. That is quite clearly an error. What makes it a material error is that in the first two words of the sentence the Judge identifies the interview (which did not take place) as the most important factor in his decision. The Judge decries a lack of basic knowledge, yet parties' agents agreed that the interview did not take place so that the lack of basic knowledge which forms the fulcrum for the Judge's decision does not exist.

8. In E and R (2004) EWCA Civ 49 the Court of Appeal said that "*a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area.*" The Court of Appeal set out the ordinary requirements for a finding of unfairness as follows:

- i) There must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular fact;
- ii) The fact or evidence must have been established, in the sense that it was uncontested and objectively verifiable;
- iii) The appellant (or his advisors) must not have been responsible for the mistake; and
- iv) The mistake must have played a material (not necessarily decisive) part in the Adjudicator's reasoning.

9. The Judge's decision quite clearly proceeds on a significant mistake of fact. The Judge identifies that error of fact as the most important part of his decision. The removal of the most important part of the Judge's decision manifestly removes the very foundation of the decision. The error is therefore a material error of law

10. The Judge's decision is brief. At [8] the Judge says that he has considered all of the documents placed before him, but nowhere in the decision is there any analysis of the evidence led for the appellant. The appellant lodged a bundle containing 104 pages which included the appellant's witness statement, the EEA national's witness statement, HMRC records and bank statements.

11. I have to find that the decision is tainted by material errors of law because of inadequacy in reasoning and fact-finding. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

12. At [11] of the decision the Judge relies on the case of IS (marriages of convenience) Serbia [2008] UKAIT 31. The Judge should have taken guidance from Rosa [2016] EWCA 14 and Sadovska v SSHD [2017] UKSC 54.

13. As the decision is tainted by material errors of law I must set it aside. I am asked to remit this case to the First -tier. I consider whether or not I can substitute my own decision, but find that I cannot do so because of the extent of the fact-finding exercise necessary.

Remittal to First-Tier Tribunal

14. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

15. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

16. I remit this case to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge Juss.

Decision

17. The decision of the First-tier Tribunal is tainted by material errors of law.

18. I set aside the Judge's decision promulgated on 26 July 2017. The appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed

Paul Doyle

Date 3 April 2018

Deputy Upper Tribunal Judge Doyle