



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04356/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15th April 2019

Decision & Reasons Promulgated
On 25th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

TETIANA DUSHENKIVSKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T. Dushenkivska, in person
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal (“FtT”) Judge Kaler promulgated on 14th January 2019. The FtT Judge dismissed the appeal of the appellant against the decision of the respondent dated 23rd May 2018, refusing her application for a residence card to confirm that she is a former family member of an EEA national, exercising treaty rights in the UK.

2. The application was refused by the respondent because the application was not accompanied or joined by a valid national identity card or passport in the name of the EEA national as required by Regulation 21(5) of the Immigration (Economic Area) Regulations 2016 ("the 2016 Regulations"). In the decision, the respondent noted that the appellant had only supplied a copy of the EEA national's passport, and the respondent went on to say:

"In addition, the photocopy provided of your EEA sponsors passport is a copy of a passport that was reported lost or stolen to the relevant authorities on 10 August 2015. As such, even the original document itself could not be relied upon to qualify as proof of your sponsors identity."

The decision of the FtT Judge

3. The decision of the FtT Judge was one that was made on the papers without a hearing. The Judge noted, at [3], that a person who has ceased to be a 'family member' of an EEA national can qualify for a right of permanent residence on the termination of a marriage, provided certain conditions are met. The Judge referred, at [4] to Regulation 21 of the 2016 Regulations, that set out the "Procedure for applications for documentation" and noted that Regulation 21(5) provides as follows.

"(5) where an application for documentation under this part is made by person who is not an EEA national on the basis that the person is or was the family member of an EEA national or an extended family member of and EEA national, the application must be accompanied or joined by a valid national identity card or passport in the name of that EEA national"

4. At paragraph [5], the Judge noted Regulation 42 of the 2016 Regulations, which makes provision for alternative evidence of identity and nationality where the person is unable to obtain or produce the required document due to circumstances beyond the persons control. At paragraphs [7] and [8] of the decision, the FtT Judge summarises the factual matrix and notes the appellant's claim that she has been unable to provide the EEA national's identity documents due to circumstances beyond her control. The Judge also notes the claim by the appellant the she was unaware that the copy passport she had managed to obtain, had been reported lost or stolen. At paragraph [9] of the decision, the FtT Judge concludes as follows:

“The only issue before me is whether the application should have been refused because it was not accompanied by a valid identity card of the EEA national, the appellant’s former spouse. I need to consider whether the exception in Regulation 42 applies. Where an applicant is unable to supply a valid passport or identity card of the EEA national, the Secretary of State “may accept alternative evidence of identity and nationality”. The only “alternative evidence” provided is a copy passport which has been reported lost or stolen. That is not a copy of a “valid document”, and so it is not a valid alternative evidence of his identity and nationality. If there had not been the added complication of the fact that this document is null and void, I may have accepted this as satisfying Regulations 42 and 21.”

5. In the grounds of appeal, the appellant claims that the FfT Judge failed to consider the documentary evidence provided with the application, and on appeal, to demonstrate the efforts that she made to obtain the required evidence, from an individual who was simply not prepared to cooperate.
6. Permission to appeal was granted by FfT Judge Garratt on 1st March 2019. The matter comes before me to consider whether or not the decision of the FfT Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
7. Before me, Ms Dushenkivska accepts that she had been unable to provide the national identity card or passport in the name of her former partner, as required by Regulation 21(5) of the 2016 Regulations. She submits that there had been an acrimonious breakdown of the marriage, and her inability to obtain the relevant document, is due to circumstances entirely beyond her control. In the evidence provided to the FfT, the appellant had provided evidence of the steps taken by her representatives to obtain the required document. There was also evidence concerning the breakdown of a relationship with her former partner, and the ongoing difficulties, requiring the involvement of the police. When she made her application on 15th March 2018, what she was able to provide was a copy of the passport issued to her former partner, as a British citizen, on 2nd April 2009. That passport was said to be valid until 20th May 2019. In broad terms, she contends that the FfT Judge’s conclusion at paragraph [9] of the decision is *Wednesbury* unreasonable and irrational.

8. The respondent's decision of 23rd May 2018, by which the appellant was notified of the decision stated that "*.. The photocopy provided of your EEA sponsors passport is a copy of a passport that was reported lost or stolen to the relevant authorities on 10 August 2015. As such, even the original document itself could not be relied upon to qualify as proof of your sponsors identity.*". In that decision, the respondent does not appear to have considered whether there was alternative evidence of a valid national identity card or passport in the name of the EEA national.
9. At paragraph [9] of the decision, the FtT Judge noted that she needed to consider whether the exception in Regulation 42 applies. Although there was a wealth of evidence before the FtT Judge regarding the breakdown of the appellant's relationship with her former partner, and the steps taken by the appellant to obtain the documents required to support the application, the FtT Judge notes at paragraph [9], "*the only "alternative evidence" provided is a copy passport which has been reported lost or stolen. That is not a copy of a "valid document", and so it is not a valid alternative evidence of his identity and nationality.*". The FtT Judge was satisfied that the appellant had been unable to obtain or produce the required document due to circumstances beyond her control, but was not satisfied that the appellant has provided "*...a copy of a "valid document", and so it is not a valid alternative evidence of his identity and nationality*".
10. The requirement in Regulation 21(5) is that the application must be accompanied or joined by a valid national identity card or passport in the name of the EEA national. The exception in Regulation 42 provides for "alternative evidence of identity and nationality". The alternative evidence of identity and nationality relied upon by the appellant here, was a copy of a passport that had been reported lost or stolen. Although it was not a copy of a 'valid passport', it was nevertheless alternative evidence of identity and nationality. Here, it was in fact a passport issued by the Identity and Passport Service to a British citizen, and although that passport itself may well have been reported lost or stolen, the respondent should have been readily able to confirm the identity and nationality of the appellant's former partner. The respondent rejected the application on the basis that the appellant had produced a

photocopy of the passport, and the copy provided is a copy of passport that was reported lost or stolen on 10th August 2015, but did not consider whether that evidence was capable of amounting to alternative evidence of identity and nationality.

11. In my judgment, the FfT Judge erred in her consideration of the issue. Regulation 42 did not require the appellant to provide a copy of a 'valid national identity card or passport', but required 'alternative evidence of identity and nationality'. The FfT Judge states that if the copy of the document relied upon were not null and void, she may have accepted the document relied upon as satisfying Regulations 42 and 21. It may have been reported lost or stolen, but it was in my judgement, nevertheless, capable of amounting to alternative evidence of identity and nationality, that could readily have been confirmed by the respondent.
12. A finding made by the FfT may be set aside for error of law on the grounds of perversity if it is irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. In my judgement, the FfT Judge erred in application of Regulation 42 and the decision must be set aside.
13. The focus of the appeal before FfT Judge Kaler was, perhaps unsurprisingly, upon the question of whether Regulation 42 is satisfied. In order to succeed in the appeal, I accept as the respondent submits, that the appellant must establish that the other requirements to establish an entitlement to a residence card to confirm that the appellant is a former family member of an EEA national exercising treaty rights in the UK, must be met. These were matters that were not addressed by the FfT Judge.
14. In the circumstances, as to the disposal of the appeal, in my judgment, the appropriate course is for the matter to be remitted to the FfT for hearing afresh. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

