Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02038/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14th February 2018

Decision and Reasons Promulgated
On 26th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

NANCY ARMAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Malik (Counsel, instructed by Calices Solicitors)
For the Respondent: Mr L Tarlow (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. On the 31st of March 2015 the Appellant applied for a residence card confirming a right of residence as the former spouse of an EEA national in the UK exercising treaty rights. The application was refused and the Appellant appealed. The appeal was dismissed by First-tier Tribunal Judge Daldry in a decision promulgated on the 6th of October 2017. The Appellant sought permission to appeal to the Upper Tribunal which was granted on the 7th of November 2017.

2. The history of the Appellant's case is relevant. The Appellant had entered the UK in 2005. She married a Mr Euphrem Saboro, a French national, by proxy on the 25th of November 2009. Her first application for a residence card was made on the basis of her being the spouse of a French national and she was issued with a residence card on the 17 of June 2010 valid for 5 years. It is accepted that the Appellant and Mr Saboro had divorced on the 30th of October 2014 again by proxy in Ghana

3. Following this application the Respondent wrote the Appellant on the 7th of September 2015 requesting the former-husband's passport. The Appellant's representatives wrote stating that the documentation was not available. In the Refusal Letter of the 7th of April 2016 the application was refused. At the bottom of the first page it stated "On 17 June 2010 you were issued a residence card as the spouse of Euphrem Emery Saboro who displayed a French ID card 081067802600. However, the ID card in the name of Euphrem Emery Saboro was reported lost or stolen on 12 August 2010. Your former spouse's ID card has been issued fraudulently to cover other people's identity. As this has occurred, we cannot be sure that your former spouse was the legal owner of the identity card or he was fraudulently the card. As you have only submitted a copy of the identity card, we are unable to distinguish whether your former spouse actually is Euphrem Emery Saboro this is who is on the ID card." The residence card was refused as there was no evidence that he was the rightful holder of the card.

4. In the decision the judge summarised the Refusal Letter and in paragraph 15 noted that the only issue was the status of the documentation which had been produced by the Appellant in support of the application. The Judge found that the nature of the Appellant's entry to the UK was not to be held against her. In paragraph 24 the Judge found that with a copy of the French ID card had the passport been available then it would have been possible for the Home Office to verify the ID.

5. The Judge stated that it was reasonable for the Home Office to ask for the passport as there was a suspicion of fraud in the application. The Judge was troubled by the absence of evidence of the efforts made to contact the Appellant's former spouse, with the issue of fraud having been raised she had failed to do so. There was no other supporting evidence for the claim that Mr Saboro was French. In the circumstances the Judge found that the Appellant had not discharged the burden of proof.

6. In the application for permission to appeal to the Upper Tribunal it was submitted that the Judge had erred in respect of the case of Barnett referred to in paragraph 19 of the decision. The burden was on the Appellant in respect of the requirements of the EEA Regulations 2006. Under Agho the burden was on the Home Office to establish reasonable suspicions by evidence.

7. Permission having refused by the First-tier Tribunal the application was renewed and permission granted by Upper Tribunal Judge Canavan on the 9th of January 2018. As Judge Canavan noted the French ID card as likely to have been before the Respondent when the 2010 application was granted. Even if the card had been used in fraudulent applications after it was reported lost or stolen the Judge had not conducted an analysis of whether the evidence was sufficient to justify the Respondent asking for further documentation relating to the former spouse's identity. There did not appear to be any evidence to suggest that the copy of the ID card could not be relied on and, on the face of it there was nothing to suggest fraudulent use in relation to the Appellant's first application.

8. The submissions of the representatives are set out in the Record of Proceedings and referred to where relevant below. In the course of submissions from the Appellant's counsel I asked Mr Tarlow what was meant by the sentence that the spouse's card had been used fraudulently. Mr Tarlow did not have the file and was unable to shed any light on the meaning of the phrase. It was submitted that there was a weak suspicion of fraud, there was no positive case and suspicion appeared to arise from the report of its loss and the loss had been reported after the original grant.

9. The Judge correctly referred to the case of Barnett and Others (EEA Regulations: Rights and Documentation) [2012] UKUT 142 (IAC). In regulation 17 of the EEA Regulations 2006 the reference to a passport is to that of the applicant not the EEA national. However the EEA national's passport can be requested if there is a valid reason for doing so. In relation to regulation 18 at paragraph 25 Upper Tribunal Judge Lane (as he was) observed that *"As a general matter, the Secretary of State cannot lawfully insist under regulation 18 on an applicant's producing the EEA national's passport or other identity document, unless the same is genuinely required in order to prove the right which the applicant is asserting, in order to be granted the permanent residence card."*

10. In Barnett there was no issue with regard to the EEA national's identity. In this appeal the question was whether there was a justification for the Secretary of State to request the former spouse's passport. The issue being raised by the Secretary of State was whether the Appellant's former husband was an EEA national, if he was not then whatever else was accepted about the Appellant's circumstances she would not derive a right as her circumstances were entirely based on her former spouse being an EEA national (and exercising treaty rights at the relevant time).

11. The fact that there was no basis for questioning that when the 2010 application was made and granted did not preclude the issue being raised later if there was justification for it. To be a qualified person the Appellant's former spouse would have to meet the requirements of regulation 6 and to do that nationality of an EEA state would be a prerequisite.

12. Was the Secretary of State wrong to take this issue and the Judge wrong to find that the Secretary of State was justified in the request made? The circumstances of the reported loss if the French Identity card and evidence that it had been used fraudulently subsequently, with no suggestion that subsequent use was by the Appellant, entitled to Secretary of State to investigate the previous use of the card. In those circumstances I am satisfied that the request for the French passport of the former spouse was a reasonable request by the Secretary of State to confirm that the Sponsor was French as claimed because it was on that basis that the Appellant's own claimed rights depended.

13. As the request was reasonable was there a justification for the passport not then being made available by the Appellant. The Judge considered this in paragraph 24. In that regard the Judge noted that the Appellant had been able to obtain wage slips for her former-partner for his work at Chelsea FC it would have been reasonable for her to be able to provide his passport. His willingness to provide his wage slips was significant and inconsistent with a suggestion that he would not co-operate with her. The Appellant had not explained why the passport was not available and there were no supporting witness statements relating to his nationality.

14. The fact that the passport had not been provided did not decide the issue but a reasonable explanation was required. The Judge was, for the reasons given, entitled to find that the

Appellant had not justified the absence of the passport and in the circumstances was entitled to find that the Appellant had not discharged the burden of proof. In the final paragraph the Judge referred to the Appellant being unable "to meet the requirements of the Rules." Clearly that should read Regulations but that is not material.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 22nd February 2018