



IAC-TH-CP-V1

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

Appeal Number: IA/23965/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated**

Reasons

On 6 April 2016

On 28 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

**M N K
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nasim, Counsel for Pioneer Solicitors, London

For the Respondent: Miss Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on [] 1986. He appealed against the decision of the Respondent dated 23 May 2014 curtailing his leave to remain in the United Kingdom under paragraph 323(i) and giving directions for his removal under Section 47 of the Immigration, Asylum and Nationality Act 2006 as amended. His appeal was heard by Judge of the First-tier Tribunal Flynn on 26 June 2015. His appeal was dismissed and the decision promulgated on 31 July 2015.
2. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal Grimmatt on 1 February 2016. Permission to appeal was lodged with the Upper Tribunal and permission was granted by Upper Tribunal Judge Blum on 23 February 2016. The grounds contend that the Appellant's representatives faxed a 30 page

bundle to the First-tier Tribunal and to the Respondent on 19 June 2015 but this bundle was not considered by the First-tier Tribunal Judge at the hearing on 26 June 2015. The First-tier Tribunal Judge did not have this bundle before her. The permission states that it is arguable that the First-tier Tribunal Judge through no fault of her own failed to take account of relevant evidence and committed an error of law.

3. There is a Rule 24 response dated 9 March 2016. The response states that even if the bundle had arrived on time there was no statement from Ms Vivien Ronto, the Hungarian national the Appellant had intended marrying, confirming the allegations made in the witness statement. Also the Appellant did not attend the hearing to address the issues raised in the refusal letter. The response states that based on the evidence, no Tribunal properly directing itself, could have reached a different conclusion. The response states that there is no material error of law in the decision.

The Hearing

4. The Presenting Officer handed to me the case of **Steven Richard Forman [2015] UKUT 00412 (IAC)**.
5. Counsel for the Appellant submitted that this claim was decided on the papers by the First-tier Tribunal. The Appellant's bundle was not before the Tribunal. He submitted that it is clear from the file that this bundle was sent on time to the Respondent and to the Tribunal.
6. Counsel submitted that the Appellant came to the United Kingdom in 2011 with leave to remain until October 2013 which was extended until 6 August 2015. In April 2014 his Sponsor lost its sponsorship licence. He submitted that no 60 day letter was sent to the Appellant by the Respondent.
7. Counsel submitted that the Appellant's leave was curtailed as at 23 May 2014 and he submitted that the burden was on the Respondent to prove her case in these circumstances. He submitted that the First-tier Tribunal Judge used the wrong burden of proof at paragraph 9 of the decision as the burden had shifted from the Appellant to the Respondent. Also at paragraph 10 of the decision the judge states that both parties failed to submit any evidence apart from the Grounds of Appeal and attached documents but the Appellant had actually submitted a 30 page bundle.
8. I was referred to Rule 13 of the Procedure Rules and the case of **MH Pakistan [2010] UKUT 168 (IAC)**. Counsel submitted that Rule 13 requires an unpublished documents to be supplied if it is to be relied on and he submitted that in this case the document mentioned were not supplied although the Respondent had an obligation to supply them. He submitted that the refusal letter merely made assertions. I was referred to page 2, which contains questions 5 to 9 of the refusal letter. These are quotes from the Appellant's and his bride's interviews. The Appellant

stated that they met on Facebook and his bride stated that they met in London. When the Appellant was asked how long he and his bride had been living together he said two months but his bride said six months. Counsel submitted that there is no transcript of the interviews and these questions cannot be taken out of context. He submitted that no weight should be given to these answers. I was referred to question 7 on page 2 of the refusal letter: "Where were you both living at this time?" The Appellant's bride answered that she had been living in Hungary and the Appellant had been living in London and the Appellant's answer was that his bride was living in Hungary and he was living in Ilford, Essex.

