



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

Appeal Number: IA/45762/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 29<sup>th</sup> April 2014**

**Determination**

**Promulgated**

**14<sup>th</sup> May 2014**

**Before**

**UPPER TRIBUNAL JUDGE POOLE**

**Between**

**KAISER AHMED  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Khyati Joshi

For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DECISION AND REMITTAL**

1. I will refer to the parties as appellant and respondent in the same manner in which they appeared before the First-Tier Tribunal.
2. The appellant is a male citizen of Bangladesh born 7 November 1989. The appellant applied for the issue of a residence card as confirmation of a right of residence as the spouse of an EEA national exercising treaty rights. The respondent refused the application in a decision dated 22 October 2013. The

appellant appealed against that decision. In summary the respondent had concluded that the appellant and his wife were not in a subsisting and genuine marriage. This decision is based upon a visit to the appellant's home on 10 June 2013 when immigration officers sought to execute a warrant at the appellants address with regard to a third-party unconnected with the appellant. Whilst at the address the appellant was "encountered". Checks revealed the appellants application as mentioned above. As a result of that visit the respondent took the view that the appellant and his wife were "involved in a sham marriage".

3. The appellant appealed that decision and his appeal came before Judge of the First-Tier Tribunal Shamash sitting at the Inner London Crown Court on 11 February 2014. The appellant, his wife and a witness attended and gave evidence. Both parties were represented. In a determination dated 4 March 2014 the judge "allowed the appeal under the Immigration Rules". The findings made by the judge are set out in paragraph 20 of her determination. In that paragraph the judge refers to the standard of proof as being the balance of probabilities and indicates that the case is "finely balanced". Reference is made to supporting evidence being provided to the judge after the hearing which the judge found corroborated the appellant's evidence. Reference is made to an independent witness, Mr Tovey, as being a poor witness. In the penultimate sentence the judge records "in the end I am satisfied to the lower standard that the appellant is married....and that the marriage is genuine".
4. The respondent sought leave to appeal on two grounds. Firstly procedural irregularity in that the judge had accepted additional evidence after the hearing without giving the respondent the opportunity to scrutinise and examine.
5. The second ground is that the judge had failed to adequately resolve a conflict with regard to the evidence of Mr Tovey.
6. On 21 March 2014 another Judge of the First-Tier Tribunal granted the respondent leave to appeal and in doing so gave the following reasons:
  - "1. This is an in-time application by the respondent for permission to appeal against the determination of Judge of the First-Tier Tribunal Shamash who allowed the appeal of the appellant (a citizen of Bangladesh) against the refusal of a residence card as the spouse of an EEA national.
  2. It is arguable that there was a procedural irregularity as set out at ground 1. The judge placed reliance on post-decision evidence which she found corroborated the appellant's account. The judge found the case to be finely balanced and in such a case where the post-decision evidence provided substantial reasons for her ultimate conclusion it is arguable that she should have given the respondent at least an opportunity to see and comment on that additional evidence even if she did not consider it necessary to reconvene the hearing.
  3. I consider that ground 2 on its own is less well-founded. The judge was effectively explaining both why Mr Tovey could panic and why he could have been intimidated either by immigration officers or by the appellant. She appears to have regarded his evidence as effectively neutral.

3. For the avoidance of doubt however both grounds are arguable”.
7. Following the grant of leave the appellant’s representatives lodged a document “opposing appeal”. I accept this document as being lodged by reference to Rule 24 of the Procedure Rules. In this document it is argued that there was no procedural irregularity and submits that judge should not have adjourned the case for the additional evidence to be considered by the respondent, such evidence was in any event “reasonably foreseeable” by the respondent. Reference is made to the “Guide on Appeals”.
8. It is then argued that the additional evidence in the form of travel documents did not substantiate the judge’s decision in the appellant’s favour. In addition the overriding objective is that a Tribunal handles cases fairly quickly and efficiently, and in the interests of the parties to the proceedings and the wider public interest.
9. The admissions are then made with regard to the position of Mr Tovey. It is suggested that the judge was entitled to reach the conclusions that she did upon the basis of his evidence.
10. Hence the matter came before me in the Upper Tribunal. At the commencement of the hearing Ms Joshi handed in a skeleton argument. She indicated that this document was similar in the majority of respects to the admission referred to above, that in addition the point is made that had the judge given the respondent the opportunity to comment on the additional evidence, there would not have been any difference in the outcome.
11. Mr Bramble in his submissions simply relied upon the grounds seeking leave.
12. I pointed out at this stage that I could not ignore the conflicting standards of proof set out in paragraph 20 of the judge’s decision. I noted that this had not been raised in the initial grounds, in the grant or in the documents lodged by the appellant’s representative.
13. Mr Bramble requested leave to amend the grounds to include this point. Ms Joshi made not comment. I consider it appropriate that the grounds be deemed to be amended to include this point.
14. Ms Joshi relied upon the documents as set out above that had been lodged by her firm. She emphasised that an adjournment was not the appropriate course for the judge to take. The tickets were foreseeable and even without them she submitted the judge would have accepted that the appellant’s wife had gone to Hungary as stated. The respondent was not prejudiced by their production.
15. At this stage I indicated that for the reasons that I would set out in this written decision I considered there was a material error of law contained in the judge’s determination. It could not stand and must be set aside. I also indicated that because of a finding that there was a procedural irregularity it was appropriate following the Senior Presidents practice statement to remit the case back to the First-Tier Tribunal for re-hearing.
16. I have no hesitation in finding that there was a procedural irregularity. Fairness dictates that both parties must have the opportunity to see and comment upon evidence produced by the other party. If it was the Secretary of State seeking

to adduce evidence after the event any appellant would be perfectly entitled to cry "foul" and seek to set aside any adverse decision. The same must equally apply when it is the appellant producing the additional evidence.

17. I do not accept the point raised by Ms Joshi with regard to an adjournment. In the circumstances the judge could not have been criticised if she had delayed promulgation of her determination until the respondent had an opportunity to make written submissions to her with regard to the additional evidence. This would not amount to an adjournment. Even if the judge sought to reconvene the hearing, I am not satisfied this would have amounted to an adjournment. In any event, fairness must override speed and efficiency.
18. I do consider that the judge has equally fallen into error with regard to the evidence of Mr Tovey. His evidence and what he is alleged to have said to the immigration officers amounted to a substantial and live issue before the judge. Greater explanation is required as to the judge's findings beyond what it set out in paragraph 20. I couple this point with the issue of standard of proof. The judge explains that the case is "finely balanced". The true standard of proof is balance of probabilities, but then later in the same paragraph the judge refers to the "lower standard". I am satisfied that the judge has not properly directed herself with regard to this item.
19. For these reasons I consider that errors of law are contained within the determination and that they are material to the eventual conclusions of the judge. The judge's decision must therefore be set aside. None of her findings can be preserved and it is appropriate for this matter to be re-heard for a differently constituted Tribunal. It is noted that a Hungarian interpreter will be required. Any further directions may be given by the Duty Judge at the hearing centre concerned.
20. No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Poole