



**Upper Tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/00538/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision and Reasons**

**On 2 February 2016**

**Promulgated**

**On 5 February 2016**

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**Imtiaz Khan Zico  
[No anonymity direction made]**

Claimant

**Representation:**

For the claimant: Mr R Ahmed, instructed by FDS Law

For the appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The claimant, Imtiaz Khan Zico, date of birth 13.5.89, is a citizen of Bangladesh.
2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Gibbs promulgated 8.5.15, allowing the claimant's appeal against the decision of the Secretary of State, dated 9.12.14, to refuse his application for an EEA Residence Card as a family member (spouse) of an EEA national exercising Treaty rights in the UK, pursuant to the

Immigration (EEA) Regulations 2006. The Judge heard the appeal on 20.4.15.

3. First-tier Tribunal Judge Chohan refused permission to appeal on 13.7.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge McGeachy granted permission to appeal on 29.8.15.
4. Thus the matter came before me on 2.2.16 as an appeal in the Upper Tribunal. I heard submissions from both Ms Brocklesby-Weller and Mr Ahmed and gave my decision, setting the decision of the First-tier Tribunal aside and remaking it by dismissing the appeal, reserving my reasons which I now give.

### **Error of Law**

5. For the reasons set out below, I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Gibbs should be set aside and remade by dismissing the appeal.
6. On 19.3.14 the claimant, who first entered the UK as a student in 2009, applied for an EEA Residence Card as confirmation of a right to reside in the UK as the family member (spouse) of Patricia Maurerova, a citizen of Slovakia. At the time of application he had no valid leave to remain in the UK.
7. The application was refused in the Reasons for Refusal letter dated 9.12.14. This explains that after examining his application, noting that he did not have leave to remain in the UK and that he and his spouse are of different cultural backgrounds, the Home Office had reasonable doubt whether the claimant had a right to reside in the UK, pursuant to regulation 20B(1)(a) and in order to verify eligibility invited both the claimant and his spouse for interview on 27.11.14, pursuant to regulation 20B(2)(b).
8. The refusal letter states that the claimant failed to cancel this first interview within 10 days and did not give good reason for this failure. They were then invited to a second interview scheduled for 17.12.14. The refusal decision states, "Again you failed to cancel the interview in time and did not give the Home Office good reason for this failure."
9. The Secretary of State relied on regulation 20B(2)(b) and 20B(4) which states, "If, without good reason, A or B fails to provide the additional information requested or, fail to attend an interview on at least two occasions if so invited, the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances." The Secretary of State considered that the failures to attend two interviews, twice failing to confirm attendance, implied that the claimant did not have a right to reside under regulation 14(1) and thus refused his application.
10. At the First-tier Tribunal appeal hearing, the claimant and his wife gave

evidence that they did attend for the first marriage interview, but because their legal representative failed to confirm that they would be attending, it could not proceed. It is said that there and then they re-arranged the interview for 17.12.14, but when he telephoned the Home Office to confirm his attendance they told the claimant that a decision had already been made. This call must have been made after 9.12.14.

11. In the light of that evidence and the date of the refusal decision, First-tier Tribunal Judge Gibbs considered that the refusal decision was in error, pointing out that it pre-dates the second marriage interview arranged for 17.12.14. "I consider this error to be significant and I find that it undermines the respondent's evidence which is that the appellant and his wife did not attend the interview on 27 November 2014.
12. However, as the grounds of application for permission to appeal assert, Judge Gibbs misunderstood the regulations and made a material mistake of fact.
13. The grounds submit that the judge failed to address the central reason for refusal. The grounds submit, and I so find, that the judge failed to address whether, pursuant to Papajorgji [2012] UKUT 00038 (IAC), the background circumstances, raising reasonable suspicion that the marriage is one of convenience, and their failure twice to confirm attendance for interview were sufficient to shift the burden from the Secretary of State to the claimant to demonstrate that his was not a marriage of convenience. The judge did not address whether the burden of proof had shifted and was distracted by his belief that the refusal decision was issued in error in advance of the second interview. If the burden had shifted, the claimant had to demonstrate that he had a right to reside as the family member of an EEA national exercising Treaty rights in the UK and thus failed to qualify for a Residence Card. The judge failed to address this primary point and make clear findings as to whether the claimant was entitled to a residence card. I am satisfied on the evidence that the burden had shifted, particularly given the failure twice to confirm attendance for interview.
14. Further, if the judge considered that the decision of the Secretary of State was not in accordance with the law, the correct approach would have been to allow the appeal to the limited extent that the refusal decision was not in accordance with the law and that it remained for the Secretary of State to make a decision in accordance with the law. In the circumstances, simply to allow the appeal was an error of law.
15. The application was refused because neither the claimant nor his legal representative contacted the Home Office at least 10 days prior to the re-arranged interview to confirm attendance, as was required. The letters of invitation sent to the claimant and his wife for each interview explicitly required email confirmation, to a specified Home Office address, 10 working days before the date specified to allow an interpreter to be booked in advance. The letters also explain that failure to confirm attendance could lead to the cancellation of the interview and the

resulting refusal of the application. That is exactly what happened.

16. In essence, the First-tier Tribunal Judge misunderstood the Reason for Refusal letter, The 17.12.14 interview was cancelled prior to that date due to the claimant's failure to confirm attendance 10 working days in advance, which would have been by 3.12.14. The interview was not in fact cancelled until the date of the refusal decision, which the judge considered to be 11.12.14, but the letter is dated 9.12.14. As the judge was aware from the evidence of the claimant and his wife, the first interview was also cancelled because of failure to confirm attendance 10 days before the due date. The claimant repeated that failure in respect of the second interview. It follows that the decision of the Secretary of State was not made in error. Having drawn the inference she was entitled to do under regulation 20B(4), the Secretary of State was entitled to exercise her discretion under regulation 20B(5) to decide that the claimant did not have a right to reside in the UK.
17. In the circumstances, the refusal decision was entirely correct and the appeal should have been dismissed at the First-tier Tribunal.
18. It remains open to the claimant to make a fresh application as there is no removal decision and the issue of an EEA Residence Card is no more than confirmation of the right to reside.

**Conclusions:**

19. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

**Anonymity**

I have considered whether any parties require the protection of any anonymity

direction. No submissions were made on the issue. Given the circumstances, I make no anonymity order.

**Fee Award**                      **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

A handwritten signature in black ink, appearing to read 'James Pickup', is centered on the page.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**