



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/02699/2018

THE IMMIGRATION ACTS

Heard at Field House

On 1 October 2018

Decision and

Promulgated

On 26 November 2018

Reasons

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**CHINELO AGNES OKAFOR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Osifeso, Legal Representative

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Nigeria born in 1977, made an application for a residence card as confirmation of a right of permanent residence pursuant to regulation 15(1)(f) of the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”).
2. The application was refused and the appellant’s appeal against that refusal was dismissed by First-tier Tribunal Judge Foulkes-Jones (“the FtJ”) after a hearing on 8 June 2018.

3. The basis of the respondent's refusal of the application was in terms of the appellant having failed to provide a valid ID card or passport as evidence of her former EEA national's spouse's identity and had failed to provide sufficient evidence of her inability to obtain or produce those documents due to circumstances beyond her control. Another reason given for refusing the application was that HMRC documents provided as evidence of her former spouse's self-employment were copies of documents and copies were not acceptable.

The Ftj's decision

4. The following is a summary of the Ftj's decision and her own summary of the evidence before her. It has to be said however, that the style of paragraph numbering in the Ftj's decision is apt to confuse.
5. The Ftj heard evidence from the appellant who said that she could not obtain her ex-husband's passport because the marriage had broken down. She said that she had tried all she could with his sister to get him to sign the application form but he would not and would not provide his passport. Some documents had been obtained through his sister, and some correspondence still came to her address.
6. She said that her relationship with her ex-husband started in October 2011 and ended in around April 2015. However, she still keeps in contact with her ex-husband's sister with whom she is on good terms and they speak very often. The Ftj recorded that the appellant said that she had asked her to attend court but she was very busy and the appellant thought that she was doing something else.
7. In relation to documents that had been obtained via her ex-husband's sister, she said that she thought that his sister had begged her ex-husband on her behalf to provide documents. When she was asked if there was any reason as to why her ex-husband would give her HMRC documents but would not give her further documents, such as identification documents, the appellant said that he would not release his original passport and was not willing to provide a photocopy of it either. Regarding a document relating to her ex-husband's self-employment, she said that she obtained it from her ex-husband's sister.
8. The Ftj summarised the grounds of appeal, to the effect that the appellant had used her best endeavours to obtain an identity document from him but she was unable to because the relationship had broken down irretrievably.
9. At para 5.9 the Ftj quoted from the respondent's guidance entitled Free movement rights: retained rights of residence, version 3.0 dated 7 February 2017. She also referred to the appellant's witness statement in terms of the difficulties she said that she encountered psychologically because of the breakup of the relationship, including that her ex-husband flatly refused to make available his Italian passport.

10. She recorded a submission made on behalf of the respondent to the effect that the appellant had avenues of contact but she had still not supplied documents. The submission made on behalf of the appellant was to the effect that although the appellant was in contact with her ex-husband's sister, she could not compel her to obtain the passport. At paras 5.13-15 the FtJ said as follows:

"13. I have no evidence before me save what the Appellant states that her relationship with her ex-husband ended under difficult circumstances such as a copy of the Divorce Petition, evidence of witnesses etc. The Appellant's ex-husband did not sign the EEA (PR) form but this could have been for a number of reasons arising from the relationship breakdown. I also have no evidence that the Appellant has made every effort to provide the required documents, again save for her evidence. The Appellant said in cross-examination that she had asked her sister-in-law to attend Court but she was busy and she was doing something else. There is no statement from her before me. There was therefore no obligation on the Respondent to make enquiries having regard to the above.

14. Mr Osifeso said that the Appellant was previously granted a 5 year residence document and her ex-husband's identity was not in dispute. There is no mention of this in the EEA (PR) (question 3) and I do not have a copy of the above before me. In any event any national identity card or passport must be valid so even if a Residence Card was previously issued there is no evidence that the Appellant's ex-husband's current passport/identity card is still valid.

15. The Appellant's application was not accompanied or joined by a valid national identity card or passport in the name of her ex-husband, the same has not been since produced (sic) and there was no obligation on the Respondent to make enquiries having regard to what I say above. The Appellant therefore falls at the first hurdle as she does not satisfy Regulation 21(5) of the Immigration (EEA) Regulations 2016. The appeal is therefore dismissed under the EU Treaties."

