



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

Appeal Number: IA/17188/2014

THE IMMIGRATION ACTS

Heard at Field House

On 17th November 2014

**Determination
Promulgated**

On 8th January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

**MR ALI RIZWAN KHAN
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Pakistan whose application for a residence card as a spouse of a Lithuanian national was refused by the Secretary of State and his subsequent appeal dismissed by First-tier Tribunal Judge

Clarke in a determination promulgated on 1st October 2014. Grounds of application were lodged primarily on the basis that the judge had failed to consider the Appellant's bundle which was submitted to the Tribunal. It is said that had this evidence been taken into account the outcome of the hearing would have been different. Furthermore it was claimed that the judge had failed to take into account that the Appellant's wife had attended the hearing and the judge could have asked questions of her.

2. Permission to appeal was granted by First-tier Tribunal Judge Frankish who noted that the Tribunal had apologised by letter dated 7th July 2014 to the effect that they had not yet managed to link the bundle to the file despite evidence of this having been delivered. As Judge Frankish put it, if the application was to be believed not one but two things had gone "very wrong" with this case, namely the Appellant's evidence not coming into the assessment and the lack of credit for the Sponsor being present.
3. It was on this basis that the matter came before me on the above date.
4. Mr Khan (and his wife) was present and explained to me that he no longer had legal representation. He had received a letter from his representatives indicating that they were no longer acting for him and he said he wanted to conduct the case himself.
5. For the Home Office Miss Isherwood agreed that the judge did not have the bundle that he should have had, but looking carefully through the bundle which was now before us there was no material evidence there which would have enabled the judge to have changed his views. The witness statement did not set out clear employment details for his EEA national spouse. In all these circumstances there was no error in law.
6. Mr Khan explained that when he received the refusal letter he had not been asked to produce further wage slips. Rather it was said that the company concerned could not be contacted by telephone or located at Companies House, Yell.com or Google etc. As such the Home Office was not satisfied that this was a genuine business. Evidence in his bundle showed it was a genuine business.
7. So far as the Sponsor was concerned, what had happened was that he had told the Home Office Presenting Officer that his wife was outside the courtroom in response to a question from the solicitor as where was his wife. He did not know he had to bring her into the actual hearing room for the appeal.
8. I reserved my decision.

Conclusions

9. As Judge Frankish pointed out in the granting of permission matters went slightly awry at the appeal before Judge Clarke in that the bundle which should have been before him was not. Furthermore, when the judge found that he was not assisted by the fact that "the Sponsor did not attend the

hearing” (paragraph 15) there is no real dispute but that he was fundamentally wrong in that regard as the Sponsor had attended the hearing. This may well have had a bearing on his finding that the Appellant had failed to discharge the burden of proof (paragraph 11). The judge repeated that this was a case where the onus of proof was important (paragraph 16). He found that he could not rely on the two letters from Afro World. However in the Appellant's bundle - which the judge should have had but did not - reference is made to Afro World. Documents are produced which show the company does exist; in particular at page 29 there is a letter from Companies House referring to Afro World. At page 30 there is a Google document confirming that the company does exist and details are provided.

10. In my view these documents are fundamental to the Appellant's case and the fact that the judge was denied an opportunity to consider the documents amounted to severe procedural unfairness on the Appellant.
11. It therefore seems to me that the Appellant has not had a fair hearing because the judge was not in a position to consider documents which should have been before him which may well have had a significant bearing on the outcome of the appeal. Unfortunately, it seems to me that further fact finding is necessary and this matter will have to be heard again by the First-tier Tribunal.
12. The determination of the First-tier Tribunal is therefore set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of the judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Decision

13. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
14. I set aside the decision.
15. I remit the appeal to the First-tier Tribunal.

Signed

Date 7th January 2015

Deputy Upper Tribunal Judge J G Macdonald