
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/00283/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
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| **On Friday 1 March 2019** | **On Monday 11 March 2019** |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MS SEVIM CALISKAN**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms J Blair, Counsel instructed by London solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Kainth promulgated on 21 September 2018 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 11 December 2017 refusing the Appellant a residence card as the mother of her British Citizen son ("the Sponsor") who it is said exercised Treaty rights in Germany as a worker and with whom the Appellant lived at that time before returning to the UK with him.

2. The Appellant is a national of Turkey as, originally, is her son. He is a naturalised British citizen. Following the refusal of the Appellant's applications to enter the UK under the Immigration Rules for either settlement or as a visitor, in March 2016, the Sponsor went to Germany to live with his nephew. He worked while there. The Appellant went to Germany for a visit in August 2016 and remained there with the Sponsor. She was granted a residence permit as his family member there on 5 January 2017, valid to 4 January 2022.

3. The Appellant and Sponsor returned to the UK on 14 May 2017 and the Appellant applied for a residence card here under regulation 9 of the Immigration (European Economic Area) Regulations 2016, which application was refused by the decision under appeal.

4. Judge Kainth dismissed the appeal on the basis that he did not accept that regulation 9 was met. I do not need to expand on that conclusion because the grounds of appeal as argued before me focus on the Judge's conduct and some of his factual findings which are said to be inconsistent with or disclose a misunderstanding of the evidence. It is said that the Judge displayed a lack of objectivity at the hearing and appeared to have pre-determined the outcome. Although the Appellant does not go so far as to suggest that the Judge was actually biased, it is said that he would have appeared so if his conduct was considered by an independent, fair-minded observer. I will come on to the detail of the allegation below.

5. Permission to appeal was granted by First-tier Tribunal Judge Povey on 17 October 2018 in the following terms so far as relevant:

> "… [3] The primary issue in the appeal centred around Regulation 9 of the EEA Regulations 2016. The Judge set out the text of the Regulation in its entirety and at [27] provided reasons for his finding that the sponsor's residence in Germany was not genuine. The Judge's reasoning applied and addressed the factors identified as relevant in Regulation 9(3). He reached conclusions which were open to him on the findings he made. No error of law was apparent.
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> [4] Various allegations were made of the Judge's conduct of the hearing and his treatment of the evidence. Those allegations were contained in the grounds drafted by the same advocate who appeared before the Judge. If the allegations were made out, they could arguably constitute an error of law (as a number of the challenged factual findings were material to the Judge's finding on genuine residency).
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> [5] As such, the application for permission disclosed an arguable error of law and permission to appeal is granted. Given the interdependence of the two grounds advanced, they may both be argued."

6. The matter came before me initially on 13 December 2018. I adjourned the hearing on that occasion as the barrister representing the Appellant was Ms Shaw who appeared before the First-tier Tribunal and whose evidence was required to make out the allegation regarding the Judge's

conduct. I gave directions to both parties to file and serve evidence relating to the conduct issue. The matter comes before me with a different representative now acting for the Appellant in order to determine whether there is an error of law and, if I so find, to either re-make the decision or remit the appeal to the First-tier Tribunal to decide afresh.

## Conduct of the Hearing

Nature of the Allegations and Evidence

7. The pleaded grounds in this regard make the following allegation:

> "[12] Prior to the start of the hearing (as the appellant's representative entered the courtroom), the FTTJ enquired whether this was *'a Regulation 9 case'.* Upon the appellant's representative confirming that Regulation 9 applied, the FTTJ sarcastically commented that *'I'm seeing a lot of these cases lately.'* He then proceeded, throughout the course of the hearing, to critically comment in response to the live evidence of the sponsor and nephew. Such remarks suggest a lack of impartiality and pre-determination of the appeal. This in turn, raises a concern as to whether the Tribunal properly and fully considered relevant evidence having regard to the correct test(s). This concern is further raised by the FTTJ's palpable lack of objectivity, as evidenced by his 'selective' recording/presentation of the evidence in his written evidence…"

That citation is followed by a list of errors said to have been made in relation to the factual findings, some of which I consider below.

