



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/09214/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13<sup>th</sup> February 2019**

**Decision & Reasons  
Promulgated  
On 19<sup>th</sup> February 2019**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SANDEEP SINGH  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Miss Everett, Senior Home Office Presenting Officer

For the Respondent: Mr Ahmed, Counsel instructed on behalf of the Appellant,

**DECISION AND REASONS**

1. The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal Panel (Judge Froom and Judge Stedman) (hereinafter referred to as the “panel”) who, in a determination promulgated on 17<sup>th</sup> August 2018 allowed the appeal against the decision of the Secretary of State to refuse Mr Singh’s application for a residence card under the Immigration (European Economic Area) Regulations 2016 (“hereinafter referred to as the 2016 Regulations”).

2. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to him as the Respondent as he was the Respondent in the First-tier Tribunal. Similarly, I will refer to Mr Singh as the Appellant as he was the Appellant before the First-tier Tribunal.

The background:

3. The history of the application is set out in the decision of the First-tier Tribunal. The Appellant is a national of India who entered the UK on the 23 May 2007 with entry clearance to visit the UK for a short period “to finalise business deals” but he did not leave and remained in the UK.
4. On the 12<sup>th</sup> August 2017 he applied for a residence card as confirmation of the right to reside in the United Kingdom as a family member of an EEA national exercising Treaty Rights. During the period spent in the United Kingdom he had met his wife who was a national of Romania. They subsequently married on the 16<sup>th</sup> June 2017.
5. The application made by the Appellant was refused by the Secretary of State in a decision letter dated 12<sup>th</sup> November 2017. In the notice of immigration decision, it is stated that the application was refused under Regulation 7. The reasons given in the decision were stated as follows; that the applicant had failed to provide evidence that he met the requirements of Regulation 7 because he had not provided adequate evidence that he was the direct family member of an EEA national. The decision letter made reference to Home Office records indicating that he was granted entry clearance on 23 May 2007 and that he had declared in that form that he was married to an Indian national. In support of the current application he had provided a marriage certificate issued in United Kingdom dated 16 June 2017 showing his marriage to an EEA family member. It was stated that as he had not provided any divorce certificate to show that his marriage was dissolved and he was free to enter into that second marriage the marriage was therefore deemed invalid. As the Respondent did not believe that he was legally free to marry, the application was refused with reference to Regulation 7 of the 2016 regulations on the basis that he is not provided adequate evidence to show that he was a family member of an EEA national exercising Treaty Rights in the UK.
6. The Appellant lodged Grounds of Appeal against that decision and as a result the appeal came before the First-tier Tribunal on 3<sup>rd</sup> August 2018 before the panel.

The decision of the FtT panel:

7. In a decision promulgated on 17<sup>th</sup> August 2018 the panel allowed the appeal.
8. At paragraph 5 of the determination, the panel set out that it had been agreed between the parties that the sole issue that required consideration

was whether the Appellant's marriage to the sponsor was valid. The Appellant's case as set out in the Grounds of Appeal was that he had never been married in India and that his marriage to his wife and sponsor was valid. It was also recorded at paragraph 6 of the determination that the presenting officer confirmed that the Secretary of State accepted the relationship between the Appellant and the sponsor was genuine and that this was not a "marriage of convenience" case. There was also no issue as to whether the sponsor was genuinely exercising Treaty Rights. Indeed, as the panel observed, the contents of the Appellant's bundle demonstrated that point.

9. The panel had the advantage of hearing oral evidence from the Appellant and although his wife was present, the panel recorded that it was not necessary for her to give evidence (see paragraph 7). The panel also made reference to the Appellant adopting his statement and the evidence that the Appellant maintained he was never married in India and suspected that the agent who helped him to apply for entry clearance had made a mistake. He stated that he had not had any opportunity to check the form before it was submitted and that he and the sponsor were interviewed at Becket House in February 2017 and they had been shown the application form on that occasion. His marriage had been approved by the Home Office after a 70-day investigation. He confirmed that, apart from the reference to Ms Kaur, the information in the application had been accurate.
10. At paragraph 11 the panel set out Regulations 7 and 18 and at paragraph 14 - 19 set out its conclusions on the evidence. They can be summarised as follows: -
  - (1) A key piece of evidence was missing in the case. The presenting officer accepted that the couple had been interviewed in February 2017 and whilst it was not a formal marriage interview the fact that it took place was significant. Those transcripts not been provided. Furthermore, it was also accepted that the proposed marriage had been subjected to a 70-day investigation; similarly, the result of that investigation had not been provided either (at [14]).
  - (2) The investigation would have taken place under Section 50 of the Immigration Act 2014; following information received from the registrar, the Respondent can investigate whether the proposed marriage is a "sham". The panel made reference to having been informed that the Respondent had issued a "certificate of approval" although that has been abolished. Thus, they understood the evidence to indicate that the compliance issue would be met in this case enabling the couple to go ahead and marry. They observed that neither party had provided a copy of the notice but that it is likely that one was issued given couple were able to marry on 16 June 2017.