9. Counsel submitted that the Respondent has not said that this was a marriage of convenience. He submitted that when the Appellant was apprehended he thought he still had leave to remain in the United Kingdom until August 2015. He was unaware that his leave had been curtailed on 23 May 2014. Counsel submitted that the Appellant went to Belfast on 20 May 2014 but at that time he still had leave as the curtailment of his leave was not issued until 23 May 2014.
10. Counsel submitted that the Appellant's evidence is that the pressure on his Hungarian partner was unfair and that is why she did not answer the questions properly.
11. Counsel submitted that it is true that the Appellant did not appear for the hearing of the First-tier appeal but even if he had appeared, because there was no Appellant's bundle, the First-tier Tribunal Judge could not have come to a fair decision.
12. Counsel submitted that had the bundle been before the judge she would have known that the Appellant was a genuine student. In the bundle there is evidence of his qualifications. He submitted that there is no evidence from the EEA national in the bundle but this is not an appeal against a decision accusing the Appellant of entering into a marriage of convenience. This is an appeal against the curtailment of the Appellant's leave.
13. Counsel submitted that there is a material error in law in the judge's decision because he did not consider the Appellant's bundle.
14. I was asked to find that because of this material error of law the First-tier Tribunal Judge's decision should be set aside and the claim remitted back to the First-tier Tribunal for a fresh hearing. He submitted that that would be fair on both the Appellant and on the Respondent who can then provide the further evidence which is necessary.
15. Counsel submitted that Article 8 is not relevant in this context but there has been procedural unfairness and the decision should be set aside.

16. He submitted that the Appellant tried to contact the Respondent when he found the college's licence had been revoked and he was told to wait until he got the 60 day letter which he never got.
17. The Presenting Officer submitted that there has been no challenge to the refusal letter and there has been no evidence from the Appellant's partner. The Presenting Officer referred me to paragraph 13 of the decision which refers to there being no evidence before the First-tier Tribunal Judge to confirm that the Appellant is a genuine student or has undertaken any studies in the UK. She submitted that it is arguable that the Tribunal judge would have seen that the Appellant had studied in the United Kingdom had the Appellant's bundle been before her but this does not mean that the judge would have found the Appellant to be a genuine student when his history was considered, along with all the circumstances of the claim.
18. I was referred to paragraph 11 of the said case of **Forman** which refers to the Article 8 jurisprudence evolving and states that Article 8 is not a general dispensing power. She submitted that this Appellant's private life is limited and she submitted that she is relying on the Rule 24 response.

Decision and Reasons

19. The file makes it clear that a 30 page bundle was sent by the Appellant to the First-tier Tribunal and the Respondent on 19 June 2015. It is clear from the decision that this bundle was not considered by the First-tier Tribunal Judge. It was not before her.
20. Because of this the First-tier Tribunal Judge failed to take account of relevant evidence.
21. The burden of proof transferred to the Respondent, but this was not taken into account by the First-tier Tribunal judge. Although the refusal letter refers to the interviews with the Appellant and with his bride the actual interview records are not on file. The refusal letter states that the Hungarian bride admitted that this was a sham marriage and she has now left the United Kingdom.
22. The Upper Tribunal's permission to appeal states that there are concerns about the materiality of the arguable error as the Appellant's partner no longer appears to be in the United Kingdom, his Tier 4 (General) Student leave was revoked and the Appellant's statement was brief but permission to appeal was still granted.
23. The bundle referred to, contains evidence of the Appellant's studies which should have been before the First-tier Tribunal Judge.
24. No reason has been given by the Appellant for not turning up at his First-tier hearing but he did not do so. Based on the facts and on what is before me I find that there is a material error of law in the First-tier Judge's decision as relevant evidence was not considered by her.

25. The First-tier Tribunal Judge's decision, promulgated on 31 July 2015 should be set aside and in the interest of fairness to both parties the Appellant's appeal should be heard before the First-tier Tribunal.
26. No findings of the First-tier Tribunal can stand. Under Section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of 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. The members of the First-tier Tribunal chosen to reconsider the case are not to include Judge Flynn.
27. Anonymity has been directed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Murray