IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34495/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 April 2016	**On 4 May 2016**

Before

MR H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDRIA PATRICIA SAVERY SILVA CABRAL SANHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr O Yekinni, Solicitor

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Molloy) allowing an appeal under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") and on Article 8 grounds against a decision to remove the applicant on the

basis that her removal was justified on the grounds of abuse of rights under reg 21B(2) of the EEA Regulations. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Portugal born on 10 July 1993. According to her witness statement she has been living in the UK since 2007. She has been in full-time education and employment and is at present on an extended four year BSc (Hons) business management degree course at Plymouth University. She came to the UK with her mother and two sisters when she was aged 13 and has been living here since then. She has a daughter, an EEA national, born on 1 April 2015.

3. On 27 August 2014 the appellant was served with a decision to remove her following service on her on 27 August 2014 of a notice informing her of her status under the 2006 Regulations and of her liability to detention and removal. In that notice it was indicated that her removal would justified on the grounds of abuse of rights in accordance with reg 21B(2) of the EEA Regulations and in the box headed "Specific Statement of Reasons", the following appears:

> "You are specifically considered a person who has assisted another to enter or attempt to enter into a marriage or civil partnership of convenience, because you were interviewed today in relation to your marriage which has been deemed a marriage of convenience."

4. The appellant appealed against that decision. The grounds are drafted in general terms arguing that the decision is contrary to her rights as an EEA national, that her removal would be unlawful under s.6 of the Human Rights Act 1998 and that the decision is not in accordance with reg 21 of the 2006 Regulations.

5. The appeal was heard in the First-tier Tribunal on 22 September 2015. The appellant was represented by Mr Yekinni but there was no appearance on behalf of the respondent. A 50 page bundle of documents from the appellant's representative had been faxed to the hearing centre on the previous day in the afternoon but that did not reach the judge until the day of the hearing. The judge explained that the only documents he had had when pre-reading the file were those accompanying the lodging of the appellant's notice of appeal and a bundle from the respondent (dated 25 September 2014) consisting of a photocopy of the appellant's documents and a full copy of the notice of appeal. Therefore, he did not have a proper bundle from the respondent and had only received the appellant's bundle on the day of the hearing. The judge rightly criticised the parties for their failure to comply with the requirements of the Rules. The judge put the matter back so that Mr Yekinni could take instructions from his client as to whether she wanted to have a full oral hearing or to have the

issues determined on the papers. Mr Yekinni unequivocally asked for a decision on the papers.

6. The judge then referred to the provisions of reg 24(2) of the EEA Regulations and to the fact that where a decision was taken to remove a person under reg 19(3)(a) or (c) the person was to be treated as if a person to whom s.10 of the Immigration and Asylum Act 1999 applied. He noted from reg 21B(2) that the respondent may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so. The judge found that there was no evidence before him from the respondent which could support a claim that there were reasonable grounds to suspect the appellant had abused her right to reside, it not being in dispute that she was a Portuguese national and therefore a citizen of the EU. He further commented that even if there was some evidence, which could lead him to say that there were reasonable grounds to suspect an abuse of the right to reside on the part of the appellant, there was nothing from the respondent to show that it was proportionate for her to take the decision on the specified grounds.

7. The judge said that the only indication as to where the abuse might lie was from the appellant's own witness statement where she had stated that she had not entered into a marriage of convenience but had met and fallen in love with someone who did not share the same feeling.

8. In the absence of any further details about the basis of the decision, the judge understandably commented that he struggled to ascertain the basis for the respondent's decision. The appellant had denied entering into a marriage of convenience and in her statement she had set out the family life that she had in the UK and the fact that her daughter had only known life in this country. The skeleton argument lodged on her behalf submitted that the respondent had failed to prove there were reasonable grounds to suspect an abuse of the right to reside but in any event family factors had not been taken into account before the s.10 decision was made. The judge therefore allowed the appeal under the EEA Regulations. He went on to consider article 8 saying at [37] that it need not be examined further because he was not satisfied there was any evidential basis for finding that the respondent's immigration decision was in accordance with the EEA Regulations but at [40] then said that, as the appeal had been allowed under the Regulations, it followed that it should be automatically allowed on article 8 grounds.

<u>Grounds and Submissions</u>

9. In the grounds the respondent seeks to challenge the decision for the following reasons:

   (1) In allowing the appeal under article 8 the judge materially erred in law, submitting that where no notice had been served under s.120 of

the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") the appellant could not bring a human rights challenge to removal in an appeal under the EEA Regulations relying on Amirteymour and Others (EEA appeals; human rights) [2015] UKUT 00466 and to the head note which reads:

> "Where no notice under Section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature."