8. The Judge was invited to comment on the grounds of appeal and specifically the allegation regarding conduct of the hearing. His comments led to the issuing of a Memorandum which, in this regard, states as follows:

> "…Ground 2: I have some recollection of commenting "I'm seeing a lot of these cases lately". It was meant as indicating that I am familiar with the applicable regulations and the case law…."

9. In response to my directions, a witness statement was filed and served from Ms Frances Shaw who is the barrister who attended the First-tier Tribunal hearing. On the day before the hearing, I received documents from the Respondent, being the Presenting Officer's file minute from the First-tier Tribunal hearing and the Respondent's written submissions pointing out that the minute makes no mention of the Judge's behaviour and that, although there was evidence from Ms Shaw, there was none from the witnesses. That prompted the filing on the day of the hearing of a statement by the Sponsor. Ms Blair accepted that this had been prepared only in response to the Respondent's submissions. Mr Melvin objected to the late production of the evidence although, as Ms Blair pointed out, the Respondent's evidence and submissions were also produced late.

10. In the event, I decided that it was neither appropriate nor necessary to hear from the Sponsor. I have not taken his statement into account. As I pointed out, his only familiarity with the conduct of appeals is the one hearing and whatever his view as to the Judge's conduct on that occasion, it would be unlikely to assist me in determining whether it was unfair due to that lack of experience of how Judges should behave. That point is made at [2] of the headnote in PA (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 0337 (IAC) ("PA").

11. I also indicated that I was not assisted by the Presenting Officer's file note. Although I accept that this does not indicate that there was anything untoward in the Judge's conduct, without any supporting evidence from the Presenting Officer, it does not follow that this omission amounts to evidence that the Judge did not behave in an inappropriate manner.

12. I heard oral evidence from Ms Shaw. She was also cross-examined by Mr Melvin. She gave evidence that she completed her second six pupillage in October 2011 and has appeared in immigration cases as a barrister since then. She has focussed almost entirely on immigration work since about 2012. She does some family cases but in the past two and a half years, has done only one family case. She estimates that 70% of her work since 2012 has been in immigration. She attends the First-tier Tribunal on a regular basis to present appeals – often daily and at least several times in a week. This is the first occasion when she has made a complaint about a First-tier Tribunal Judge's conduct.

13. In support of her witness statement, Ms Shaw produced her contemporaneous handwritten notes of the hearing. My attention was drawn in particular to the following notes. On the first page, Ms Shaw has written:

> "As I walked into ct, IJ asked if case was a Reg 9 case. I confirmed it was & IJ sarcastically said 'I'm seeing a lot of these cases lately, they're v popular @ the mo."

At internal page [6], in the course of the Sponsor's evidence, the following is recorded:

> "(14) Deposit in Deposit protection scheme – IJ says OK that's against the law but then."

Ms Shaw gave this as an example of where the Judge had made negative comments about the evidence and taken negative points of his own volition. She explained that this concerned the rental of the Sponsor's London property. The Judge had asked whether the Sponsor had placed a deposit from the tenant in the deposit protection scheme. The Sponsor did not know about this scheme and so had said that he had not to which the Judge replied that this was against the law in the UK. It was not clear what was meant by "but then".

14. Ms Shaw accepted that there were no other negative comments identified in her notes but said that this was because she was trying to take a full note of the evidence. She says this in her statement about further comments:

> "[6] Unfortunately, my contemporaneous record of proceedings do not fully record all of Judge Kainth's comments during the live evidence and I cannot recall the exact number of remarks made or their precise content. I do recall however, that there were several remarks made in response to the live evidence and that I viewed the comments to be negative and/or critical, such that I felt sufficiently concerned about Judge Kainth's conduct to mention it in my Attendance Note to my instructing solicitor as follows:
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> > *"Before the hearing started the IJ sarcastically said "I'm seeing a lot of these cases, they are very popular at the moment." The IJ continued to sarcastically comment throughout the evidence which suggested he was looking for reasons to refuse the appeal."*

