



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/13401/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 28 March 2018

Decision and Reasons Promulgated  
On 21 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

K A W  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Ali, Counsel, on behalf of M & K Solicitors, Luton  
For the Respondent: Ms Holmes, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born on [ ] 1985. He appealed against the decision of the respondent dated 24 March 2015 refusing his application for a residence card as the spouse of Barbora Bihariova, who he states is an EEA national exercising Treaty Rights in the United Kingdom, under Regulation 17 of the Immigration (European Economic Area) Regulations 2006. His appeal was heard by Judge of the First-Tier Tribunal Graham on 5 June 2017 and dismissed in a decision promulgated on 10 August 2017.
2. An application for permission to appeal was made and permission was granted by Judge of the First-Tier Tribunal Hodgkinson on 31 January 2018. There are five grounds of application and permission was granted on ground five only. The permission states that under ground five there is a wealth of material documentary

evidence which may or may not have caused the Judge to have arrived at a different conclusion and there is no indication that the Judge took that documentary evidence into account. The permission states that this arguably impinges adversely on the sustainability of the balance of the Judge's adverse findings.

3. There is no Rule 24 response.
4. Ground five of the application for permission states that there was documentary evidence before the judge establishing a strong prima facie case that the couple were cohabiting together as husband and wife and that this evidence outweighed any discrepancies in the oral evidence highlighted by the First-Tier Judge. The First-Tier Judge completely failed to consider or assess this evidence which was placed before her. This ground states that the weight of the evidence available in support of the case was sufficient to overcome any doubts raised by the respondent and the First-Tier Judge erred in law by failing to consider the substance of the documentary evidence before her and failed to attach proper weight to the same. It goes on to state that the corroborative evidence is relevant but the Judge rejected this and it states that this is a flawed rejection as the couple have been married for over four years and are cohabiting, have attended several court hearings as a couple with supporting witnesses and there was no further visit to their house or marriage interview by the respondent. The ground states that if the First-Tier Judge had considered all the evidence and taken heed of the detail, together with the witness evidence she might have arrived at a different conclusion.
5. I asked if anything could be agreed and the Presenting Officer submitted that the Judge has not taken the particular bundle referred to in ground five into account but the first four grounds have been set aside so the findings apart from those referred to in ground five should stand.
6. She submitted that this claim should be remitted to the First-Tier Tribunal but only on this ground and the findings made by the First-Tier Judge should be preserved, i.e. Judge's negative credibility findings. She submitted that there is a material error of law as these documents have not been considered by the Judge and they should have been and the remitted hearing should be based on these documents only.
7. Counsel submitted that the Presenting Officer is correct in that these documents should have been considered by the Judge as they support the appellant's claim. He submitted however, that all the documents in the respondent's bundle should be considered as there is documentation showing that the appellant and his partner have been cohabiting going back to 2013. He submitted that all the evidence before the Judge is now relevant and this cohabitation is important. I was referred to the skeleton argument.
8. He submitted that there will be a difficulty in preserving the other findings if this evidence is taken into account as the Judge's other findings are likely to have been contaminated by her failure to consider these documents.

9. He submitted that the documents show four addresses for the appellant and his wife and for these addresses there are bank statements, work documents, photographs and joint bills. He submitted that all of this is significant because of the allegation that the appellant is not in a genuine marriage. He submitted that a lot of the evidence has been overlooked in the initial decision and the decision is flawed.
10. He submitted that the Judge's findings on credibility on the facts should have been considered based on the statements by family members and he submitted that the Home Office guidance recognises this.
11. He submitted that this appellant and his wife have moved away from the inception period of the marriage and the fact that they have been living together for a long period indicates that it is not a sham marriage but is a genuine marriage. He submitted that the respondent has paid no more visits to the house and has carried out no interviews and at the First-Tier Hearing he, Counsel, had made submissions and had referred to the documents which the Judge has not considered but the Judge still found that credibility is an issue in this case. He asked me to remit the case to the First-Tier Tribunal but he asked me not to preserve the findings of fact of the First-Tier Judge.

### **Decision and Reasons**

12. Both parties have stated that there is a material error of law in the decision as a bundle of documents has not been properly considered by the Judge. The permission is very clear. It was only granted on ground five of the grounds of application. The fact that the Judge did not consider this evidence impinges adversely on the sustainability of the balance of the Judge's adverse findings.
13. Counsel submitted that the fact that the Judge has not considered this evidence must have infected her other findings. The Judge was correct in that the burden of proof relating to the sham marriage is on the respondent although the evidential burden may shift to the appellant. As the appellant produced a marriage certificate and the sponsor's passport the Secretary of State has to show that there is a reasonable suspicion that the marriage is one of convenience and if this is shown the evidential burden then passes back to the appellant.
14. The Judge states that she makes no adverse finding relating to the fact that the sponsor was not at the flat when the Immigration Officers visited it and there were few female items in the flat as the appellant's evidence is that the sponsor had gone back to Czechoslovakia at that time. She then refers to inconsistencies in the evidence relating to the period of the sponsor's absence and assesses the other evidence before her, noting that the sponsor has not left the United Kingdom since November 2012 in spite of what the appellant told the Immigration Officers.
15. The Judge then refers to other significant discrepancies and other material inconsistencies in the evidence given by the appellant and the evidence given by the sponsor and finds the sponsor's uncle not to be a credible witness. He also criticises Mr Sheik's evidence. The judge has given good reasons for all of these findings.

16. There is a material error of law in that one of the bundles of evidence provided by the appellant was not considered by the Judge. I find that once this evidence is considered in the First-Tier the appellant's adverse credibility findings can be assessed along with this new evidence. The new evidence may well support the Judge's findings or on the other hand it may support the appellant and his sponsor.

**Notice of Decision**

I accept that there is a material error of law in the First-Tier Tribunal's decision. The First-Tier Judge's findings of fact shall be preserved but I am remitting the claim to the First-tier Tribunal so that the documents referred to at ground five of the application for permission can be considered and assessed with the Judge Graham's findings. It is on this basis only that the First-Tier Tribunal has to consider the claim.

The members of the First-Tier Tribunal, chosen to consider the case are not to include Judge Graham.

Anonymity has been directed.

Signed

Date 15 May 2018

Deputy Upper Tribunal Judge Murray