



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

Appeal Number: EA/07859/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 28 January 2020**

**Decision & Reasons
Promulgated
On 3 February 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

VALENTYNA ANDRUSHKIV

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder, instructed by Kadmos Consultants
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Ukraine born on 22 October 1952, appealed against the respondent's decision to refuse to issue her with an EEA residence card under the Immigration (European Economic Area) Regulations 2016 ("the

EEA Regulations”) as the family member (spouse) of Vladas Gumuliauskas, a Lithuanian national exercising treaty rights in the UK.

2. The appellant entered the UK on 14 September 2017 on a visit visa valid until 11 February 2018. She married the EEA national sponsor following a marriage interview on 23 March 2018 and applied, on 4 October 2018, for a residence card under the EEA Regulations. The application was refused on 27 November 2018 on the basis that the respondent considered the marriage to be one of convenience.

3. The appellant appealed against that decision and her appeal was determined in the First-tier Tribunal on the papers, at her request, on 22 March 2019, by Judge O’Rourke. The judge concluded that the appellant had failed to discharge the burden of proof upon her and concluded that the marriage was one of convenience. The appellant’s appeal was accordingly dismissed.

4. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that there had been unfairness in the judge’s decision, in that it had been made without the respondent having provided the interview transcript which was relied upon in the refusal decision.

5. Permission was granted on 24 April 2019. However, the Upper Tribunal, following an oral hearing on 31 May 2019, upheld the First-tier Tribunal’s decision. The Upper Tribunal concluded that this was one of the rare occasions where the non-disclosure of the interview record did not contaminate the fairness of the tribunal’s decision-making process, given the failings and complete inaction of the appellant’s representatives. The Upper Tribunal observed that it may be said that the First-tier Tribunal erred in relation to the legal burden of proof, but noted that that point had not been raised in the grounds and that there had been no application to amend the grounds.

6. The appellant’s new representatives then made an application for permission to appeal to the Court of Appeal on detailed grounds which raised issues of fairness owing to the poor advice and representation provided by the previous representatives. The grounds seeking permission were that there had been an unfair hearing owing to the First-tier Tribunal’s reliance on assertions made by the respondent without any supporting evidence; and the First-tier Tribunal’s application of the wrong burden of proof.

7. Following that application, the Upper Tribunal set aside its own decision in light of the additional evidence of sub-standard legal advice from the appellant’s previous representatives which cast light on the entirety of the fairness of the proceedings before the First-tier Tribunal and the Upper Tribunal.

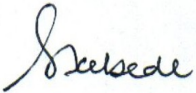
8. In response to the Upper Tribunal’s directions made with the set aside decision, the appellant’s new representatives submitted amended grounds, in line with the grounds seeking permission to the Court of Appeal.

9. The matter then came before me to re-make the decision in relation to whether the First-tier Tribunal had erred in law. At the hearing Mr Singh confirmed that there was no objection to the amended grounds and these were then admitted. Mr Singh helpfully conceded that the First-tier Tribunal Judge had erred in law in its application of the burden of proof, which was contrary to the principles set out in Sadovska & Anor v Secretary of State for the Home Department (Scotland) (Rev 1) [2017] UKSC 54. Whilst he was resisting the first ground of appeal, he accepted that that was academic in light of his concession on the second ground. Ms Pinder made submissions on the fairness point in the first ground.

10. In light of Mr Singh's properly made concession on the second ground relating to the burden of proof, and given the comments made by Upper Tribunal Judge Norton-Taylor at paragraph 6 of his Directions Notice of 30 September 2019 proposing to set aside his previous decision on grounds of unfairness arising from sub-standard legal advice from the appellant's previous representatives, it is plain that First-tier Tribunal Judge O'Rourke's decision simply cannot stand and must be set aside in its entirety. As the parties both agreed, this is a matter that has to go back to the First-tier Tribunal to be heard afresh.

DECISION

11. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge O'Rourke.

Signed 
Upper Tribunal Judge Kebede
2020

Dated: 29 January