- (3) At paragraph 15, the panel reached the conclusion that if the Respondent had concluded that the Appellant could not marry, it is likely that the panel would have been shown a document to this effect.
- (4) At paragraph 16 the panel recognised the purpose of the investigation was to consider whether the marriage was a sham, as opposed to the issue of whether the parties were free to marry. However, as the Appellant had stated that the visa application details were shown to him in February and that this was not in dispute, the panel found that they could not conceive that the issue would not have been considered by the Respondent i.e. whether the parties are free to marry. The panel considered that if the view of the Respondent at that stage was that the Appellant was not free to marry, that they could not conceive that the information would not have been passed on to the registrar. Thus, the panel considered that the Respondent changed mind on this issue but that they were not told why that was the case.
- (5) The panel made reference to the marriage certificate which records the Appellant was single and drew an inference from that document that the registrar who signed it was satisfied as to that fact, not only as a result of their own enquiry but reinforced by the decision of the Respondent following the 70-day investigation (at [17]).
- (6) The panel reached the conclusion that this was a validly issued certificate of marriage (at [18]).
- (7) The panel viewed the Appellant's claim that he did not have time to check the contents of the application with "considerable circumspection" but that did not mean that he was married to Ms Kaur.
- (8) The panel did not find that the Appellant was ever married to Ms Kaur (at [18]).

The grounds of challenge:

11. The Respondent sought permission to appeal the decision of the panel. The grounds can be summarised as follows:

- (1) The panel erred in law by finding that the Appellant was free to marry his wife. The reasons given by the panel were speculative and assume as to what happened in relation to the "70-day investigation" and what the Secretary of State would have told the registrar.
- (2) The evidence given by the Appellant to the registrar was inconsistent with what the Secretary of State had been told in the Visa application in 2007 but the panel made no findings on this. This was a material error of law.
- (3) The panel was side-tracked by the issue of the 70-day investigation and assumed what the Secretary of State

would or would not have told the registrar. This was irrelevant and, in any event, it was such critical factor Secretary of State should have been given the opportunity to respond. The grounds make reference to a letter written on 3 May 2017 informing him that the secretary stated chosen not to investigate the marriage and the letter noted it was for the Appellant to show the registrar that he was lawfully able to marry.

- (4) It is therefore submitted that the panel erred in law by failing to come to a material conclusion on the central issue in the case.

12. Permission to appeal was granted by the First-tier Tribunal on 20 December 2018.

The appeal before the Upper Tribunal:

13. Miss Everett relied upon the written grounds which are summarised in the preceding paragraphs. She submitted that the panel had reached findings based on speculation as to why the Appellant may have originally lied at paragraph 18 and was not entitled to do so. She submitted that the panel gave considerable weight to the Respondents' in action or inactivity at paragraph 15 but that it was incumbent upon the Appellant to show that he was lawfully married.
14. She directed the Tribunal to paragraphs 14 - 17 of the determination and submitted that the panel had been "side-tracked" by the issue of the investigation and whether the marriage was a sham but that was irrelevant as that was not the reason for the Respondent refusing the application and thus giving weight to that issue was an error of law.
15. As to the new document provided by Mr Ahmed, is she submitted that the document on the face of it was not easy to understand. In particular, it was not known what evidence the document was based upon; it refers to him being unmarried, but the document does not say whether he was married in India. Thus, she submitted the provenance of the document did not assist in establishing any particular fact. She invited the Tribunal to find that there was a material error of law and set aside the decision.
16. Mr Ahmed on behalf of the Appellant submitted that the panel had reached a conclusion upon the evidence which they were entitled to make. He directed the Tribunal to paragraph 18 where the panel reached the overall finding that the Appellant had not been married to Ms Kaur. He submitted that the finding was based on the evidence referred to by the Tribunal panel at paragraph 8 which had been set out in the Appellant's witness statement. The evidence given by the Appellant was that he had never been married to Ms Kaur but suspected the agent who had helped him to apply for entry clearance had made a mistake had been accepted. Furthermore, the panel placed weight and reliance upon the evidence of the Appellant, which was not in dispute at the hearing, that when he and

the sponsor were interviewed in February 2017, the Appellant had been shown the Visa application details on that occasion. Thereafter the marriage had been approved by the Home Office after the investigation had taken place. He submitted that the crucial finding was that the Appellant and sponsor had been interviewed in February 2017 and thus had been shown the Visa application. It was in this context that the panel found at paragraphs 15 and 16 that it was inconceivable that the issue would not have been considered at that stage and that if the Appellant was not free to marry, that the information would not have been passed on to the registrar. Consequently, the panel arrived at a conclusion that he had not been married previously.

