Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06756/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 12 January 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

AZIZ RAHIM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Z. Malik, instructed by K & A Solicitors
For the respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 26 November 2019 to refuse to issue a residence card as the family member of an EEA national. The respondent refused the application because, after having interviewed the appellant and the EEA sponsor, she considered the marriage to be one of convenience. The decision letter also noted that the Home Office 'is aware that Simona Baloghova is no longer living in the United Kingdom and therefore she is unable to sponsor you regardless of

whether you are still married… it is not possible for Simona Baloghova to exercise Treaty Rights if she is not in the country.'

2. The appeal form stated that the appellant and the EEA sponsor would give evidence at the hearing and would require the respective assistance of Pashto and Slovakian interpreters. The appeal was listed for hearing on 12 February 2020 but was adjourned for the respondent to file and serve further evidence, including the transcript of the interviews conducted with the appellant and the EEA sponsor.

3. The appeal was relisted for hearing on 08 June 2020 but the hearing was adjourned following the start of the Covid-19 pandemic. Case management directions were sent to the parties on 26 June 2021. Subject to submissions, the parties were notified that the hearing would be held remotely by video. The parties were directed to make arrangements to participate in the hearing and to produce a case summary, which must include the 'identity of the witnesses'. On completion of the steps outlined in the directions, the parties were notified that there might be a case management hearing. It is unclear from the documents on the paper file whether a case management hearing subsequently took place.

4. First-tier Tribunal Judge Cartin ('the judge') dismissed the appeal in a decision promulgated on 04 March 2021. The decision records the procedural history of the case. The judge noted that the appellant was conducting the hearing from the office of his solicitor and was told that 'his wife was in Slovakia and would be joining to give evidence from there.' [16]. In view of this indication the judge recorded that he brought the decision in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC) to the attention of the appellant's representative and gave time for him to consider the decision during a break. The judge went on to note:

> '21. On the issue of her giving evidence from abroad, the respondent submitted that the principles from Nare had not been complied with. Namely:
>
> > *If the proposal is to give evidence from abroad, the party seeking permission must be in a position to inform the Tribunal that the relevant foreign government raises no objection to live evidence being given from within its jurisdiction, to a Tribunal or court in the United Kingdom.*
>
> 22. Mr Ahmed submitted that the situation was regrettable, he had not been aware she was outside of the UK and having considered Nare, he accepted the Appellant was not able to evidence the Slovakian government took no issue with her giving evidence to a UK Tribunal from their jurisdiction. He accepted no enquiries had been made with the Slovakian government or the Foreign and Commonwealth Development Office and that he could not advance any submission as to why I ought not to follow Nare. I concluded that as the require steps had not been taken and there was no good reason for this, it would not be appropriate to hear evidence from the sponsor from Slovakia. I observe at this juncture that although I ruled that I would not permit her to give evidence

> from abroad, Miss Baloghova did not 'attend' the remote hearing at any stage either; not to observe the preliminaries or even oversee the case despite not giving evidence. I am unsure whether she would have 'attended' to give evidence if I had ruled this was permissible.'

5. Although the grounds for permission to appeal to the Upper Tribunal put forward a single point, that the First-tier Tribunal erred in refusing to permit the appellant's wife to give evidence remotely, in fact a series of points were made.

   (i) The original grounds argued that the decision in *Nare* was otiose because technology had moved on and it was now common for witnesses to give evidence remotely and this had become the norm during the pandemic.

   (ii) The grounds argued that nothing in the guidance given at paragraph 21(d) of *Nare* was setting out a rigid set of rules.

   (iii) There was no reason to assume that his wife giving evidence would interfere with the United Kingdom's diplomatic relations with Slovakia.

   (iv) Even if the First-tier Tribunal judge was entitled to refuse to allow evidence to be called, he should have considered the overriding objective, the potential unfairness to the appellant, and the significance of the evidence proposed to be called.

   (v) The judge's observation that the appellant's wife did not as a matter of fact 'attend' the hearing remotely did not defeat the submissions relating to *Nare* when the judge was told that it was intended for her to give evidence from abroad.

   (vi) The judge should have adjourned the hearing of his own initiative for steps to be taken to obtain the relevant permission.

   (vii) The refusal to allow the appellant's wife to give evidence denied her the opportunity to explain whether she was still exercising Treaty Rights in the United Kingdom.

6. The case was listed for hearing in the Upper Tribunal on 27 October 2021. At the hearing I indicated that a decision had recently been promulgated by a Presidential panel of the Upper Tribunal, which considered the issue of giving evidence from abroad in more detail. However, the decision was not yet reported. Given the relevance of the decision, it was appropriate to adjourn the hearing pending reporting.

