Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number
IA/50448/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 20 November 2014	**On 21 November 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Muhammad Shahzad Rafique
(No anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr. M. Biggs of Counsel instructed by Mayfair Solicitors.
For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer.

DECISION AND REASONS: ERROR OF LAW

1. This is an appeal against the decision of First-tier Tribunal Judge Majid promulgated on 27 August 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 11 November 2013 to refuse to issue him a residence card as confirmation of a right to reside in the UK.

2. I am grateful for the helpful and realistic approach taken by the representatives before me – and in particular Ms Isherwood who readily acknowledged that there were difficulties in the written decision of the First-tier Tribunal. In such circumstances I do not propose to rehearse the basis of the Appellant's claim or the procedural history of the appeal - all of which are a matter of record on file and are known to the parties.

3. The salient matters are these. The Appellant's application was based on his relationship with Ms Silvija Kondrataviciute, a Lithuanian national. The Respondent refused to issue a residence card with reference to regulations 2 and 6 of the Immigration (European Economic Area) Regulations 2006. Immigration officers attended the Appellant's address on 16 October 2013, and on the basis of their observations and questions it was concluded that the Appellants marriage was "*one of convenience for the sole purpose of [the Appellant] remaining*" in the UK. Accordingly the key issue before the First-tier Tribunal Judge was the genuineness of the claimed marital relationship. The Judge concluded that he was "*not persuaded that the Appellant has not entered into a marriage to facilitate his stay in this country*" (determination at paragraph 16). (I observe in passing that the Judge's phrasing in this regard is not a model of clarity in demonstrating an appropriate understanding of the burden of proof.)

4. In my judgement the Judge erred in the following material respects:

   (i) At paragraph 7 of the determination the Judge observed that the Appellant had given oral testimony consistent with his assertions in the various documents, before commenting "*However, his evidence, as described below, did not come through as very credible*". The Judge did not thereafter supply a description of the Appellant's evidence, or otherwise state any findings in respect of it. It is not possible to discern the Judge's reasons for concluding that the Appellant's evidence was not 'very credible'. This deficiency of reasoning constitutes an error of law.

   (ii) In the section of the determination headed 'Dispositive Reasons and Deliberations', the only aspect of the oral testimony upon which the Judge makes express comment is at paragraph 14, where the Judge refers to the manner in which Ms Kondrataviciute answered one of his questions. The Judge writes: "*I… very clearly and slowly asked the Appellant's wife (with due apology) when she was last with the Appellant in the same bed? She did not*

reply to this question for a while and I recorded in my notes "I asked the European wife of the Appellant when she was last sleeping with the Appellant, but she was not able to answer that question for a while." This clearly gave me the impression that the Appellant and his Lithuanian wife in their statements were not telling the truth." The determination does not inform the reader as to what the answer was when it was given; moreover, there is no exploration or consideration of any possible reason for hesitation in responding to such a direct and personal question – no matter how sensitively put. In my judgement the First-tier Tribunal Judge does not adequately explain why the delay on the part of the witness in answering this question gave such an adverse impression as to be determinative (as it appears to have been on the limited reasoning offered by the Judge) of the credibility of both the witness and the Appellant. I consider the Judge's conclusion to be unsustainable in so far as it is based on the reason offered, to an extent that amounts to an error of law.

(iii) The Judge referred to the contents of the report of the visiting immigration officers as having stated "*that the Appellant and his wife were sleeping in separate rooms*" (paragraph 14). The report contains no such statement, and indeed concluded that it was "*clear... that the couple are living in the same room*", albeit it was considered they were sleeping in different beds. I consider this to be a material misconception of fact amounting to an error of law.

5. In all such circumstances I find that the First-tier Tribunal Judge materially erred and I conclude that the decision of the First-tier Tribunal must be set aside.

6. Both representatives acknowledged that in the circumstances the Appellant had in effect been deprived of a full and fair hearing, and it would be necessary for his appeal to be reheard afresh with all issues at large, with the most appropriate forum being the First-tier Tribunal. I accept this joint position.

7. I do not consider that any specific Directions are required in relisting the appeal, beyond the standard Directions. However, I do consider it appropriate to make the following observations – although in due course it is a matter for the Appellant as to whether, and if so how and to what extent, he wishes to address such matters. The evidence filed in support of the appeal, including the witness statements, offer no meaningful information as to the Appellant's 'hinterland'. It is a feature of

the case that the Respondent had not been able to identify any date of entry to the UK, records showing only that a visit visa application had been refused in October 2006. The Appellant has a Pakistan passport issued in Dublin in October 2011, but the evidence is silent as to whether he was in Ireland at that time, and if so, for what period. Similarly, the evidence is silent as to when he entered the UK, on what basis, and what he has done here since. In this latter context it is to be noted that there is a tension between the answers of the Appellant and of Ms Kondrataviciute recorded in the immigration officer's report of the visit of 16 October 2013 in respect of the Appellant's employment: a possible starting point for clarification might be evidence of the true position. Nor is there even ay meaningful account of the circumstances of the development of the relationship with Ms Kondrataviciute. It is also to be noted that the Appellant pleaded Article 8 of the ECHR in his Grounds of Appeal to the First-tier Tribunal. In the event that he is unsuccessful in his appeal under the EEA regulations and it becomes necessary for him to rely upon Article 8 in the alternative, it will be a likely obstacle to successful pursuit of such a ground if the Appellant does not provide any relevant evidence as to his history and circumstances in the UK.

Notice of Decision

8. The decision of the First-tier Tribunal Judge contained material errors of law and is set aside.

9. The decision in the appeal is to be re-made before the First-tier Tribunal, before any judge other than First-tier Tribunal Judge Majid.

Deputy Judge of the Upper Tribunal I. A. Lewis 21 November 2014