17. As to the document that he had provided, he conceded that it had not been served in accordance with Rule 15 (2A) of the procedure Rules. However, he submitted that it was a document issued by the Government of India and stamped by the Ministry of Affairs which demonstrated that upon enquiries conducted in India the authorities had certified that the Appellant was “unmarried in India” as at the date of 4 September 2018. The document would only be relevant if the Tribunal found that the decision of the panel involves the making of an error on a point of law and thus may be relevant to the issue of materiality.

#### Discussion:

18. At the conclusion of the submissions I informed the parties that I had reached the conclusion that the decision of the First-tier Tribunal panel did not involve the making of an error on a point of law and gave brief reasons as to why I had reached that conclusion.
19. I now set out those reasons.
20. It was accepted by the Respondent that the relationship between the parties was genuine and subsisting and that they had married on 16 June 2017. Thus, as the panel set out the sole issue was whether the marriage of the Appellant to the sponsor was valid. Whilst the grounds assert that the panel either failed to make findings on a material issue or in the alternative, had made findings that are speculative, it is plain from reading the decision as a whole that they did resolve that issue.
21. The panel properly analysed the background circumstances and reached a conclusion on the issue as to whether he had been previously married. At paragraph 8, the panel recorded the evidence of the Appellant which was in accordance with his witness statement, that he had maintained (and always had maintained since it was brought to his attention in February 2017) that he had never been married in India and that this was a mistake on the form completed by the agent.
22. There was no challenge to the Appellant’s evidence that both he and his partner when interviewed in February 2007 had been shown this form. Therefore, the Respondent was aware of this information in February

2017. The panel was told by the presenting officer that following this a 70-day investigation took place (see paragraph 14). Whether or not this had taken place, it was open to the panel to infer from the chronology and the information known to the Secretary of State that in their view it was inconceivable that the issue (that is, whether he could marry in the UK) would not have been considered by the Respondent. As the panel found at [16] if the Respondent knew at an early stage that the Appellant was not free to marry, they could not “conceive that this information would not have been passed on to the registrar.” This is not speculation, but a proper inference drawn from the factual background.

23. Contrary to the submission made by Miss Everett, at paragraph [16] the panel expressly recognised that the purpose of any investigation was to consider whether the marriage was a sham as opposed to the issue of whether the parties were free to marry. Therefore, the panel were aware of that distinction, but it was open to the panel to reach the conclusion from the factual background that the Respondent had changed his mind and at [17] the panel accepted that the marriage was valid.
24. Whilst the grounds refer to there being no finding on the issue of whether the Appellant was free to marry or specifically in the context of the Appellant’s explanation, at paragraph [18] the panel drew together the evidence and gave further consideration to the Appellant’s account of why he did not notice the mistake on the form. Whilst they viewed that with circumspection, they nonetheless concluded overall that they “did not find the Appellant was ever married to Ms Kaur.” It is therefore plain from the concluding paragraph that having weighed in the balance the Appellant’s explanation when viewed against the evidence as a whole they reached the overall finding that he had been free to marry in June 2017 and this was a valid marriage.
25. As Miss Everett accepted, it would have been difficult for the Appellant to prove a negative, that is, that he was not married when his account was that he had never been married and this was a mistake on a form. At best, the Appellant could only give an explanation as to why that information had been on the form, which is what he did before the FtT panel. They were entitled to believe that account when viewed against the particular factual background, including the Respondent’s conduct.
26. At the start of the hearing, Mr Ahmed provided further evidence. This had not been served in accordance with the Tribunal Rules under Rule 15 (2A) and therefore had not been served upon the Tribunal or the Respondent with any explanation as to its provenance and its relevance. The document reported to show that the Appellant had not been married in India. On the face of the document, it emanated from the Indian authorities and therefore gave some support to his claim. Miss Everett properly identified some evidential issues arising from the document and given its late disclosure the Respondent had not had the opportunity to consider it further. However, given my conclusions it is not necessary to

consider that document any further as I have reached the conclusion that the panel did not err in law when reaching its decision.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law; the decision of the FtT panel to allow the appeal stands.

No anonymity direction is made.

Signed

Date 14/2/2019

Upper Tribunal Judge Reeds