Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04027/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 April 2018	**On 08 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SAIF UR REHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. A. Seehra, Counsel instructed by Farani-Javid-Taylor Solicitors
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Nixon, promulgated on 31 August 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to issue a residence card.

2. Permission to appeal was granted as follows;

> "The grounds state that although the judge took into consideration the decision of Judge Camp dated 6th October 2014 the judge failed to take into account the fact that the marriage is still subsisting. It is argued that the interview notes were before the present judge and therefore should have been looked at afresh as if the first decision had never been made. I find that there are arguable errors of law as stated in the grounds. I also note that the judge stated at paragraph 4 of the decision that the burden of proof is on the appellant and the standard of proof required is a balance of probabilities. That is a clear error of law as the burden of proof is on the Respondent on the balance of probabilities. I find that all aspects of the grounds are arguable."

3. The Appellant and Sponsor attended the hearing. I heard brief submissions from Mr. Jarvis in which he accepted that the decision involved the making of a material error of law. Ms Seehra made brief submissions. I stated that I found the decision involved the making of a material error of law and I remitted the appeal to the First-tier Tribunal to be reheard.

Error of Law

4. At [13] of the decision the Judge states:

> "I turn next to the consideration of the additional documentation before me and do not find that there is anything new before me of such significance that the determination should be departed from."

5. The Judge then goes on to refer to the medical evidence of fertility treatment which was before him. He concludes [13] by stating:

> "In any event, I do not find that this is fresh evidence and I do not find that it is sufficient to displace the original decision. I find that there is nothing before me to cause me [to] depart from Judge Camp's determination and consider this matter afresh."

6. I find that this evidence was fresh evidence. It was not just a general assertion in oral evidence, but was independent corroborative documentary evidence. No explanation has been given for the statement that it was not fresh evidence. Further, given the passage of time since Judge Camp's decision in 2014, the fact that the Appellant and Sponsor were still claiming to be in a relationship in and of itself was something to be taken into account when considering whether it was appropriate to depart from the previous findings.

7. Given that there was fresh evidence before the Judge, it was incumbent on him to explain why it could not be relied on. However, he stated only that this evidence "could have been put before the Tribunal to bolster the claim". There are no reasons given for why he considered this to be the case, given that it was independent evidence.

8. I find that the Judge has failed properly to engage with this evidence. He has failed to explain why it is not fresh evidence, and why he has rejected

it. This goes to the core of the Appellant's appeal against the decision that he is not in a sham marriage.

9. Further, as stated by Judge Adio when granting permission, the Judge has incorrectly stated the burden of proof. He states that the burden of proof is on the Appellant [4]. This is incorrect. It is well-established in caselaw that, where the Respondent is alleging that a marriage is a marriage of convenience, the burden of proof lies on the Respondent in the first instance. Only when the Respondent has provided evidence which raises the suspicion that the marriage is a marriage of convenience does the burden shift to the Appellant.

10. I find that this is a material error of law, especially given that the Judge relies on the findings of Judge Camp who, as was pointed out by Ms Seehra, also stated that it was for the Appellant to discharge the burden of proof, see [28]. Further, when making his decision in 2014, Judge Camp did not have the interview transcript before him. Had this evidence been before Judge Camp, and had he been able to consider it, it is not possible to say that he would have come to the same conclusion.

11. I find that the decision involves the making of material errors of law in the failure to consider the fresh evidence, and the failure to apply the correct burden of proof. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

12. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside.

13. The appeal is remitted to the First-tier Tribunal to be remade.

14. The appeal is not to be heard by Judge Nixon.

15. No anonymity direction is made.

Signed Date 2 May 2018

Deputy Upper Tribunal Judge Chamberlain