Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04554/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th May 2019	**On 19th June 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

OLANREWAJU AMUDAT BAKARE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P V Thoree, Thoree & Co Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 16 May 1979. She appeals against the decision of First-tier Tribunal Judge Kaler promulgated on 6 February 2019 dismissing her appeal against the decision to revoke a permanent residence card as confirmation of a right of residence as a family member of an EEA national.

2. The Appellant did not attend the appeal before the First-tier Tribunal and she submitted a letter from the Belvedere Medical Centre which stated as follows:

> "This is a letter to certify that the above patient will not be fit enough to take her exam on 30th January. She was seen by myself and is complaining that she still has pain in the back radiating down to left leg with several days history. There are no red flags but paracetamol is not helping. I have prescribed co-codamol. She has a court hearing on 31st January please could you take this into consideration and allow her an exemption from her exam. I advised her that she can self-certify and add cover letters if she wishes."

3. The First-tier Tribunal Judge found that the Appellant had not provided a good reason for her non-attendance. The judge noted that the Appellant was represented and telephoned her representative speaking to Mr Olugan of SLA Solicitors. He stated in an email:

> "We refer to our telephone conversation of this even date regarding our non-appearance at the Tribunal for the hearing of the appeal against the decision of the Secretary of State to revoke the permanent residence card of Mrs Bakare. The situation is that we advised the appellant with regards to evidence required to enable us to prepare a bundle as well as the cost implication. Thereafter she instructed us that she would seek alternative legal advice in preparation for the hearing. We spoke to her partner on 29th January 2019 and he stated that the final decision whether we will represent the Appellant rests with her. We made attempts on 30th January 2019 but we were unable to speak with her. The appellant did not put us in funds neither did she perfect her instructions with regards to evidence required to prepare a bundle. We apologise for our non-appearance no discourtesy of the Tribunal is intended."

Judge's findings

4. There was no request for an adjournment and the judge proceeded in the Appellant's absence. He set out Regulation 24 of the Immigration (EEA) Regulation 2016 and made the following findings:

> "10. The Appellant born on 16 May 1979 is female and is a citizen of Nigeria. She was issued with a residence card on 25 October 2011 as the spouse of Mario Luis Goncalves, a Portuguese national. She was issued with a permanent residence card on 13 September 2017.
>
> 11. The evidence received from the Portuguese authorities stated that the Sponsor is not entitled to Portuguese nationality due to the fact that both of his parents were foreigners a (sic) the time of his birth. Therefore, the Portuguese documents were issued in error at the time.
>
> 12. The documents in the Respondent's bundle contain the email exchange passing between the Portuguese Counsel and the Respondent. The exchange confirms that the documents the Sponsor was issued with had been annulled and he was not entitled to Portuguese nationality.
>
> 13. In Nkrumah (OFM – annulment of residence permit) Ghana [2011] UKUT 00163 (IAC) the Tribunal said that

(i) Where a residence card has been issued in a passport on an application duly made it becomes a valid document if it has not been cancelled before it is communicated to the applicant;

(ii) An application for a residence card cannot be lawfully refused if it has already been issued; and

(iii) A residence card may be revoked if it is shown that was issued by mistake to someone not entitled to it.

14. In Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC) the Tribunal said that where the Secretary of State revokes a residence card before the expiry of its validity it falls on her to justify such revocation.

15. In Sannie and Hussein v Secretary of State for the Home Department [2013] EWCA Civ 1638 it was held that the Secretary of State for the Home Department had been entitled to revoke a residence card where the applicant for the card had not fulfilled the relevant statutory criteria. It was implicit in the EEA Regulations 2006 that if the card was issued in error there was an implied power to revoke; such a power was concomitant with the power to issue.

16. I am satisfied on this evidence that the Sponsor was not entitled to Portuguese nationality. He had been issued with nationality as the result of an administrative or procedural error. The Appellant was issued with a residence card because of this error. The case law satisfies me that the Respondent is entitled in these circumstances to revoke the residence card issued to the Appellant."

5. Permission to appeal was sought on the grounds that the refusal of an adjournment was unfair because it was clear from the evidence before the judge that the Appellant was unwell and could not attend the hearing. She did not have any representatives. Regulation 24(1) did not apply and reliance on the cases in the decision related to a residence card not a permanent residence card. It appears from the grounds that the submission made was that if the card was issued in error by an administrative mistake there was no reason why it should be revoked even if the holder has no right of residence. The grounds rely on paragraph 25 of the decision of Sannie quoting the decision of Samsam:

> "A residence card can clearly be revoked on broader grounds and conduct making cancellation of the card and removal from the UK appropriate. If a card is obtained by fraud and misrepresentation then it will be open to the issuing authority to cancel it but, again, the onus would be on the Secretary of State. But if it could be shown that a card was issued in error by administrative mistake, we see no reason why it should be revoked even if the holder has no right of residence."

