



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

Appeal Number: IA/19220/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15 May 2015
Prepared 15 May 2015**

**Decision & Reasons
Promulgated
On 9 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**MR MOHAMED AHMED MOHAMED NASAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chakmakjian, Counsel instructed by Mondair Solicitors

For the Respondent: Mr P Nath, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Egypt, date of birth 13 October 1980, appealed against the Respondent's decision, dated 15 April 2015, to revoke a residence card on the basis that the Appellant did not meet the

requirements of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations) with particular reference to Regulation 2 of those Regulations.

2. An appeal against the Respondent's decision came before First-tier Tribunal Judge Stott, dated 8 October 2014, who dismissed the Appellant's appeal under the 2006 Regulations.
3. In advance of the hearing and in the light of the Reasons for Refusal Letter, which had highlighted material discrepancies between the information provided by the Appellant and Sponsor, was addressed both as a basis for refusal, by the Appellant's evidence contained within his statement and in part the evidence of the Sponsor and a friend of the Appellant and Sponsor, Mr Hosny.
4. The Respondent's Reasons for Refusal Letter cogently set out significant discrepancies that simply cannot be ignored. The judge evidently took into account in reaching his decision the differences between the answers given by the Appellant and the Sponsor. It is clear from the judge's notation of the papers that he did a scrupulous exercise in identifying the different answers to the respective questions by reference to the matters highlighted as the "main discrepancies" contained within those two interviews.
5. It is common ground that the Appellant's representative made several requests for sight of the full interviews which were not forthcoming prior to the date of hearing on 1 October 2014. It was only at the hearing for the first time that the full interviews of the Appellant and Sponsor were produced. I do not understand that there was ever any adequate explanation for the lateness of their production and certainly the Respondent does not assert that that material was provided before the date of the hearing.

6. The Appellant was represented at the hearing before First-tier Tribunal Judge Stott by Counsel Mr I Ali of Chambers in Northampton.
7. There is no statement from Mr Ali concerning matters arising at that hearing. Bearing in mind there are criticisms being made in the grounds of appeal as to the conduct of the judge in dealing with the late arising copies of the interviews: These collectively run to approximately 500 questions per Appellant and per Sponsor. In the normal course of events where it is said there was procedural unfairness is raised there is an expectation that Counsel or the representative who appeared should make a witness statement and provide the same or notes in support of the grounds of application for permission to the First-tier Tribunal or to address any remarks made by the judge granting permission.
8. The grounds assert at paragraph 3 that with the late receipt of the Respondent's records of interview Counsel applied for an adjournment which was refused by the judge. Instead the judge put the matter back for hearing later in the day for "a short while so that instructions could be taken on the voluminous interview records."
9. I assume for the purposes of the matters before me today that an adjournment request was made to the judge rather than simply more time for the matter to be considered by Counsel for the Appellant. It is plain that the relevant consideration was the issue of fairness to the Appellant. No interpreter was provided by the Appellant's representatives, and the Sponsor was not particularly, as I understand it, articulate in English. Counsel was faced with considerable difficulties or potentially considerable difficulties in obtaining, in what is said to be a one hour, instructions on the records of the interviews provided.
10. It seems clear from the Record of Proceedings and from the decision of the judge that having had an opportunity to look at the interviews the Appellant's representative Mr Ali did not apply for the case to be

adjourned nor for more time to prepare the case and nor does it seem on the face of it he raised the issues of an inability to take instructions given the absence of an available interpreter.

11. Had there been a statement from Mr Ali provided it would have been possible to achieve some greater measure of certainty as to what happened on the day. It is clear that from the way the matter is written in paragraph 6 of the determination that the judge does not record there having been an adjournment request at all and nor does he address the requirements under the Rules and the relevant considerations relating to an adjournment request made on the basis of the late provision of material.
12. Again the judge's Record of Proceedings in manuscript does not set out a request for an adjournment so much as what transpired once the hearing had been commenced.
13. The Appellant's representatives plainly had had time to prepare the Appellant's response to the deficiencies or discrepancies identified within the Reasons for Refusal Letter. The Appellant in his statement made extensive remarks about the interview and its length and comments in relation to discrepancies raised by the Secretary of State. As the Appellant's witness statement self-evidently perhaps point out:

“Our interviews lasted about four hours approximately in total and we were asked a lot of questions. I cannot tell how many exactly as I have no access to my interview record at present but as far as I recall I was asked approximately 180 to 190 questions.”