15. Ms Shaw accepted that she had not complained about the Judge's conduct at the time. In response to a question from me, she confirmed that she had not complained either immediately after the hearing. She was unaware that it was possible to make a complaint informally to the Resident Judge. Having spoken to senior colleagues since, she accepted that she should perhaps have done so. Her evidence is that she "regrets" not doing so. In her statement, she says the following about her reasons for not raising this at the time:

> "[4] I confirm that, although surprised, I did not question Judge Kainth's comment as I entered the courtroom as I was of the view that the appeal was strong and should succeed and consequently, the remark would become immaterial. I did however make a full note of the comment (as confirmed above).
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> [5] Nor did I question Judge Kainth's comments during the live evidence, as I was taken aback by them, and not having been in this position before, I was not entirely sure how to approach the matter. I was also concerned that I might alienate the judge and cause an atmosphere that would worry and upset my elderly and frail client, who was already very anxious. I do however recall saying that I considered the judge was being 'unfair' when he abruptly refused to allow the appellant until 4pm that day to submit evidence from Turkey of her son in law's health issues. My request to submit further evidence was only made because Judge Kainth questioned the absence of this evidence for the second time during oral evidence, which led me to believe that he considered the evidence to be relevant to his decision-making."

16. Ms Shaw was asked to explain why she had viewed the comments as sarcastic. She replied that she recognised sarcasm when she heard it and that she was even more taken aback because the comment was made

when she had just entered the room and had not even sat down. She was asked whether the comments might just have been a display of rudeness rather than bias to which she replied:

> "I don't actually think it was actual bias but in particular based on the comment when I entered this suggested pre-disposition because he had seen a lot of regulation 9 cases lately. I found it unusual for him to comment so often on evidence. This is not something I've come across before."

The point was made to Ms Shaw that the Judge said that he only made the comment he did to short circuit legal submissions. She did not accept that this was his reason and insisted that the comment was made sarcastically.

17. In relation to the point made about the challenge to the Judge's refusal to allow the Appellant time to adduce further evidence, Ms Shaw expanded upon this as follows. She accepted that her notes do not show that she said it was unfair. She said though that she remembered that the Judge had asked whether there was evidence from Turkey about the health issue. She recalled clearly that she asked the Judge for seven days to submit that evidence which he refused. When he raised the point again during cross-examination, she asked again for time until 4pm the same day and he again refused.

18. Ms Shaw also strongly refuted Mr Melvin's suggestion that she had only raised this complaint as a ground because she was disgruntled about the outcome and the Judge's refusal to allow her time to put in more evidence. She said that had the conduct been limited to the comment made at the start of the hearing, she may have accepted that it was insufficient to show bias, but the Judge had made a number of comments throughout the evidence which were all negative not positive. She formed the view that the Judge had therefore pre-determined the appeal. She thought the behaviour unprofessional.

Discussion and Conclusion

19. Mr Melvin relied on the Judge's response to the grounds and to what was said (or rather not said) in the Presenting Officer's file note. As I have already indicated, I do not view that omission as of any assistance one way or another. Mr Melvin also pointed out that no accusation had been made at the hearing and no complaint made until the grounds. He submitted that the allegation was not made out. He submitted that this was a case of a disgruntled representative who was simply trying to obtain a good outcome for her client.

20. Ms Blair submitted that Ms Shaw clearly had not made the allegation lightly. As a junior barrister, she would be cautious before making a complaint. Based on the evidence, Ms Blair submitted that the allegation was made out. She reminded me that the test is whether from the

perspective of an independent, fair-minded observer, there would be a perception of bias. Justice must not only be done but be seen to be done.

21. I have taken into account what is said by the Judge. He was provided only with the one allegation relating to his comment at the start of the hearing. As I observed in the course of the hearing, by indicating a familiarity with a particular type of case, the Judge might simply have intended to indicate to the representatives that they did not need to dwell on the legal issues as he would be aware of them. That is what Judge Kainth says that he thinks he meant by the comment. It may be that he did. However, the addition of the words "they are very popular at the moment" is potentially pejorative and might suggest that he took a negative view of such cases. He may not have meant it in that way but if, as he says, he merely intended to indicate that submissions could be foreshortened, it would have been better expressed as a direction to the representatives at the outset rather than a glib remark before the Appellant's barrister had taken her seat. The manner in which the comment was phrased was ill-advised.