6. Permission was granted by First-tier Tribunal Judge Hollingworth on 29 March 2019 on the ground it was arguable that unfairness had arisen in failing to grant the adjournment. P J M Hollingworth stated:

> "It is arguable in the light of the inferences that the Appellant was not sufficiently fit to attend court to give evidence. It is arguable that an adjournment should have been granted. It is arguable that the email produced at paragraph 5 of the decision confirmed the relative position and that the attempts by the author of 30th January did not result in success in seeking to speak with the Appellant."

Submissions

7. Mr Thoree relied on the grounds and submitted that the judge had acted unfairly in failing to grant the adjournment. There was ample evidence before him that the Appellant was sick. She was unable to attend an exam the previous day and therefore the evidence showed that she would also be unable to attend the appeal hearing. He accepted that there was no specific evidence that she was not fit to attend the hearing, but given that she was unable to attend an exam on the previous day, there was sufficient evidence for the judge to make such an inference. It was unfair to refuse the adjournment given that the Appellant had a real prospect of success. She had married a Portuguese national and had been granted permanent residence having been successful on an appeal.

8. The Appellant's husband was Portuguese at the relevant time. After the permanent residence card was issued, the Respondent received an email stating that the Appellant's husband was not Portuguese. The Respondent was not able to revoke the residence card because he had already given permanent residence to the Appellant after her divorce. She had children and was settled in the UK and the situation that she found herself in was not due to any fault on her part. The judge had acted unfairly and the Appellant should be given an opportunity to be heard.

9. Ms Everett submitted that the medical evidence did not go to the issue. The doctor did not say that the Appellant was unfit to attend the hearing and it was not clear what more the judge could have done. There were no credibility findings required in this case and therefore her attendance would have made no difference to the outcome of the appeal. There was nothing to rebut the Respondent's evidence. The Appellant may be totally innocent but given the nature of declaratory rights her situation could not be remedied through the EEA Regulations even if she had a strong basis to remain in the UK.

10. Mr Thoree submitted that there was insufficient evidence before the judge to show that the Appellant's ex-husband was not a Portuguese national. He submitted that the email was not enough and the appeal should be reheard in the interests of fairness.

Conclusions and reasons

11. Regulation 24(4) states, "The Secretary of State may revoke or refuse to renew a document certifying permanent residence or a permanent residence card if the holder of the certificate or card has ceased to have or never had a right of permanent residence under Regulation 15."

12. The email chain referred to in the judge's decision was in the Respondent's bundle. The Respondent had produced evidence that the Appellant's ex-husband was not entitled to Portuguese nationality and had not been so entitled at the time she was granted a residence card and at the time she was granted a permanent residence card. Whilst this situation is very unfortunate for the Appellant, because it is not of her own making, she does not acquire any rights under the EEA Regulations. She, notwithstanding her belief, was not married to an EEA national at the time she was granted a residence card or permanent residence. The email chain was sufficient to support the Respondent's decision to revoke her permanent residence card under Regulation 24(4).

13. I am not persuaded by the submission that once a residence card is granted it is not possible to revoke it as submitted in the grounds of appeal. The Appellant could not succeed under the EEA Regulations and the judge rightly dismissed her appeal. The refusal of an adjournment was not arguably unfair because had the Appellant attended the hearing it would have made no difference to the outcome. There was no evidence contradicting the emails. It was clear from the refusal letter, dated 11 June 2018, the basis upon which the residence card was revoked. The Appellant had ample opportunity to produce evidence to rebut the Respondent's assertion and failed to do so. Her oral evidence was unlikely to have changed the position. While she may well have been able to give evidence about her situation currently in the UK, Article 8 was not arguable in this context and it is open to the Appellant to make an application on Article 8 grounds if she wishes.

14. Accordingly, I find that the refusal of an adjournment was not arguably unfair and there was no error of law in the judge's conclusion that the Respondent was entitled to revoke the residence card under Regulation 24(4). The judge properly directed himself in law and his conclusion that the Sponsor was not entitled to Portuguese nationality was open to him on the evidence before him. I find that there was no error of law in the judge's decision promulgated on 6 February 2019 and I dismiss the Appellant's appeal.

15. Given the late application for permission to appeal and the fact that, even if the judge had granted the adjournment, the appeal could not succeed on its facts, I am of the view that permission to appeal should not have been granted in this case by First-tier Tribunal Judge P J M Hollingworth.

Notice of decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed Date: 17 June 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 17 June 2019

Upper Tribunal Judge Frances