Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00900/2019**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 19 September 2019	**On: 24 September 2019**

Before

UPPER TRIBUNAL JUDGE MARTIN
UPPER TRIBUNAL JUDGE KEBEDE

Between

SYED IRFAN HUSSAIN SHAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal (Direct Access Counsel)
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan born on 26 November 1983. He appeals, with permission, a decision of the First-tier Tribunal (Judge Lucas) dismissing his appeal against the respondent's decision to refuse to issue him with a residence card under Regulation 10 of the Immigration (European Economic Area) Regulations 2016 as a person with a retained right of residence following his divorce from his EEA national wife.

2. The background to this appeal is as follows. The appellant made an application in June 2014 for a residence card as the spouse of an EEA national, whom he had married in a proxy marriage ceremony in Senegal. The Secretary of State refused the application and the appellant's appeal against that decision came before the First-tier Tribunal in

September 2015. By a decision promulgated on 23 October 2015, First-tier Tribunal Judge Roots dismissed the appeal.

3. So far as the marriage was concerned, in line with Kareem (proxy marriages-EU law) [2014] UKUT 249, at that time good law, the judge found the appellant was not validly married. The judge then went on to consider whether or not the couple were parties to a durable relationship and found, on the basis of the evidence, that they were not and indeed concluded that it had not been established that the parties lived or had ever lived together let alone in a relationship.

4. The appellant then, on 20 August 2018, applied for a residence card as the former family member of an EEA national exercising treaty rights in the UK who had a retained right of residence following the end of his marriage. That application was refused on 8 February 2019 and it was his appeal against that decision which came before First-tier Tribunal Judge Lucas on 7 May 2019.

5. The 2018 application was refused, not on the basis that there was no valid marriage but on the basis that documents that the appellant had provided in support of his application to show that his wife was a qualified person were found to be false. In particular he had provided P60s and employee letters from Z A Butchers Ltd and H and S Woolwich Ltd which, when the Secretary of State performed checks, revealed that there was no record of the appellant's wife having the national insurance number provided on the documents. Furthermore, the appellant provided what purported to be joint bank statements with Santander, which the bank confirmed were not genuine. There was a letter from Thames Water which, after checks with Thames Water, the Secretary of State found was not genuine and an Aviva insurance policy which, while the document itself was genuine, had lapsed due to non-payment.

6. Furthermore, the appellant had not provided a passport or ID card for his former wife.

7. Of particular note in the refusal letter is the fact that the Secretary of State recorded that, while the marriage had not been previously recognised due to it having been a proxy marriage, given the Decree Absolute of 4 January 2019 in relation to a marriage solemnised on the 25 July 2013, the Secretary of State accepted the appellant was the former spouse of an EEA national.

8. The issues to be decided before the First-tier Tribunal therefore were whether the appellant's application should have been refused for failure to provide an ID card or passport and whether the appellant had submitted false documents. Those were the only issues to be decided.

9. Judge Lucas, in the Decision and Reasons failed to make any findings on either of the issues under appeal. Despite noting at paragraph 6 of the Decision and Reasons that the Secretary of State accepted the appellant was a former spouse, the judge proceeded to look carefully at the judgment of Judge Roots and applied Devaseelan. The judge noted, at paragraph 7 of his judgment, some surprise that the refusal letter

did not mention Judge Roots' determination. At paragraph 8 the judge noted that the findings of Judge Roots were significant and could not be simply ignored.

10. At paragraph 10 Judge Lucas referred to Judge Roots' finding that the appellant was not in a durable relationship and then went on at paragraph 11 to say that that was hardly a satisfactory basis upon which to seek to argue that he should acquire the benefit of a retained right of residence following the dissolution of a marriage that had been found not to be durable in 2015.

11. The judge went on at paragraph 13 to state the purpose of the appeal before him was not to sidestep the findings of the previous tribunal and that there had been a clear finding that the appellant was not in a durable relationship in that appeal. He said that he was entitled to rely on the findings of the previous judge and at paragraph 16 said that the problem for the appellant in this appeal was that he could not go behind the findings of the previous appeal. He said the Tribunal was "entitled to the clear finding that he is not in a durable relationship with the EEA national and that therefore he could not now rely upon that relationship to show that he has in some way acquired a retained right of residence."

12. Unsurprisingly, the appellant was granted permission to appeal to the Upper Tribunal and equally unsurprisingly, Mr Bramble conceded that the decision of Judge Lucas contained material errors of law.

13. The judge failed, following the concession by the Secretary of State that there had been a valid marriage, to consider the actual issues in the appeal. The previous decision and reasons was wholly irrelevant to the issue before him. It was not a matter of whether the relationship was durable or not but rather the issue was, having terminated a marriage, whether the appellant could show that his EEA national former spouse was a qualifying person at the relevant time and in deciding that, to make findings on whether the appellant had submitted false documents. The judge was also required to make findings on the appellant's failure to provide an ID document for his former spouse. The judge wholly failed to consider the issues under appeal.

