



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

Appeal Numbers: IA/34102/2014
IA/37990/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17th September 2015**

**Decision & Reasons
Promulgated
On 1st October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MS MOUNIA BATAOUI (FIRST APPELLANT)
MR KEBAB MOHAMMED (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Saleem of Counsel
For the Respondent: Mr Tarlow, Presenting Officer

DECISION AND REASONS

Introduction

1. The first Appellant in this case had made application for a residence card as the spouse of an EEA national under the 2006 Regulations on 20th March 2014. That application had been refused by the Respondent on 27th

August 2014 on the basis that the marriage was one of convenience. The second Appellant Mr Kebab, a French national was at the same time issued with removal directions arising out of Regulations 19(3)(a) and 24(2) of the 2006 Regulations. The Appellants had appealed that decision and the appeal was heard by First-tier Tribunal Judge Barber at Sheldon Court on 19th February 2015. The judge had allowed the appeals in this case.

2. The Respondent had made application to appeal that decision on 18th March 2015. The application was on the basis that the judge should only have allowed the appeal to the extent of remitting it back to the Home Office to exercise their discretion under Regulation 17(4) of the 2006 Regulations.
3. Permission to appeal was granted by First-tier Tribunal Judge White on 5th May 2015 on the basis that those grounds disclosed an arguable error of law. Directions were issued for the Upper Tribunal to decide firstly whether an error of law had been made or not and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Respondent

4. Mr Tarlow referred to the single issue raised in the Grounds of Appeal namely the judge's failure to remit the matter to the Home Office for the Home Office to exercise their discretion under Regulation 17(4) of the 2006 Regulations. That was in respect of the first Appellant Ms Bataoui.
5. Mr Saleem conceded there was no basis for him to argue against the point raised by Mr Tarlow in the circumstances. I therefore provide my decision below.

Decision and Reasons

6. The first Appellant is a citizen of Morocco. The second Appellant Mr Kebab is an EEA national namely a Frenchman. The case was originally presented on the basis that they had been married and that accordingly the first Appellant would fall within the provisions of Regulation 7 of the 2006 Regulations. The Home Office had not accepted that it was a genuine marriage and found that this essentially was a marriage of convenience, hence the decision against the first Appellant and also the implementation of provisions under Regulation 19 of the 2006 Regulations against the second Appellant.
7. At the appeal hearing the judge had found, properly, that the proxy marriage of the Appellants did not meet the requirements and that the first Appellant did not fall within the terms of Regulation 7. However he had found that the parties had not entered into a sham marriage or relationship and were in a durable relationship to the extent that he found the first Appellant came within the provisions of Regulation 8 of the 2006 Regulations and therefore allowed the appeals of both Appellants.

8. Given the stance taken by the Respondent in their refusal letter they had at no stage considered the question of the discretionary issue of a residence card. The first Appellant's application had been for a residence card. The judge had allowed the appeal. However given that he found that the first Appellant was an extended family member under Regulation 8 of the 2006 Regulations the issuing of a residence card is a discretionary matter for the Home Office under the terms of Regulation 17(4) rather than a mandatory issue that would flow from the finding of the Appellant being a family member under Regulation 7. The judge therefore made a material error of law in simply allowing the appeal outright rather than allowing the appeal to the extent that it should have been remitted back to the Home Office for the Home Office to exercise their discretion under Regulation 17(4) of the 2006 Regulations. Having found that material error of law I can remake that decision, and by agreement with the representatives.

Notice of Decision

9. I find that a material error of law was made by the judge in this case and set aside the decision of the First-tier Tribunal. In remaking that decision I allow the appeal of the first Appellant to the extent that it is remitted back to the Home Office to consider the exercise of their discretion under Regulation 17(4) of the 2006 Regulations.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Lever