7. Following the reporting of the decision in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 Mr Malik amended his grounds as follows:

> ‘2. It was practically impossible for the Appellant to comply with the guidance in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC) prior to his appeal hearing and obtain the confirmation from the FCDO. This is essentially for the reasons set out in *Agbabiaka* at [26]-[27]. Contrary to the position in civil and commercial cases, there was no system in place for cases at the administrative tribunals. The new “Taking of Evidence” Unit was not even in existence when the Appellant’s appeal was heard. The UT in *Agbabiaka* therefore made it clear, at (3) [headnote], that its guidance in that respect would apply “Henceforth”. Further, as contemplated in *Agbabiaka*, at (2) [headnote], the FTT was required to “consider alternatives”, but failed to do so.’

Decision and reasons

8. The evidence indicates that most of the problems that occurred at the First-tier Tribunal hearing were rooted with the appellant and his representative. The appellant should have notified his representative in good time if his wife was outside the United Kingdom. No witness statements were prepared for the hearing. There was nothing to indicate that the appellant’s wife was even ready to give evidence from abroad given that she did not log into the video hearing.

9. Even if she was ready to give evidence, the appellant’s representative appeared to be unaware of the principles in *Nare* or of the need to make enquiries to obtain approval for her to give evidence from abroad. Once the decision in *Nare* had been drawn to the attention of the appellant’s representative, and he realised that relevant approval had not been obtained, it was open to him to apply for an adjournment to give time to either (i) obtain the relevant approval; or (ii) for the appellant’s wife to return to the UK to give evidence on the next occasion. None of this was done.

10. The judge was entitled to bear in mind that the appellant was legally represented. However, the fact that his legal representative did not appear to be aware of the relevant principles, and did not act appropriately in his client’s interests, did not obviate the judge from considering whether it was fair to proceed with the hearing without evidence from the appellant’s wife. The appellant’s wife’s evidence was central to both reasons given for refusing the application.

11. The original grounds made a series of points relating to the practicalities of giving evidence by video and made submissions on why the judge should have exercised discretion to allow her evidence to be given from abroad. Most of the points made in the grounds failed to appreciate that the key issue is not whether it was possible for the witness to give evidence, but whether it was appropriate to do so when considering the need to maintain diplomatic relations between nation states.

12. I accept that the evidence produced in *Agbabiaka* disclosed a flaw in the previous system of approving witnesses to give evidence from abroad in

administrative tribunals in the UK, which is now being dealt with by way of a new system administrated by the 'Taking of Evidence' (ToE) Unit.

13. Considering what was said in *Agbabiaka* at [43], it seems clear that the Upper Tribunal did not envisage that a First-tier Tribunal judge would have the kind of discretion argued for in the grounds. The Upper Tribunal did not suggest that a judge has discretion to hear evidence from abroad in the absence of the relevant approval from the state where the witness is located. Although *Agbabiaka* indicates that it was not possible to obtain permission from the old list of approvals held by FCDO, the primary guidance was to ensure that approval is obtained. Even if there was a delay in obtaining approval the Upper Tribunal suggested alternatives such as providing the evidence in writing or travelling to another country where there is known to be no diplomatic or other objection to giving oral evidence. The Upper Tribunal did not suggest that judges should simply waive the requirement to obtain approval for evidence to be given from abroad in cases where no permission had been given.

14. I consider that the difficulties at the First-tier Tribunal hearing lay primarily with the failings of the appellant and those who represented him in the First-tier Tribunal. Nevertheless, a judge is obliged to consider whether poor advice and representation might still engage fairness issues. It was apparent that the appellant's representative was unaware of the relevant issues relating to diplomatic relations between states and the need to obtain approval to give evidence from abroad. Given the centrality of the wife's evidence to the issues in the appeal, I conclude that fairness required the judge to consider whether it was necessary to adjourn the hearing of his own motion to allow time for the appellant (i) to obtain the relevant approval; or (ii) to allow time for the appellant's wife to return to the United Kingdom to give evidence. The judge's failure to consider whether fairness nevertheless required an adjournment involved the making of an error of law.

15. The First-tier Tribunal decision involved the making of an error of law. The decision is set aside. Although the normal course of action is for the Upper Tribunal to remake the decision, given the nature of the issues involved, and the need for a complete rehearing of the appeal, it is appropriate to remit the case to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is remitted to the First-tier Tribunal for a fresh hearing

Signed M. Canavan Date 15 February 2022
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email