



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/02626/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 20 November 2014**

**Decision Promulgated
On 23 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**RAJESH FRANKLIN KHANDAVALLI
(ANONYMITY NOT ORDERED)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Faryl counsel instructed by JMR Solicitors

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge A D Smith promulgated on 14 August 2014 which allowed the Appellant's appeal under the Immigration Rules although this was clearly a typographical error as the case was an appeal against an decision under the EEA Regulations.

Background

3. The Appellant was born on 13 July 19080 and is a citizen of India.
4. On 10 April 2013 the Appellant applied for admission to the United Kingdom, a family permit, as a family member of an EEA national who was exercising treaty rights in the United Kingdom, in essence as the spouse of Emanuela Dorobantu a Romanian citizen.
5. On 22 January 2013 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons: the Respondent stated that theirs was a marriage of convenience; the parties had at the time of application only lived together for 7 days; there was no evidence of their relationship prior to their marriage in 2013; there was no evidence of contact.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal and the case came before First-tier Tribunal Judge Smith. The Appellant was represented by Ms Faryl and there was no Home Office Presenting Officer. The Judge recorded at paragraph 6 of his decision why he dealt with the case in the absence of a Presenting Officer. After hearing evidence from the EEA sponsor the Judge found that the marriage in issue was not a sham marriage and therefore allowed the appeal.
7. Grounds of appeal were lodged and on 3 September 2014 First-tier Tribunal Judge Osbourne gave permission to appeal stating that it was
“arguable that in proceeding in the absence of representation for the Respondent when the Respondent would have wished to have been represented amounts to an arguable error of law.”

8. At the hearing I heard submissions from Mr Mc Veety on behalf of the Appellant that :
 - (a) He relied on the grounds of appeal.
 - (b) He conceded that the grounds were drafted by someone who, unlike Ms Faryl, was not present in court when the decision in issue was made. He conceded that if no application was made for an adjournment there was no error of law. He had to concede there was no 'paper trail ' in his file to suggest that the Respondent had made an application for an adjournment.
9. On behalf of the Respondent Ms Faryl submitted that :
 - (a) There had been no error of law because the Respondent had notice that the matter was to go before a court which had no Presenting Officer but made no application for an adjournment.
 - (b) In the absence of such an application the Judge was entitled to proceed in the absence of a Presenting Officer if it was just to do so.
 - (c) This was merely a disagreement with the outcome of the appeal.

The Law

10. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigration Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence

of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

13. This was an appeal against a refusal of a family permit and the basis of the refusal was, in essence, that the marriage underpinning the application was a sham marriage.

14. The Judge recorded the circumstances in which the case came to be dealt with without a Presenting Officer at paragraph 6 of his determination:

“No Home Office Presenting Officer was in attendance. This was not due to any fault on the part of the Respondent. This case had been originally listed as a ‘floating hearing’ and the respondent would have anticipated that it would have been dealt with in a court were they already had a representative in attendance. The respondent could not provide a representative on short notice. The file was reviewed by a Senior Immigration Judge who took the view that the case was suitable to be dealt with without a representative for the respondent. The reasons for refusal were clearly stated by the Respondent in the refusal letter and I can give them due consideration.”

15. The Procedure Rules require that cases are dealt with taking into account the overriding objective which is to deal with cases fairly and justly. This is defined as including “(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal. There is no absolute right to have a representative present.

16. What is clear from the decision is that the Judge did not have an application for an adjournment before him. Mr Mc Veety confirmed to me that there was no record on his file of any such application having been made. I have checked the court file. There is no document on that file and no endorsement on the file cover

which suggests that the Respondent, who had as Ms Faryl suggests, some notice albeit 'short notice' that this case would proceed without a Presenting Officer, made an application for an adjournment. The Respondent argues in the grounds that they were disadvantaged by the loss of opportunity to cross examine the sponsor but at the earlier stage of listing this case there is no suggestion that the Respondent had indicated that this was a case that they required should only be placed in a list that had a Presenting Officer.

17. In determining whether the court had acted fairly I am satisfied that that the Respondent was made aware that the case would be put into a court without a Presenting Officer but made no application to adjourn the case. It is clear from the decision that the Judge understood that the Respondent's challenge was that this was a sham marriage and he asked a number of questions of the sponsor which were focused on that issue and these are set out at paragraph 9 of the determination. I find that taking into account all of the circumstances there has been no procedural unfairness and the decision must therefore stand.

CONCLUSION

18. I therefore found that no errors of law have been established and that the Judge's determination should stand.

DECISION

19. The appeal is dismissed.

20. There is no order for anonymity.

Signed

Date 25 .11.2014

Deputy Upper Tribunal Judge Birrell