



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/09455/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22 October 2018

Decision & Reasons Promulgated  
On 31 October 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

VARUN JASPAL SINGH SETHI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Mustafa, Counsel, instructed by Jade Law Solicitors

For the Respondent: Mr J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of India, born in 1987. On 11 August 2017 he applied for a residence card pursuant to the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) as confirmation of his right to reside in the UK as the former family member of an EEA national exercising Treaty rights who retained a right of residence.

2. In a decision dated 13 November 2017 the respondent stated that the appellant had not provided adequate evidence that he was in a genuine relationship, that interview notes from a 'pastoral visit' disclosed 'vague', 'less than forthcoming' and 'contradictory' answers in respect of the claimed relationship and the breakdown of the marriage, and that the marriage was therefore one of convenience.
3. The appellant lodged an appeal with the First-tier Tribunal. The appellant paid a fee of £80, the appropriate sum for an appeal to be determined on the papers without an oral hearing. On 20 December 2017 the First-tier Tribunal issued directions to the parties. The directions issued to the appellant required any written evidence and submissions to be served on the First-tier Tribunal and the respondent by 17 January 2018. A similar direction was issued to the respondent.
4. Attached to the case file is a bundle of documents, addressed to the First-tier Tribunal and dated 17 January 2018. There is manuscript writing in pencil reading 'PHC 18/1/2018', and a reference to 'J Lawrence @ H'worth'. There is a formal 'Hatton Cross Received' stamp dated '19 Jan 2018', and a 'Harmondsworth HC Received' note dated '22 Jan 2018'. An email received from the appellant's legal representatives, sent at 11:09 on 31 January 2018, claims that the appellant's bundle of documents was served on person to IAC Hatton Cross on 18/01/2018. An email response from IAC Customer Service, dated 6 February 2018, states that, according to the relevant database, the appellant's bundle of documents was received at Hatton Cross on 19 January 2018 and linked to the file on 22 January 2018.
5. Although there is no entirely clear picture of events, I am satisfied that the appellant's bundle was served on the First-tier Tribunal after 17 January 2018, and that the most likely date of service is 19 January 2018.
6. In a decision stating that it was 'heard' at Harmondsworth on 18 January 2018, but which is signed and dated 21 January 2018, and which was promulgated on 29 January 2018, Judge of the First-tier Tribunal NMK Lawrence (the judge) dismissed the appeal noting, inter alia, that appellant's grounds were not supported by any evidence.
7. It seems that the judge was not made unaware that, despite being in breach of the deadline contained in the First-tier Tribunal's Directions, the appellant had in fact provided a bundle of documents running to 196 pages and containing a skeleton argument, a witness statement from the appellant, documents relating to the appellant's ex-wife, including evidence of her employment and place of residence, and photographs.
8. I am satisfied, having regard to the aforementioned evidence, that the First-tier Tribunal did receive the 196-page bundle of evidence prior to the date that the judge signed his decision, and prior to the date on which the decision was

promulgated. **E & R v Secretary of State for the Home Department** [2004] EWCA Civ 49 is authority for the proposition that a Tribunal is seized of an appeal up until the date its decision is promulgated. Moreover, a successful appeal is not dependent on the demonstration of some failing on the part of the Tribunal and an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the Tribunal, was not considered, with resulting unfairness (**MM (unfairness; E & R) Sudan** [2014] UKUT 00105 (IAC)). I fully accept that the appellant did not comply with the directions, but the judge did not dismiss the appeal because of a failure to comply with the directions. The judge was apparently unaware of the existence of materially relevant documents that were within the possession of the First-tier Tribunal.

9. In my judgment the administrative staff at Hatton Cross failed to attach the bundle of documents to the file in an expedient manner and, as a result, the judge either did not have the bundle before him when the decision was made, or was not made aware, after he reached his decision but before it was promulgated, that a large bundle had been provided to the First-tier Tribunal. Although the judge is blameless for his failure to consider evidence that was not before him I am satisfied, given the history of this matter, that there has been a procedural impropriety sufficient to render the decision unsafe as relevant evidence was not taken into account by the judge even though it was in the Tribunal's possession. I am satisfied that this constitutes a material error of law.
10. In these circumstances where there has been no proper consideration of the application by the First-tier Tribunal, and further to 7.2 (b) of the Presidential Practice Statement, it is appropriate to remit the matter back to the First-tier Tribunal to be considered afresh before a judge other than Judge of the First-tier Tribunal NMK Lawrence.

### **Notice of Decision**

**The decision of the First-tier Tribunal is set aside as it involved the making of an error of law on a point of law.**

**The case is remitted to the First-tier Tribunal for a de novo hearing.**

**As the appellant initially requested a paper hearing the First-tier Tribunal will consider the appeal on the papers unless the appellant makes any application, and pays the requisite fee, to have his appeal considered at an oral hearing.**

No anonymity direction is made.



Signed

22 October 2018

Date