Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36422/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 30 September 2015	**On 28 October 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JEPTHAT EMMANUAL

Respondent

Representation:
For the Appellant: Ms Julie Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms Sarah Pinder, Counsel, instructed by Universe Solicitors

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Owens) allowing the respondent's appeal against a decision taken on 29 August 2014 to refuse to issue a

permanent residence card under the Immigration (European Economic Area) Regulations 2006 ("the Regulations").

Introduction

3. The respondent is a Nigerian citizen and was previously issued with a residence card on 1 September 2009 on the basis that his spouse was a Portuguese citizen exercising treaty rights in the UK. He was divorced in March 2014 and the Secretary of State concedes that the spouse was exercising treaty rights at the date of divorce and therefore the respondent is entitled to a residence card because he meets the requirements of paragraph 10(5) in respect of his retained right of residence.

4. The Secretary of State accepted the respondent's identity and nationality but concluded that he was not entitled to a permanent residence card because he had to show that his spouse was a qualified person from April 2011 to the date of divorce. There was no evidence of the spouse exercising treaty rights between April 2011 and May 2012.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Richmond on 27 March 2015. He was represented by Ms Pinder. The First-tier Tribunal found that the respondent must be issued with a residence card and that the decision to refuse to issue a permanent residence card was not in accordance with the Secretary of States' own policy. The relevant policy notice was issued on 4 August 2011 and is entitled "Pragmatic approach in cases where an applicant is unable to provide required evidence 10/11 (revised)", hereafter "the policy".

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law because the policy only applied where the relationship had ended acrimoniously and the applicant had made every effort to obtain the required documentation. There was no finding in the decision that the respondent had made every effort to obtain the required documentation.

7. Permission to appeal was granted by First-tier Tribunal Judge Heynes on 8 July 2015 on the basis that it was arguable that the judge was wrong to have concluded that the Secretary of State had failed to follow her own policy and in any event the pragmatic approach might still lead to a refusal.

8. Thus, the appeal came before me

Discussion

9. Ms Isherwood confirmed that a residence card issued under retained right of residence would be valid for 5 years and conceded that the respondent was entitled to a residence card. However, there was no evidence about what the respondent did to obtain the information. The applicant cannot sit back and do nothing. There is nothing in the decision about what the appellant has done and in paragraph 21 of the decision the judge shifts the burden back to the Secretary of State.

10. Ms Pinder conceded that there was difficulty in how the judge had adduced the policy. There are no findings about how the respondent sought to obtain the evidence but that was dealt with in oral evidence. Ms Pinder could not submit that the judge had not erred in applying the policy because of the absence of such findings. The appeal was allowed under retained right of residence anyway. It was open to the Upper Tribunal to remake the decision by considering the evidence from the First-tier.

11. Ms Isherwood confirmed that she had not seen the record of proceedings but the presenting officer in the First-tier did make a note about the efforts made by the respondent.

12. Paragraph 2 of the policy is clear – applications received on the basis that the appellant has a retained right to reside should be treated pragmatically where there has been a breakdown in the relationship between the applicant and the EEA national sponsor because it may not be possible for the applicant to provide the required documentation – including where the applicant's relationship has ended acrimoniously but they have provided evidence to show that they have made every effort to provide the required documents.

13. In this case, the judge has made no findings about any efforts made by the respondent but has allowed the appeal in respect of issuing a permanent residence card on the basis of the policy. That is a material error of law. In addition, the appeal in respect of the permanent residence card should only have been allowed to the extent that no lawful decision had yet been made in respect of the application. The policy only requires caseworkers to look at each case according to its individual merits.

14. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the policy involved the making of an error of law and its decision cannot stand. This appeal could have been avoided if the judge had made findings of fact on the evidence relevant to the policy that was before the First-tier Tribunal and avoided falling into error by equating any failure to follow the policy with a mandatory requirement to issue a permanent residence card.

15. I indicated to the parties that I would consider remaking the decision on the basis of the record of proceedings. Having done so, I find that the respondent gave uncontested evidence that some documents relating to the spouse's employment were left in the house and he also got some of them through subsequent contact with the spouse. A cousin was involved

but the last telephone contact with the spouse was in June 2013. The respondent explained that he needed her help but she was not willing to do anything. He also sent people to see her but she was not interested. I am therefore satisfied that the respondent has made every effort to provide the required documents; namely the evidence that the spouse was exercising treaty rights in the UK between April 2011 and May 2012.

Decision

16. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision as follows;

    (1) The decision of the Secretary of State to refuse to issue a permanent residence card is not in accordance with the law and the respondent's appeal is allowed to the extent that no lawful decision has yet been made in accordance with the policy. The Secretary of State should now further consider the respondent's application for a permanent residence card in light of my findings of fact.

    (2) The respondent is entitled to a residence card in any event.

Signed  Date 27 October 2015

Judge Archer
Deputy Judge of the Upper Tribunal