Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05252/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2018	**On 14 November 2018**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

DOREEN BASSEY UDAH
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Nwaekwn, Solicitor from Moorehouse Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against the decision of the Secretary of State refusing her a residence card to confirm her right to reside in the United Kingdom.

2. The Secretary of State was frustrated because the appellant failed on two occasions to attend to be interviewed about her application and on 20 May 2017, in reliance on paragraph 20B(4) of the Immigration (European Economic Area) Regulations 2006, decided, because the applicant had failed without good reason on at least two occasions to attend an

interview, to draw inferences from the failure and concluded that the appellant's was not a genuine marriage.

3. Before the First-tier Tribunal the appellant provided a substantial bundle of documents running to some 214 pages. They were not produced until immediately before the hearing and the First-tier Tribunal refused to consider them. This approach is criticised in the grounds and I am entirely satisfied that it was a wrong approach. The judge thought about the decision and noted, correctly, that this is not a protection case where anxious scrutiny was required and there was not a removal decision so a fresh application was possible. Nevertheless it is trite law that cases should be determined on their merits and not on procedural technicalities and it is hard to see why the Tribunal could not have received and considered the evidence at the hearing. Most of the documents illustrate claims made in short witness statements.

4. I acknowledge Mr Duffy's point that it seems that the appellant did not ask for an adjournment and the position may have been different if that application had been made but even so it was, in my judgment, quite wrong to exclude evidence of such potential significance in a case of real importance to the parties simply by reason of late disclosure. There were other ways of achieving fairness. In this case a short break for the Respondent's representative to have consider the statements would probably have sufficed.

5. Having excluded the evidence on which the appellant sought to rely the First-tier Tribunal Judge then *reviewed* the decision of the Secretary of State. This was the wrong approach. His function was to *decide* the appeal on the evidence and particularly to see if the necessary allegations had been proved. Not only was the judge's approach wrong but he misdirected himself when executing it. He considered, I think, the Immigration (European Economic Area) Regulations 2016 and particularly Regulation 22(4). This provides:

> "If without good reason A or B (as the case may be) –
>
> (a) *[irrelevant];*
>
> (b) on at least two occasions, fails to attend an interview if so invited;
>
> the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances."

6. It is perfectly plain to me, despite Mr Duffy's energetic submissions to the contrary, that the words "without good reason" apply to "at least two occasions". This is highly relevant in this case. There is evidence that the appellant failed to attend two interviews but there is very clear evidence that there was a good reason for not attending one of the interviews. The appellant maintained that she was suffering from gastroenteritis as a consequence of a badly prepared Chinese meal and she was not fit to be interviewed the day following the meal which was the day appointed for the interview. The appellant provided medical evidence to confirm this and it seems the Secretary of State accepted it. Indeed it is hard to see

why the Secretary of State would not accept it or how it could be rejected rationally. It follows therefore that the Secretary of State had not shown that the appellant had on at least two occasions failed to attend an interview without good reason.

7. In a sense this is irrelevant. This Rule and its predecessor in the 2006 Regulations enables the Secretary of State to make a decision when a person appears to be uncooperative. It does not apply to decision of the First-tier Tribunal which hears appeals against decisions that have been made. It might be that the Secretary of State's approach here could have been criticised in the event of judicial review but that is not what happened. There was an appeal and the appeal should have been decided on the evidence and submissions relied upon by the parties.

8. It follows therefore that the First-tier Tribunal erred in its application of the law as well as its refusal to admit new evidence. I set aside its decision.

9. Mr Nwaekwn argued that I should allow the appeal. With respect, this was an ambitious and misconceived submission. He seemed to have in mind the approach to be taken in a criminal case where the prosecution failed to produce any evidence capable of supporting a conviction so that the case is dismissed. It is not a helpful analogy. The proper approach was to make an assessment of the evidence as a whole even though any question of a marriage of convenience had to be proved by the Secretary of State.

10. I have set aside the decision of the First-tier Tribunal and I direct the case be heard again in the First-tier Tribunal.

11. I do acknowledge that the First-tier Tribunal found that a second interview had been arranged properly and refused for no good reason. I accept Mr Nwaekwn's submission that this might not be a sound finding. It could be that the appellant's husband was speaking with the benefit of hindsight when he gave evidence appearing to acknowledge awareness of the second interview. It is safer that this finding does not stand although it may be that on a proper consideration of the evidence the same conclusion will be reached again.

Decision

12. In short, I allow the appellant's appeal. I set aside the decision of the First-tier Tribunal and direct the case be heard again in the First-tier Tribunal with no findings preserved.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 6 November 2018