Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28129/2014

THE IMMIGRATION ACTS

Heard at Bradford **Decision and Reasons**
On 24th June 2015 **Promulgated**
On 3rd July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR RAJA QAMAR ABBAS
(ANONYMITY NOT DIRECTED)

Appellant

and

THE IMMIGRATION OFFICER – TERMINAL 2, MANCHESTER AIRPORT

Respondent

Representation:

For the Appellant: Ms B Asanovic, Counsel instructed by Bankfield Heath Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Saffer who, in a decision promulgated on the 25th February 2015, dismissed his appeal against the respondent's decision (a) to refuse him admission to the United Kingdom, and (b) to revoke his EEA Residence Card.

Background

2. The original immigration decision, which Judge Saffer upheld, was taken on the 14th July 2014. It was made on the basis that (i) the appellant had

submitted false documents (a divorce certificate and confirmation of authenticity from the Union Council Shakrial Rawalpindi) in support of his application of the 9th December 2009 for approval to marry in the United Kingdom, and (ii) anomalies in the parties' interviews with a Home Office official that gave rise to a suspicion that the appellant's marriage was one of convenience.

Decision and reasons

3. The First-tier Tribunal's decision cannot stand for reasons that are identified in three of the five grounds of appeal. I take the grounds of appeal in turn.

4. The appellant's EEA Residence Card had been granted on the strength of his marriage to Ms Lucie Kroupova. Ms Kroupova had given oral testimony with a view to rebutting the respondent's claim that she had entered into a marriage of convenience with the appellant. In assessing her evidence, Judge Saffer placed "significant weight" upon a written record of a visit to the matrimonial home by an Immigration Officer [paragraph 35]. Based upon this record, the judge concluded that the Ms Kroupova had lied in stating that the appellant was at work at the time of the Immigration Officer's visit. The judge reached this conclusion because he believed that the appellant's passport showed him to be in Pakistan on the occasion in question. However, as the respondent acknowledges, the record of the visit incorrectly stated that it took place on a date in 2014 when it had in fact taken place on a date in 2013. At that time the appellant was undoubtedly in the United Kingdom. It is thus not surprising that the respondent did not rely upon this supposed anomaly as a reason for the decision. There is force in Ms Asonovic's submission that, whilst there was undoubtedly a typographical error in recording the year of the visit, this was nevertheless apparent from the context within which it appeared (there was reference to a visit, some two days' earlier, which correctly gave the year as 2013) and that it would in any event have become clear had the judge to put his mistaken belief to the witness directly. I am satisfied that the failure to put to the witness the suggestion that she had lied about her husband's whereabouts before drawing an adverse conclusion was a procedural irregularity that has resulted in proven unfairness affecting the outcome of the appeal. For this reason, alone, the decision of the First-tier Tribunal cannot stand.

5. The respondent had originally refused the application on the basis that the appellant had submitted a forged divorce certificate in order to show that he was free to marry the sponsor. Judge Saffer upheld this aspect of the respondent's decision [paragraph 29]. This was somewhat surprising in view of the fact that he had accepted as genuine a document purporting to be from a local Union Council that confirmed the fact of the divorce. It is nevertheless possible, at least in theory, for a person to submit a false document in order to evidence a true fact. To that extent, therefore, this was a finding that was open to the judge. However, the real problem with it is that further investigation by the respondent had led to the conclusion that the divorce certificate was, contrary to the findings of the original investigation, also a genuine document. This forms the basis of the second

ground of appeal. It is not of course an error of law for the Tribunal to make a finding of fact upon the basis of evidence that is subsequently found to be unreliable. However, with his customary fairness, Mr Diwnycz informed me that in a Minute Sheet, completed at the end of the hearing, the Presenting Officer had noted that the divorce certificate was genuine. It is right to say that the Minute Sheet does not say, in terms, that this concession had been drawn to the attention of the judge. It is nevertheless a short inferential step to conclude that it was. In any event, it is only right to give the benefit of the doubt to the appellant, given that he would otherwise stand wrongly condemned of involvement in fraud

6. The third ground relates to the judge's finding that the appellant had failed to prove that his marriage was legally valid by reason of a lack of evidence that it was recognised in the EU citizen's country of origin (the Czech Republic). In light of the decision in TA and others (Kareem explained) Ghana [2014] UKUT 316 (IAC), it is arguable that the validity of the appellant's marriage was subject to its recognition under the law of the country of the sponsor's nationality. It would perhaps be surprising if the law of one EU Member State failed to recognise the validity of a marriage that was celebrated under the law of another. It may be that this was the reason why the appellant's marriage (which took place in and is recognised under the laws of England) had never been questioned by the respondent. Indeed, the respondent usually raises the issue of validity only in cases where a ceremony of marriage has taken place by proxy in a country that is outside the EU. Whatever the reason for it, however, the fact remains that this was not an issue that had been raised by the respondent. The appellant had not therefore been placed on notice of the need to adduce evidence in order to address it. This procedural unfairness clearly had a bearing upon the outcome of the appeal and thus provides a further basis for setting aside the decision.

7. The fourth ground of appeal takes issue with the judge's findings of fact. In view of my decision with regard to the first three grounds of appeal, it is unnecessary to consider this complaint in detail. It will suffice to say that I have concluded that the individual challenges to the judge's factual finding on this ground are essentially based upon an isolated view of individual aspects of the evidence rather than upon an appreciation of the evidence as a whole. I am satisfied that were it not for the misunderstandings of the evidence, to which I have already alluded, the judge's factual findings would have been reasonably open to him.

8. The fifth ground of appeal is based upon the judge's purported upholding of the respondent's decision to refuse the application under paragraph 320A of the Immigration Rules. Both the judge and the respondent were wrong to consider a provision that governs the granting of leave to remain under the Immigration Rules (as opposed to those governing the recognition of a right of residence under EU law). This error was however immaterial to the outcome of the appeal. This is for two reasons. Firstly, the judge also upheld the respondent's decision on the basis of Regulation 21B of the 2006 regulations. This provision was applicable to the misconduct of which the judge had mistakenly found the appellant to be guilty and it was also

relevant within the context of the appellant's rights under EU law. Secondly, and more fundamentally, the basis for suggesting that the appellant was guilty of such conduct was in any event flawed, for the reasons that I considered at paragraph 5 (above).

9. I am satisfied that the errors of law that have been correctly identified in the first three grounds of appeal are such as to infect the entirety of the Tribunal's decision. It is appropriate in those circumstances to remit the matter to the First-tier Tribunal to be determined afresh.

Notice of Decision

10. The appeal is allowed, the decision of the First-tier Tribunal is set aside, and the determination of the appeal is remitted to be heard afresh by any judge of the First-tier Tribunal other than Judge Saffer. None of the original findings of fact are preserved.

Anonymity is not ordered

Signed Date

Judge D Kelly

Deputy Judge of the Upper Tribunal