



IAC-FH-NL-V1

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

Appeal Number: IA/46198/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 October 2015**

**Decision & Reasons Promulgated
On 15 October 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS ECATERINA MARILENA GORAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Respondent: No representation

For the Appellant: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State (the appellant) against Judge of the First-tier Tribunal Easterman who, on 20 May 2015, allowed the respondent's appeal against a decision by the Secretary of State to remove her pursuant to regulation 19(3) of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

Background

2. The respondent is a citizen of Romania. Her date of birth is 27 May 1989. After entering the United Kingdom the respondent married a non-EEA national. An application was made by the non-EEA national for a residence card but appellant considered the marriage to be a sham. The respondent's husband had already been removed from the United Kingdom at the date of her appeal hearing before the First-tier Tribunal.
3. The appellant considered that the respondent herself ought to be removed from the United Kingdom on the basis of public policy grounds in accordance with regulation 21 of the 2006 regulations.
4. The appeal came before the First-tier Tribunal on 15 May 2015. No documentation had been served by the appellant prior to the date of the hearing. At the hearing the Presenting Officer indicated that he had copies of an interview with the respondent and her spouse and sought to rely on that interview record. The Presenting Officer additionally indicated that he was in possession of notes from Immigration Officers that could assist the First-tier Tribunal in determining whether it was a marriage of convenience and therefore whether the respondent could be removed under the EEA Regulations. The Presenting Officer was unable to explain why the documents were only provided on the date of the hearing, in breach of directions. The First-tier Judge indicated his awareness that appeals were being listed in October owing to the pressure of work. The First-tier Judge concluded that, as no reasons whatsoever had been given by the appellant for the late service of the interview record and the Immigration Officers notes, he would not admit that evidence. The appeal thereafter proceeded. The Judge found there was no evidence before him indicating that the respondent entered into a marriage of convenience. There was therefore no evidence to support the appellant's claimed basis for removing the respondent and the appeal was allowed.

The Grounds of Appeal to the Upper Tribunal

5. The Secretary of State sought to appeal the First-tier Tribunal's decision on the basis that the Judge acted unfairly in not admitting the documentation. It was contended that the better option available to the Judge would have been to adjourn the proceedings. This would have been the fair option having regard to the seriousness of the issues before the Tribunal. Permission was granted on that basis.

The hearing before the Upper Tribunal

6. I have heard brief submissions today from Mr Duffy supporting the grounds of appeal and I heard from the respondent, who was unrepresented. She invited me to find that the Judge acted in a fair way in not admitting the documentation and in allowing the appeal.

Discussion

7. The allegation made against the respondent is a serious one. It is alleged that she abused Treaty rights by entering into a sham marriage. It is clear from Regulation 2 of the 2006 Regulations that the term 'spouse' does not include a party to a marriage of convenience. Regulation 19(3)(c) of the 2006 Regulations enables a person to be removed from the United Kingdom if the appellant has decided that that person's removal is justified on grounds of public policy, public security or public health and is in accordance with Rule 21. Rule 21 indicates that any decision taken to remove an EEA national must be taken, *inter alia*, in compliance with the principle of proportionality, must be based on the personal conduct of the person concerned, and that the personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Regulation 20(4)(2) of the 2006 Regulations indicates that, when a decision is taken under Regulation 19(3)(c), that person is to be treated as if they were a person to whom Section 10 of the Immigration and Asylum Act 1999 applies.
8. The issue that I have to consider is whether the First-tier Judge was justified in refusing to admit the documentation available to him despite the breach of directions by the appellant. In assessing the lawfulness of the First-tier's decision I have considered firstly the nature of the documentation the Home Office Presenting Officer sought to adduce. This consisted of an extemporaneous note of the marriage interview between the respondent and her husband as well as notes from Immigration Officers. I am satisfied that this documentation was probative and relevant to the central issue before the First-tier Tribunal. Another factor that I must consider is the seriousness of the issue at stake. I am satisfied that the potential abuse of Treaty rights by entering into a marriage of convenience is a serious issue, one that required full and careful consideration.
9. I note that no satisfactory explanation has been provided for the late provision of that documentation and Mr Duffy did not seek to defend the appellant's conduct. I must however also consider whether there were other options available to the First-tier Tribunal other than not admitting the evidence that would have ensured a fair hearing. I am satisfied that one option would have been to adjourn the hearing, as the First-tier Tribunal itself considered, to enable the respondent to consider the documentation and, if she considered it appropriate, to seek legal representation.
10. The overriding objective of the 2014 Procedure Rules is to enable the Tribunal to deal with cases fairly and justly. The First-tier Tribunal has case management powers listed in Rule 4 to enable it to adjourn hearings. Rule 6 of the 2014 Procedure Rules deals with situations where there has been a failure to comply with the Rules. I note that one of the powers available to the First-tier is to waive the requirement or to require the failure to be remedied. I have also considered the decision in **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**. The head-note of this case recognises that the question for the Upper Tribunal is not

whether the First-tier Tribunal acted reasonably, but whether the decision deprived a party to a fair hearing.

11. Applying the principles enunciated above I am satisfied that the First-tier Tribunal did act in an unfair manner thus depriving the Secretary of State of a fair hearing. On the one hand the First-tier Tribunal was fully entitled to take issue with the breach of directions. This had cost implications, both to the public at large and in respect of the respondent. The requirement for an adjournment also wasted the Tribunal's time and resources. I am however satisfied that, given the seriousness of the subject matter of the appeal and the relevance of the documents immediately available at the hearing, fairness required the admittance of the interview record and the immigration officers' notes. I additionally note that there was no assessment by the First-tier Tribunal as to whether the sponsor would have been prejudiced in any significant manner if an adjournment had been granted.
12. Given the failure to consider relevant documentation and to make any primary factual findings in respect of that evidence I am satisfied that the appeal should be remitted to the First-tier Tribunal to be decided by a judge other than Judge Easterman and for the Secretary of State to serve on the appellant and the Tribunal any further evidence upon which she intends to rely at least 14 days prior to the remitted hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law.

Directions

The appeal will be remitted back to the First-tier Tribunal for a de novo hearing, all issues open, to be heard by a Judge other than Judge Easterman.

The Secretary of State for the Home Department is to serve on the Respondent (Ms Goran) and the First-tier Tribunal any documentation upon which she intends to rely no later than 14 days prior to the remitted hearing.

No anonymity direction is made.



Signed

Date

Upper Tribunal Judge Blum