14. The First-tier Tribunal's decision containing a material error of law, we set it aside.

15. We then considered whether the appropriate course was for us to re-decide the appeal, to adjourn it for a resumed hearing or whether it should be remitted to the First-tier Tribunal.

16. In considering that we noted the terms of the grant of permission by Deputy Upper Tribunal Judge Shaerf. He clearly stated, at paragraph 6 of the grant, that the issues in the appeal appeared to be justiciable on the basis of documentary evidence and legal opinion and that the appellant should consider taking legal advice on the nature of the evidence which might be required at the next hearing if an error of law is found and the hearing proceeds to a re-making of the decision.

17. Prior to the hearing before us no additional documentation had been provided. At the time of the hearing before the First-tier Tribunal the appellant was represented by Greenwich solicitors. Before us the appellant was represented by direct access Counsel. Counsel sought to adduce a 123-page bundle on the morning of the hearing. He also indicated that he had not seen the respondent's bundle in the case and therefore had not seen any of the documents relied upon by the Secretary of State to show the various documents submitted by the appellant had been false.

18. Before deciding the appropriate course, we stood the matter down for 30 minutes. Mr Bramble was provided with the appellant's bundle and Mr Iqbal was provided with a copy of the respondent's bundle.

19. The appellant's bundle, despite running to 123 pages, contained no evidence whatsoever addressing the issue of the false documents. It contained a witness statement signed by the appellant on 6 September 2019 which was wholly silent on the matter. It also contained copies of various documents within the appeal proceedings, documents relating to the marriages and divorce and then numerous bank statements in relation to the appellant's bank account. As the bundle was irrelevant to the issues to be decided, its late production did not justify an adjournment.

20. Mr Iqbal made an application, on the basis that he had not previously seen the respondent's bundle, or the documents contained therein justifying the respondent's decision on the documents, for an adjournment.

21. We noted that the decision in this matter was taken in February 2019. We noted that the hearing before the First-tier Tribunal had taken place in May 2019. We noted that the bundle of documents provided by the appellant's representatives for the First-tier Tribunal hearing contained no documents or evidence that spoke to the veracity of the documents and the actual issues in the appeal. Whilst we accepted that Mr Iqbal had not had sight of the respondent's bundle and therefore the various verification documents, he had seen, because it is included in the appellant's bundle, the refusal letter. The refusal letter makes abundantly clear why the application was refused. It made abundantly clear which documents were said to be false and why, in particular the P60s namely that there was no trace of the appellant's former wife having the national insurance number shown on the P60s. The purportedly joint bank statements with Santander which were found to be false were referred to but nevertheless the appellant had not obtained any further evidence to counter the suggestions that they were false. If he indeed had a joint account with his wife, such evidence would have been easily obtained. Furthermore, the appellant's witness statement was completely silent on the issue of false documents. We concluded that the appellant had had ample opportunity to address the issues in the appeal both with the assistance of his former solicitors and subsequently and yet he has done nothing. Keeping in mind the wisdom of Nwaigwe [2014] UKUT 00418 (IAC) we concluded that there was no unfairness to the appellant in proceeding and declined the adjournment request.

22. The adjournment application having been refused; Mr Iqbal acknowledged that there was no evidence before us to challenge the Secretary of State's reasons for refusal concerning the documents.

23. We now consider the documents in question.

24. The Secretary of State had made interdepartmental checks with regard to the P60s and employees letters from Z A Butchers Ltd and H and S Woolwich Ltd and the result of those checks confirmed that there was no record of the appellant's former spouse having the national insurance number provided on the documents. The results of the enquiries are contained in the bundle.

25. The Santander bank statements purported to be from an account in the joint names of the appellant and his former wife were checked with the bank who indicated that only one of the persons named held the account and it was not a joint account. The email from Santander is contained in the bundle. Similarly, checks with Thames Water showed that the document did not conform to that authority's paperwork. In the light of that cogent evidence adduced by the Secretary of State and in the absence of any evidence to counter it, we accept, on a balance of probabilities, that the documents submitted in support of the application were fraudulent. For that reason alone the Secretary of State was entitled to refuse the application and the appellant's appeal is dismissed.

26. Mr Iqbal, relying on the case of Rehman (EEA regulations 2016-specified evidence) [2019] UK UT195 (IAC) asked us to find that the Secretary of State was not entitled to refuse the application because of the lack of an ID card for the EEA national. However, the Secretary of State did not refuse the application for that reason alone. It is apparent from the refusal letter that the main reason was the submission of false documents.

DECISION

27. The making of the decision of the First-tier Tribunal did involve an error on a point of law. We set aside the decision. For the above reasons we remake the decision and dismiss the appeal.

28. There has been no application for an anonymity order and in our view no justification for making one.

Signed: Dated: 19 September 2019
Upper Tribunal Judge Martin