(2) The judge misdirected himself in allowing the appeal under article 8 without considering Sections 117A to 117D of the 2002 Act.

(3) The judge erred in that having noted that the respondent had failed to provide any evidence and admitting that the Tribunal could go no further in trying to ascertain the basis of the immigration decision he had inserted himself in the role of primary decision-maker and should have allowed the appeal to the limited extent of remitting it back to the respondent.

(4) The judge failed to give adequate reasons why the appellant had won her appeal on family and private life grounds relying on the decision in Budhathoki (Reasons for decisions) [2014] UKUT 341 .

10. Mr Avery accepted that the grounds relating to article 8 had little if any substance or materiality as this was a case where a removal decision had been made and, in any event, the appeal had been allowed under the EEA Regulations. However, he sought to challenge that decision on the basis that the proper course would have been for the judge to adjourn the appeal or remit the matter to the respondent. The appellant's bundle had not been served on the respondent who would not have been aware that the appellant had denied that she had entered into a marriage of convenience. This had not been clearly challenged in the grounds of appeal whereas the respondent had evidence that she had admitted this at interview. The respondent had been proceeding on the basis that this contention was accepted.

11. Mr Yekinni submitted that the judge had not erred in law. It had been for him to decide how the appeal should proceed and he had been entitled to find that there was no adequate basis in the evidence to support a finding that the appellant had abused her rights.

Assessment of whether the Judge erred in law.

12. This appeal was first listed for hearing on 9 January 2015. Attached to the hearing notice issued on 19 September 2014 are directions to both parties

stating that if they had not already done so, they must submit to the Tribunal and to the other party a bundle of the documents they wished to rely on in support of the appeal to arrive no later than three weeks before the date of the hearing with a specific instruction to the appellant to send all copies to the respondent at the Presenting Officers' Unit and to the respondent to send copies of all the documents to the appellant. The hearing was further adjourned on 13 March 2015 to 22 September 2015.

13. The respondent had submitted the very limited documents referred to by the judge in [7] and the appellant's documents were served by fax the day before the hearing. I note that the respondent's documents were been sent to the Tribunal on 25 September 2014 and were received at Taylor House on 30 September 2014. The judge was entitled to comment that those documents did not meet the requirements of the relevant procedure rules and that there had been a failure to make good any defaults. The respondent's case was based on the assertion that the appellant had entered or attempted to enter into a marriage of convenience. This appears in the notice to a person liable to removal. However, there was no further evidence from the respondent to support that assertion. On the evidence before him the judge was entitled to take the view firstly, that there was no adequate evidential basis to put in dispute the validity of the marriage entered into by the appellant, still less that the decision was proportionate. His decision to allow the appeal under the EEA Regulations was properly open to him on the evidence produced by the parties.

14. Mr Avery's submitted that in the light of the paucity of the evidence before him, the judge should have adjourned the hearing. I am not satisfied there is any substance in that argument. It was for the judge to decide what course should properly be taken following the defaults of both parties. Mr Avery said that the respondent should not be disadvantaged by the failure to be represented at the hearing and that she had been proceeding on the basis that the appellant had not sought to challenge the assertion that she had entered into a marriage of convenience. Whilst the grounds of appeal are drafted in general terms, it is clear that the respondent's decision was under challenge in that it was argued that the decision was not in accordance with reg 21 and that all relevant factors had not been considered before making the decision to remove the appellant. The respondent had ample opportunity to file the evidence she sought to rely on but on the issue of abuse of rights the judge had a bare assertion from the respondent unsupported by evidence. Mr Avery submitted that the respondent had evidence that the appellant had admitted entering into a marriage of convenience but there was no evidence to that effect before the judge.

15. So far as article 8 is concerned, this was a case where there was a decision to remove and therefore does not fall within the position considered by the Tribunal in Amirteymour and indeed the notice of decision itself indicated there was a right of appeal on human rights grounds. The judge was right when he said at [37] that article 8 need not

be examined in the light of his findings under the EEA Regulations but not when he said in [40] that as the appeal had been allowed under the EEA Regulations it followed that it should automatically be allowed on article 8 grounds. Having found that the appeal should be allowed under the Regulations there was no need in the circumstances of this case to consider article 8.

Decision

16. I am not satisfied that the judge erred in law in his assessment of the appeal under the EEA Regulations 2006 and the decision to allow the appeal on that ground stands. The decision to allow the appeal on article 8 grounds is set aside.

Signed H J E Latter Date: 26 April 2016

Deputy Upper Tribunal Judge Latter