The grounds and submissions

11. The grounds contend that the FTJ failed to consider the respondent's guidance (to which I have referred) and reiterate the appellant's case that she had made concerted efforts to obtain her ex-husband's passport, as set out in her witness statement. It is said in the grounds that there was no suggestion that any credibility issues arose in relation to the appellant's witness statement. It is argued that the respondent did have an obligation to make enquiries on the appellant's behalf.
12. In submissions before me Mr Osifeso relied on the grounds. He submitted that in relation to the respondent's guidance, there were only examples given there of circumstances in which it may not be possible to obtain documents. The guidance was not exhaustive in that respect. The appellant could not have obtained her ex-husband's passport or ID

document during the course of the proceedings for divorce because that was not in issue at that time.

13. Furthermore, the appellant was previously granted a five years' residence permit. Thus the respondent must have been satisfied that her husband was an EEA national. There was no evidence that anything had changed in that regard. There were no reasonable grounds to believe that he was no longer an EEA national.
14. As regards what the Ftj said at para 5.13 in terms of there being no statement from the appellant's ex-husband's sister who it is said had helped the appellant to obtain documents, Mr Osifeso said that his instructions were that she was ready to assist informally but was not willing to give evidence to the Tribunal. As a general matter, it was submitted that persons in the appellant's situation find it very very difficult to obtain the necessary documents.
15. In relation to the other issue raised in the respondent's decision in terms of the appellant having failed to provide acceptable documentary evidence of the self-employment of her ex-spouse, Mr Osifeso said that that was a matter that "fell away" at the hearing before the First-tier Tribunal. In any event, he submitted that there was evidence before the Ftj on that issue, as set out in the appellant's bundle to which my attention was drawn.
16. In his submissions, Mr Tarlow himself referred to the respondent's guidance to the effect that it was nevertheless the case that even where there had been a residence document previously issued, up-to-date evidence was still required. It was submitted that even looking at the matter pragmatically (as the guidance suggests) the Tribunal could not simply accept evidence from the appellant that her husband had a valid Italian passport. There was no evidence that any passport he previously had was valid.
17. It was further submitted that the Ftj was entitled to conclude that even if a residence card was previously issued, there was no evidence that her ex-husband's passport or identity card were still valid.
18. In relation to the photocopy HMRC documents that were provided, the respondent was entitled to reject that evidence on the basis that photocopies were not acceptable.
19. In his reply, Mr Osifeso submitted that the guidance's use of the phrase "where necessary" in relation to a case where there had previously been a residence document, indicated that that only applied where there was reason to think that the EEA national no longer retains his or her nationality. The respondent could have verified her ex-husband's nationality. I was referred to documents in the appellant's bundle, from page 5, in support of the contention that there was evidence of his exercise of Treaty rights.

Assessment and Conclusions

20. Reg 15(1)(f) provides that a person who has resided in the UK in accordance with the EEA Regulations for a continuous period of five years and who was at the end of the period a family member who has retained a right of residence, acquires the right to reside in the UK permanently.
21. It is common ground that in order for the appellant to be issued with a residence card reg 21(5) requires that the appellant provide a valid national identity card or passport in the name of the EEA national, namely her ex-husband. It is also common ground that the appellant failed to do that. Her case is that she was unable to because her husband would not assist and her ex-husband's sister could not get it from him because he would not provide it. It is further argued that given that the appellant previously had a residence card, the respondent must have been satisfied as to his nationality/identity.
22. The extract of the guidance to which I was referred states as follows on page 20:

“Applicants who are unable to provide all the evidence of their EEA sponsor

This page tells you what to do when an applicant is unable to provide evidence of their European Economic Area (EEA) sponsor to support their application for a document confirming they retain the right of residence in the UK due to difficult circumstances.

Where a relationship has broken down due to domestic violence or other difficult circumstances it may not always be possible for the applicant to provide all of the necessary documents about the EEA national sponsor. In such circumstances, you can make further enquiries about the EEA national sponsor's status but only where the applicant has shown they have made every effort to provide the necessary evidence.

Regulations 17,18 and 19 of the 2016 regulations put the responsibility on the applicant to provide the necessary proof that they are eligible for a document to confirm their right of residence in the UK.

In cases where an applicant has previously been issued a document this only demonstrates that they had a right to reside under the regulations on the date it was issued. If they apply for a retained right of residence, you must be satisfied that the applicant meets the relevant requirements relating to retained rights and request evidence where necessary.

No evidence of EEA sponsor

In cases where there has been a breakdown in the relationship between the applicant and their EEA national sponsor it may not always be possible for them to get the documents that are needed to support their application.

