



IAC-TH-LW-V1

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

Appeal Number: IA/05950/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 6th April 2016**

**Decision & Reasons Promulgated
On 14th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**SYED WASIM ABBAS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

CHIEF IMMIGRATION OFFICER - LONDON HEATHROW 3

Respondent

Representation:

For the Appellant: Mr D Balroop of Counsel instructed by Renaissance Solicitors LLP
For the Respondent: Mr C Avery of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant, Syed Wasim Abbas, is a citizen of Pakistan born on 15 December 1988. The Tribunal file contains limited information about his immigration history.

It appears that following a successful appeal to what is now the First-tier Tribunal on 14 May 2009 he entered with leave as a student expiring on 31 August 2010. The latest grant of leave was the issue of a Residence Card as the husband of an EEA national exercising Treaty Rights in the United Kingdom issued on 9 November 2011 to expire on 9 November 2016.

2. The Residence Card was issued on the basis that on 13 December 2010 the Appellant had married Vaida Barcauskiene, a Lithuanian national born on 13 May 1977, a person exercising Treaty Rights in the United Kingdom.
3. On 25 January 2015 the Appellant returned to the United Kingdom from Pakistan, having been out of the country for about 25 days. The Respondent made enquiries and interviewed the Appellant and his wife on 25 January 2015 and the Appellant again on 9 February 2015. The Respondent then refused the Appellant admission under Regulation 11 of the Immigration (EEA) Regulations 2006 as amended and proposed to make directions pursuant to Regulation 23 for his removal to Pakistan. In the notice of decision, the Respondent considered that the Appellant's wife was "not currently in the United Kingdom" and that she was not a qualified person within the meaning of Regulation 6 of the 2006 Regs because despite claims of having been almost continually employed in the United Kingdom since 2009 the Respondent was unable to trace any details of her in the United Kingdom tax or national insurance records.
4. The Respondent went on to prepare a lengthy explanatory statement which is dated 16 May 2015. This sets out events subsequent to the Appellant's arrival and details of what he and his wife had said at interview.

The Original Appeal

5. On 14 February 2015 the Appellant through his then solicitors lodged notice of appeal under Regulation 26 and Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds assert that the Respondent's decision does not comply with "common law requirements of fairness" and is "*Wednesbury* unreasonable" and that the Respondent did not exercise her discretion in favour of the Appellant and had applied "the Rules ... so strictly ... that it has defied the ends of justice". Further, the grounds refer to Regulation 10(5) and Article 8 of the European Convention.

The First-tier Tribunal Proceedings

6. On 18 March 2015 the First-tier Tribunal gave notice to the Appellant and his then solicitors that the appeal was set for hearing on 4 September 2015. The Tribunal file discloses that the next communication with the Tribunal from the Appellant or his solicitors was a fax sent at 11:09 a.m. on 3 September 2015 to the First-tier Tribunal enclosing a Statutory Sick Pay Certificate stating that the Appellant was not fit for work because he had seen the doctor on 28 August 2015 suffering from injuries to his low back and right knee following a fall from his bicycle. The solicitors requested the hearing be adjourned. The adjournment application was made late contrary to the

provisions of Practice Direction 9 which require at least one clear working day's notice. Practice Direction 9.4 states:-

Any application made later than the end of the period mentioned in paragraph 9.1 must be made to the Tribunal at the hearing and will require the attendance of the party or the representative of the party seeking the adjournment.

It appears that the fax of 3 September was not before the judge on 4 September when he received the file. There was no appearance by or for the Appellant and the Respondent had agreed that the appeal could be decided without representation for the Respondent.

7. Judge of the First-tier Tribunal Whalan decided the appeal without a hearing and on the basis of the documents in the Tribunal file. By a decision promulgated on 29 September 2015 he dismissed the Appellant's appeal on all grounds.
8. On 25 February 2016 Judge of the First-tier Tribunal Colyer granted the Appellant permission to appeal on the basis that the judge had failed to mention the Appellant's application for an adjournment of the hearing on medical grounds and that although the Judge had found the Appellant had failed to file any additional documentation or submissions he claimed he had submitted all the relevant documents to his then solicitors for filing with the Tribunal and the Appellant did not know why they had not been filed.

The Upper Tribunal Hearing

9. On 21 March 2016 the Appellant's current solicitors filed a bundle. This is the only Appellant's bundle in the Tribunal file. The Appellant attended the hearing but took no active part in the proceedings other than to confirm his present address.
10. At the start of the hearing I enquired whether having regard to the terms of the Respondent's decision to refuse admission, the sole issue raised in the original appeal was whether the Appellant's wife was a qualified person within the meaning of Regulation 6. Mr Balroop informed me that the Appellant's wife would not be attending the hearing. I referred to the grounds for permission to appeal to the Upper Tribunal. Mr Balroop properly accepted that there was no evidence to support the claims made in the grounds relating to the failure of the Appellant or his then solicitors to file a bundle in the First-tier Tribunal or evidence to show that the Appellant had in fact supplied the relevant documents to his solicitors.
11. I informed the parties with reference to grounds 6 and 7 relating to the failure of the Appellant or his solicitors to attend the hearing that the Tribunal file indicated that the solicitors' letter requesting a medical adjournment was not before the Judge.
12. The remaining ground 8 refers to the Respondent's decision being in breach of his obligations under Article 8 of the European Convention to respect the Appellant's private and family life are in generic terms. I noted the grounds for appeal to the Upper Tribunal did not in fact challenge the Judge's decision to dismiss the

Appellant's appeal under the 2006 Regs. In any event, I enquired what evidence there was before me to show the Appellant's wife was a qualified person within the meaning of Reg 6. I considered the wife's statement of 18 March 2016 by itself did not address the issue of her exercise of Treaty Rights in the United Kingdom and hence her status as a qualified person within the meaning of Regulation 6.