22. However, if this had been the only matter complained of, I would not have been inclined to consider that this demonstrated a lack of impartiality. Indeed, Ms Shaw accepted as much during her evidence. As it is, though, I was impressed by Ms Shaw's evidence. I found her truthful. I accept her evidence that she did not make the complaint lightly. She did not seek to exaggerate her evidence and was able to draw my attention to one contemporaneous note of where she said that the Judge had taken a negative stance (regarding the tenancy deposit). I confess that I can see absolutely no relevance to that issue at all. It may be that the Judge thought it was relevant. However, the comment following the response that this was against the law in the UK strikes me as unnecessary and reflective of the general attitude of which Ms Shaw complained.

23. The other specific example given of the Judge refusing to allow evidence to be produced after the hearing is less persuasive. A Judge is entitled to expect evidence to be produced before the hearing or at the latest at the hearing itself. However, the fact that the Judge himself raised the omission of such evidence as relevant in the course of the hearing and then refused to allow further evidence to be produced is further indication of his attitude to the Appellant (or at the very least provides a perception of being ill-disposed towards the Appellant when taken with the other complaints).

24. I have had regard to the headnote in PA. I do not reach this decision lightly. I also take into account that Ms Shaw did not complain of the Judge's conduct during the hearing or immediately thereafter. However, I accept Ms Shaw's evidence about the reasons she did not do so, and I also note her "regret" at having failed to make clear her concerns at the time. The fact that she wrote as she did to her instructing solicitor after the hearing is an indication that she did have those concerns at the time and has not invented them since in order to overturn an adverse decision.

25. Based on the evidence as set out above, I am satisfied that the Appellant has made out her case on this ground. I emphasise that there is no suggestion that the Judge was actually biased against the Appellant and her witnesses. However, for the reasons given, I am satisfied that an independent, fair-minded observer may well form that perception based on the conduct alleged. At the very least, the evidence tends to show a pre-disposition to a certain outcome. For those reasons, I am satisfied that the Decision should be set aside. The appeal is to be remitted to the First-tier Tribunal to be determined afresh by a different Judge.

## Factual Errors

26. Given my conclusion on the first ground, it is not strictly necessary for me to go on to consider the other grounds. I deal however with the factual errors alleged for the sake of completeness. The following in particular were drawn to my attention in the Appellant's skeleton argument and are made out on the evidence (taking into account Ms Shaw's contemporaneous notes of the oral evidence):

    (a) The Judge at [27] of the Decision draws an adverse inference from the Sponsor having rented a three-bedroomed flat in Germany. The evidence of the Sponsor was that he had lived with his nephew the whole time (in other words that the three-bedroomed property belonged to his nephew). Due to that mistake of fact, the Judge also failed to recognise that, even if the Sponsor's income was lower in Germany, his outgoings would also be lower because he was living with his nephew.

    (b) The Judge at [19] of the Decision says that there was no evidence from the nephew of financial support being offered to the Sponsor when he lost his job in Germany. Whilst that may make no difference to any of the findings, it is factually incorrect (see question [7] at internal page [9] of the notes)

    (c) At [27] of the Decision, the Judge did not accept that the Sponsor had transferred his principal residence to Germany because he maintained a flat in London. Although the Judge notes in the timeline at [23(1)] that the flat was rented out in November 2014, about eighteen months before the Sponsor moved to Germany and after he had moved within the UK to Chesterfield that is not factored into the Judge's reasoning in this paragraph on this issue.

27. Taken alone, those are not significant factual errors. Taken together, however, they are capable of infecting the Judge's reasoning on the central issues. It is not in any event appropriate to retain any of the factual findings in the Decision because this appeal must, for the reasons I have already set out, be reconsidered afresh.

## DECISION

**I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Kainth**

**promulgated on 21 September 2018 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.**

Signed  Dated: 7 March 2019

Upper Tribunal Judge Smith