It is sufficient to say that his guess as to the number of questions asked was significantly adrift from those that were in fact posed.

14. The Appellant then, on the various items identified as discrepancies, made a number of comments upon the nature of his relationship with the Sponsor, their lives together, their child and the implications for them of removal.
15. The witness statement of the Sponsor is essentially confirmatory but identified, with reference to the Appellant's statement, matters which she agreed with and she argued that removal of him would be unfair. In the statement of Mr Hosny there was reference to his knowledge and contact with the Sponsor as well as the Appellant.
16. It is again unfortunate that if Mr Ali, representing the Appellant, found that he simply could not address the issues raised by having full copies of the interviews that he did not seek the adjournment or more time to prepare the matter. So far as I can tell, once the hearing started the matter of the late provision of the records of interview was not pursued either in submissions at the end of the hearing or before further evidence was called. I do not find the evidence truly sustains any criticism of the judge in his conduct of the hearing. I have grave concerns whether through inexperience or otherwise that the Appellant was not best served by those instructing Mr Ali or possibly by him in terms of the conduct of the hearing on the day.
17. It seemed to me that it is extremely difficult to criticise the judge as making a procedural error of law. Given the truly extensive length of the interviews which are much longer than usually seen, if the delay to the start of the hearing was only for one hour there was little opportunity for proper preparation. However, what has not happened in the intervening time is that no one has apparently gone through the two interviews and identified material matters which had they been picked out and brought to the attention of the judge might make a material difference to the outcome of the appeal.

18. I cannot understand why this has not been done because it is self-evidently pertinent to the question as to whether any error of law is material to the outcome. The answer is not simply to say that if there has been procedural unfairness it follows that as a matter of law there must be a remaking of the notice of decision with the Original Tribunal's decision set aside.
19. I am therefore left with the consideration of the case of Nwaigwe (adjournment: fairness) [2014] UKUT 418, a decision of the President, The Honourable Mr Justice McCloskey. The case pointed out, admittedly in a slightly different context, the true test is fairness and whether there has been the deprivation of the Appellant of the opportunity and right to a fair hearing. The deficiencies in the representative's presentation of the Appellant's case some of which was plainly inadvertent due to the absence of the interview records. The conduct of the Appellant's representative before the judge is no fault of the Appellant. The real cause of the problem was the very late provision on the hearing date of the interview records by the Respondent.
20. I find that this is a marginal case but fairness requires the Appellant to have an opportunity to deal with the matter. Since no-one has yet done the exercise of comparing the interviews and ascertaining relevant congruence or lack of discrepancies in key areas of the evidence at this stage it is really impossible to take a view as to whether a decision is likely to be different.
20. However, I am satisfied on the basis of fairness that it is appropriate for the Original Tribunal's decision to be set aside and the matter remade.

MATTER TO BE REMADE IN THE FIRST-TIER TRIBUNAL

- (1) Not before First-tier Tribunal Judge Stott nor before First-tier Tribunal Judge Brunnen.

- (2) Time estimate two hours.
- (3) Lithuanian interpreter required.
- (4) Please list for hearing at Sheldon Court on 23 September 2015.
- (5) Any further statements or evidence relied upon by either party to be served not later than five working days before the further hearing date.
- (6) If the Appellant intends to rely upon particular questions and answers contained within the interviews of the Appellant and Sponsor then those should be identified by reference to the Q/A numbers used in the respective interviews together with any particular response to the issues raised.

Signed

Date 1 June 2015

Deputy Upper Tribunal Judge Davey