



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

Appeal Number: IA264932015

THE IMMIGRATION ACTS

**Heard at Field House
On 11 July 2017**

**Decision &
Promulgated
On 28 July 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**MD R T KHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Z. Khan of Londonium Solicitors
For the Respondent: Mr. C. Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Davey, promulgated on 28 March 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to issue a residence card as confirmation of a right to reside as the spouse of an EEA national.

2. Permission to appeal was granted as follows.

“The Grounds complain that the Judge made findings without taking note of the Bundle of documents. It would appear from the file likely the Judge did not have the Bundle in front of him when he made his findings, although there appears to be no explanation as to why the Bundle was filed just before the hearing. Thus I am satisfied that there is an arguable error of law in the decision.”

3. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Application to admit further ground

4. At the hearing Mr. Khan made an application to admit further grounds of appeal. This was made orally. Nothing had been put in writing or served on the Tribunal prior to the hearing. The new ground relates to the failure of the Respondent to provide a copy of the full interview record and the interviewer’s comments. It was submitted that she was obliged to disclose this following the case of Miah (interviewer’s comments: disclosure: fairness) [2014] UKUT 00515 (IAC).

5. I have considered headnote (iv) of the case of Miah. This states as follows:-

“However, the document enshrining the interviewer's comments - Form ICV.4605 - must be disclosed as a matter of course. An appellant's right to a fair hearing dictates this course. If, exceptionally, some legitimate concern about disclosure, for example, the protection of a third party, should arise, this should be proactively brought to the attention of the Tribunal, for a ruling and directions. In this way the principle of independent judicial adjudication will provide adequate safeguards for the appellant. This will also enable mechanisms such as redaction, which in practice one would expect to arise with extreme rarity, to be considered.”

6. This issue was raised for the first time in the error of law hearing in the Upper Tribunal. The grounds of appeal before the Upper Tribunal do not refer to disclosure of the interviewer’s notes or the full interview record. Neither do the grounds of appeal before the First-tier Tribunal. The documents in the bundle, the service of which I shall turn to below, do not include any reference to the disclosure of these documents.

7. This matter was raised for the very first time in the error of law hearing, and there was no request in writing to amend the grounds. In all the circumstances, given that it was the same solicitors who had been instructed since 28 February 2016, given the failure to raise this issue at any previous time and the failure to raise it in accordance with the Practice Directions, and bearing in mind that there is no satisfactory

explanation for this, I refuse permission to adduce the further ground of appeal.

Error of law decision

8. I have carefully considered the chronology of this case in order to establish whether or not the Appellant was deprived of a fair hearing. On 13 October 2016 notice of hearing was sent to the Appellant's representatives at the time, Universal Solicitors. This stated that the hearing would be heard on Wednesday, 1 March 2017 at 10.00 a.m. at Taylor House. The file shows that on 20 February 2017 an amended notice was sent to the Appellant's solicitors, Universal Solicitors, informing them that the appeal would be heard on the same date and the same time but at Hendon Magistrates' Court. I do not have a copy of the notice as was sent to Universal Solicitors, but I have the file copy before me and Mr. Khan acknowledged that the directions stated as follows:-

"You must send the following documents to the Tribunal at the above address to arrive no later than five days before the date of the full hearing: the witness statements and the bundle of documents." The "above address" is Hendon Magistrates Court, The Court House, The Hyde, London, NW9 7BY".

9. On 28 February 2017 the Appellant's new representatives, Londonium Solicitors, sent by fax a 45 page bundle to Taylor House. They were not able to fax the Respondent a copy of this bundle and Mr. Avery said at the hearing that there was no bundle on his file.
10. I do not have a copy of the front page of this fax which indicates that it was sent to Taylor House. The front page that I have has the address of the Presenting Officers Unit, and has another fax number handwritten on it. This appears to be Taylor House, and indeed it was received at Taylor House. It is recorded as having been received on 28 February at 21:43. No explanation has been provided as to why it was faxed so late apart from the fact that the Appellant only instructed Londonium Solicitors on 28 February 2017, the day before the hearing.
11. It does not appear that this bundle reached the judge. The front page of the bundle states "Submission of Appellant's bundle and request for paper hearing". The request for paper hearing was made at 9.43 p.m. the night before the hearing and has understandably therefore not been put before a duty judge. The judge was unaware of the request to convert the hearing to a paper hearing. It was an oral hearing at which the Respondent's representative made brief submissions.
12. The judge proceeded to decide the appeal on the basis of the documents before him. The decision was written and promulgated on 27 March 2017. Although the bundle of documents was sent to the Tribunal on 28 February 2017, almost a month earlier, it does not appear that they were

sent to the judge prior to his writing up of the decision. It is normal practice for documents to be sent to judges to be added to the file when the file is in their possession. This does not appear to have happened.

13. I find that a bundle of documents was received at Taylor House. It was received very late, and was not provided to the judge on the morning of the hearing, but it appears that the documents were not then sent to be joined to the file prior to the judge writing the decision. While these documents had not been available to the Respondent prior to making submissions at the hearing, the judge would have been able to consider the additional documents and give the Respondent a chance to respond to them prior to writing up his decision. However, there is no indication that the papers were sent to the judge to be joined to the file prior to 27 March 2017.
14. I accept that the Appellant is not without blame. No satisfactory reason has been provided for why he instructed solicitors so late and why, in all the circumstances, especially given the subject of the additional grounds of appeal, an adjournment was not requested or a request for disclosure was not made. However, there has been a procedural failing insofar as the bundle was not provided to the judge in the period between the hearing and the writing of the decision, a period of almost a month. I find that the decision involves the making of a material error of law.
15. No anonymity direction is made.

Decision

16. The decision of the First-tier Tribunal involves making of a material error of law and I set the decision aside.
17. The appeal is remitted to the First-tier Tribunal to be reheard.

Signed

Date 27 July 2017

Deputy Upper Tribunal Judge Chamberlain