13. Mr Balroop took the opportunity to seek instructions from the Appellant and confirmed the Appellant wished to proceed.
14. Mr Balroop for the Appellant submitted that his previous solicitors were supposed to have filed a bundle to support the Appellant's case and their failure so to do had the consequence that the Judge's decision was made in breach of the principles of natural justice. The Appellant had fallen off his bicycle on 28 August and it was only six days later (bank holiday intervening) that his solicitors had requested an adjournment on medical grounds. I indicated that it was established practice in the First-tier Tribunal that adjournments on medical grounds were not customarily granted on the evidence of only a Statutory Sick Pay Certificate. The expectation was that there would be a medical certificate explaining expressly that the Appellant or witness was not fit to attend court.
15. Mr Balroop said it would not be possible for a Tribunal to decide the appeal without hearing from both the Appellant and his wife. This was a procedural unfairness which amounted to a material error of law. The decision should be set aside.
16. For the Respondent Mr Avery submitted there was no error of law. The request for an adjournment had been made late. The documents supporting the adjournment application were inadequate. There was no evidence to support the allegations made by the Appellant against his previous solicitors and the evidence submitted did not show that the Appellant had an established private life in the United Kingdom, nor an established family life. The Appellant had had ample time to obtain the necessary documentation to establish his claim under the 2006 Regs and had failed so to do. The decision should stand.

Error of Law

17. I informed the parties that my initial view was that there was no error of law in the Judge's decision such that it should be set aside in whole or in part. I noted that for whatever reason, the Appellant's appeal had been decided in the First-tier Tribunal without a judicial consideration of the documents which had been filed for the Appellant on 21 March 2016 for the Upper Tribunal hearing, albeit there was no proper explanation why the documents had not previously been filed and served. I agreed that in such circumstances the Appellant should have the benefit of a judicial consideration of the documents which had been filed. I would therefore hear submissions on the substantive appeal.
18. Mr Balroop referred me to the statements for the Appellant's wife's bank account for the period November 2010 - July 2010 which showed regular payment of salary and subsequently what was said to be earnings from her self-employment as a cleaner.

The latter was supported by her contract with Naz Foods UK Ltd and Forever Provision Ltd at pages 183 following and 187 following of the Appellant's bundle. These were unsigned by any party and specified merely a rate of hourly payment of £7.75 but contained no indication of the minimum number of hours of cleaning services the Appellant was to supply.

19. Mr Balroop referred me to the witness statement made by a Revenue & Customs officer on 14 April 2015 at Appendix I to the Respondent's bundle. I noted this showed that notwithstanding the appearance in the Appellant's bundle of copies of tax returns by the Appellant's wife for the years 2011/12 - 2014/15, she had not filed any tax returns for the years 2011/12 - 2013/14. The statement was of course prepared before the 2014/15 return would in the normal course of events have been filed. It also recorded there was no evidence of any employment held by the Appellant's wife for the years 2009/10 - 2014/15 and that she had commenced employment at Aden Ltd on 11 March 2015. It also showed that the Appellant recorded self-employed earnings as a domestic worker and cleaner for 2010/11 of £6,613 on a turnover of £11,070. There were no details of why the profit margin was so low.
20. He referred me to the letter at page 92 of the Appellant's bundle from the wife's accountants. This simply states she is a client of the firm and "is a self-employed Domestic & Commercial Cleaner". The letter is dated 8 March 2016 and gives no other details. There was no explanation how the Appellant was both self-employed and in employment as disclosed in the Revenue & Customs' statement of 14 April 2015. Mr Balroop stated the Appellant had informed him that his wife's records and invoice books were at home. He properly accepted there was no documentary evidence to show that the Appellant's wife was exercising Treaty Rights by way of information issued by Revenue & Customs such as tax assessments or bank statements.
21. Mr Avery submitted the Appellant's wife had been in Lithuania since 21 January 2015 on account of her sister's illness and the Appellant had no case. There were no recent bank statements for the Appellant's wife. She had been interviewed over the telephone on 25 January 2015. There was no evidence to show the Appellant's wife was in the United Kingdom. On the Appellant's own evidence she had not for some time been present in the United Kingdom.

Findings and Consideration

22. Judge Whalan dismissed the Appellant's appeal because he had failed to file or serve any additional evidence, documentation or submissions in support of his appeal and failed completely to attempt to discharge the burden of proof: see paragraph 8 of his decision. The Appellant's claim was unsupported by any evidence other than his bare assertion at paragraph 8 of his statement of 18 March 2016 at pages 19-22 of the Appellant's bundle.
23. Both representatives accepted that the material issue of the substantive appeal is whether the Appellant's wife is a qualified person within the meaning of Regulation

6. Notwithstanding the 224 pages of the Appellant's bundle there is nothing in the bundle sufficient on the balance of probabilities to show that at the date of the decision or at the date of the hearing the Appellant's wife was a qualified person.

24. The Appellant failed to discharge the burden of proof on him to show his wife is a qualified person. Therefore even if there is a valid natural justice point to be raised in relation to the First-tier Tribunal proceedings, there is no reason to set aside the decision because it contains no material error of law such that if the matter were re-heard there is any reasonable prospect that a differently constituted Tribunal would come to any different conclusion. Consequently, the First-tier Tribunal determination did not contain an error of law such that it should be set aside and it shall stand.

Anonymity

25. There was no request for an anonymity direction and I do not consider one is warranted.

NOTICE OF DECISION

**The decision of the First-tier Tribunal shall stand.
No anonymity direction is made.**

Signed/Official Crest

Date 12. iv. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal