



IAC-FH-CK-V1

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

Appeal Number: IA/38343/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 January 2016**

**Decision & Reasons Promulgated  
On 21 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR DILEEP KUMAR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Chhotu, Counsel, Chambers of Mr Julius Seal

For the Respondent: Mr Chris Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge A W Khan (hereafter the judge), promulgated on 26 January 2015, in which he dismissed the Appellant's appeal against the Respondent's decision of 30 September 2014 refusing to issue a residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations). The Respondent's decision was based solely on the assertion that the Appellant's marriage to a Hungarian citizen, Miss A Kondor, on 14 January 2014, was one of convenience only. The

Respondent concluded therefore that the Appellant was not in fact the spouse of an EEA national and so was not entitled to a residence card.

2. At the hearing before the judge the Appellant's representative applied for an adjournment on the basis that Miss Kondor was out of the United Kingdom. It was said that she was in Hungary because a relative (it turns out to have been her grandmother) was unwell and the family there required Miss Kondor's assistance. It was said that her attendance at the Appellant's appeal was important and that a short adjournment should be granted. In support of the application the Appellant had provided a handwritten letter setting out in basic terms the reasons why the adjournment was sought. In addition, there was an email from Miss Kondor to the Appellant's then solicitors confirming those reasons.
3. The judge refused the application and gave reasons for so doing in paragraph 5 of his decision. It was said that Miss Kondor had apparently been away in Hungary at the time of the Respondent's home visit to their property on 22 July 2014. The judge noted that the notice of hearing had been sent out to the Appellant on 28 October 2014; therefore Miss Kondor would have known of the hearing date of 7 January in good time. Yet, the judge says, she had gone to Hungary and had not returned without giving satisfactory reasons as to why she was unable to do so. The judge stated that there were "not any valid reasons" why the appeal should be adjourned.
4. The judge then went on to consider the merits of the case. He found ultimately that the marriage was one of convenience only. At paragraph 13 of his decision he essentially restated a number of the reasons for refusing to adjourn the appeal in support of his conclusion that Miss Kondor's absence at the hearing severely undermined the credibility of the Appellant's case. At paragraph 17 the judge went on to observe that there was a distinct lack of evidence to support the relationship and he concluded by stating: "Looking at the whole of the evidence in the round, I am satisfied that this is a marriage of convenience simply entered into in order for the Appellant to be able to remain in the UK."
5. The Appellant sought permission to appeal. Permission to appeal was refused by the First-tier Tribunal but then granted by Upper Tribunal Judge Blum on 2 July 2015. His grant of permission focused on the adjournment issue citing the case of Nwaigwe [2014] UKUT 00418, which establishes that the essential question in these types of cases is whether the Appellant had been deprived of a fair hearing by the refusal to adjourn.

### **The hearing before me**

6. Mr Chhotu sought to amend the grounds of appeal to include a further ground based upon what he said was a misdirection as to the burden of proof in marriage of convenience cases. Mr Avery had no objection to this amendment and I granted the application. Mr Chhotu relied on the grounds and his amended skeleton argument. He clarified that it was the Appellant's wife's grandmother who had died and not in fact her mother. In essence, Mr Chhotu submitted that the judge had acted unfairly in

failing to adjourn the case and in respect of the new ground of appeal he relied on what the judge said in paragraph 11 of his decision.

7. Mr Avery submitted that on the basis of the evidence before the judge he had not acted unfairly in refusing to adjourn. The Appellant had had an opportunity to provide more evidence, which he had not taken. In respect of the new ground Mr Avery submitted that the judge had not erred in substance although he had not perhaps set out as clearly as he might have the relevant law relating to the burden of proof in marriage of convenience cases.

### **Decision on error of law**

8. Although I have a degree of sympathy for the judge in respect of the somewhat sparse evidence before him, I find that he did err in law by refusing the application for an adjournment, an error which led to the Appellant being deprived of a fair hearing.
9. The judge set out a number of factors at paragraph 5 upon which he based his conclusion that the application for adjournment should be refused. However, nowhere does he expressly address the issue of fairness, that being the ultimate test. Simply concluding that there were no good reasons why an appeal should be adjourned is not the same as dealing with the matter from the perspective of fairness, something which is made clear in the Nwaigwe case (a case concerning the old Tribunal Procedure Rules but nonetheless in my view having equal application to the new Procedure Rules).
10. There was nothing in the judge's decision as to what the Presenting Officer's view of the application was and whether any of the evidence provided in support of the application was being disputed or challenged by the Respondent. There had been no previous adjournments and in fairness to the Appellant he had made the application for the adjournment in advance of the hearing itself by way of the letter (together with an email from Miss Kondor), although it does not seem as though this application was sent in on time to be dealt with by a Duty Judge.
11. The point made by the judge in respect of the advanced notice of the hearing is relevant in my view to this extent. Miss Kondor had originally booked her return flight for 2 January 2015, thereby ensuring that was able to be in the United Kingdom for the hearing on 7 January. This was, on the face of it, an indicator that she did want to attend on behalf of the Appellant. A reason, albeit unsupported by medical evidence, was then put forward as to why she could not return to the United Kingdom as first planned (namely, a continuing need for her assistance in Hungary).
12. I also note that there is no express finding by the judge that the Appellant and/or Miss Kondor were lying about any of the matters relating to the trip back to Hungary in late 2014.
13. Overall, given the matters set out above and the centrality of the wife's attendance at the hearing, in my view the judge did not act fairly in refusing the adjournment on the basis stated in the decision.

14. The error of law was clearly material given the fact that the judge placed significant weight upon Miss Kondor's absence at the hearing. Given the above I therefore set aside the decision of the First-tier Tribunal. There is no need to deal with the Appellant's additional ground of appeal.

### **Disposal**

15. Both representatives were agreed that if I should find that there were material errors of law in respect of the refusal to adjourn, the matter would need to be remitted to the First-tier Tribunal. Having regard to paragraph 7 of the Practice Statements and Section 12 of the Tribunals, Courts and Enforcement Act 2007, I therefore remit the appeal back to the First-tier Tribunal. I set out appropriate directions below.

### **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I remit the case to the First-tier Tribunal.**

### **Directions to the parties**

- 1. The remitted appeal will be a complete rehearing, with none of the First-tier Tribunal Judge's findings preserved;**
- 2. The sole issue in the remitted appeal is whether the Appellant's marriage was one of convenience only, the burden of proof of establishing this resting on the Respondent (see Rosa [2016] EWCA Civ 14);**
- 3. Either party shall have the opportunity to adduce further evidence in accordance with standard directions to be issued by the First-tier Tribunal;**
- 4. If an interpreter is required for the Appellant or any witness, the Appellant's representatives shall inform the First-tier Tribunal of this in writing in good time before the remitted hearing.**

### **Directions to Administration**

- 1. The appeal is remitted to the Hatton Cross hearing centre;**
- 2. The appeal shall not be reheard by First-tier Tribunal Judge A W Khan;**
- 3. The Hatton Cross hearing centre shall fix a date for the remitted hearing.**

**No anonymity direction is made.**

Signed

Date: 19 January 2016

Deputy Upper Tribunal Judge Norton-Taylor