An example of this could be where the applicant was the victim of domestic violence and cannot provide evidence relating to their EEA national

sponsor's nationality or free movement rights (to ask them to do so could put them at risk). See: Documents required for retained residence in domestic violence cases.

Another example would be where the applicant's relationship has ended under difficult circumstances but they have provided evidence to show that they have made every effort to provide the required documents. Such as, attempting to make contact with the EEA national sponsor during divorce proceedings.

When dealing with these cases you must take a pragmatic approach and:

- consider each case on its merits
- if you are satisfied the applicant cannot get the evidence themselves, make enquiries on their behalf where possible, getting agreement from your senior caseworker before doing so."

23. As I pointed out to Mr Osifeso at the hearing, it is simply incorrect for the grounds to state that the Ftj failed to consider the respondent's policy guidance. She plainly did, setting it out in full at para 5.9. The appellant's complaint in reality is not that the Ftj failed to consider the guidance but that she found that it did not assist the appellant in her appeal.
24. I do not consider that there is any merit in the contention that because the appellant had previously held a residence card the respondent ought to have concluded that evidence of her ex-husband's Italian nationality had been provided. The guidance makes it clear that in cases where an applicant has previously been issued with a document, that only demonstrated that they had a right to reside under the EEA Regulations on the date that it was issued. Further, it is clear from the guidance that if an application was made for a retained right of residence the caseworker needs to be satisfied that the relevant requirements relating to retained rights are met and request evidence "where necessary".
25. With respect to Mr Osifeso's submissions, the phrase "where necessary" cannot relate to evidence relating to an ex-spouse's nationality. The phrase clearly relates to the paragraph in which it is contained, and that makes it plain that a person's previous possession of a document only relates to the circumstances on the date it was issued and an applicant needs to establish that the relevant requirements are met, and evidence in that respect is to be requested when the need arises. The next section of the guidance deals with issues relating to the EEA national sponsor's nationality (or free movement rights). It is contained within the sub-heading "No evidence of EEA sponsor".
26. It is also worth noting, as Mr Tarlow pointed out at the hearing before me, that the appellant did not indicate on her application form that she had previously been issued with a residence card. Section 3 of the form in this respect was left blank. Therefore, even if there was any merit in the contention that the respondent already had evidence of the appellant's ex-husband's current nationality, which I do not accept for the reasons I have

given, that matter was not drawn to the respondent's attention. The point otherwise has no merit.

27. The guidance at para 2 on page 20 makes it clear that Home Office staff can make further enquiries about the EEA national sponsor's status, but "only where the applicant has shown that they had made every effort to provide the necessary evidence". There is nothing to indicate, and no submissions were made before the Ftj or before me to suggest, that anything was put before the respondent to the effect that the appellant had made every effort to provide the necessary evidence. Her application form does not give any indication of any efforts made, and indeed at section 11 it states that she sees her ex-husband "occasionally" or "once in a while", and that she last saw him in 2017. I do note however, that the application form does state under section B "Sponsor's declaration" that the relationship has broken down.
28. At question 2.13 of the form, which relates to evidence of a sponsor's identity and nationality, it states that if the applicant is not submitting a valid passport, travel document or national identity card, the applicant should say why in the box indicated, and submit alternative evidence of "your" identity and nationality. There was the opportunity there for the appellant to indicate that she was unable to obtain the necessary identification document in relation to her ex-husband. In addition, the letter of application submitted with the application itself, written by the appellant's legal representatives, says nothing about any difficulty of the appellant in obtaining relevant documents, merely stating that she and her ex-husband got divorced, with proceedings having started in 2016.
29. Accordingly, there was no basis from which the respondent could be said to have been required under the guidance to make enquiries on her behalf as set out in the second bullet point of the last paragraph on page 20.
30. Whereas the grounds of appeal in relation to the Ftj's decision states that "There was no suggestion that any credibility issues arose as a consequence", meaning presumably no credibility issues arising in relation to her evidence of efforts to obtain relevant identity documents, that proposition is inconsistent with what the Ftj said at para 5.12. There, she recorded that the respondent's representative said that the appellant had avenues of contact and she had not supplied documents. In other words, the respondent at the hearing before the Ftj did not accept that the appellant was unable to obtain the relevant documents.
31. In any event, the Ftj was entitled to state that she had no evidence before her save what the appellant had said, to the effect that her relationship with her ex-husband ended under "difficult circumstances", to use the words of the guidance. She said that no evidence such as the divorce petition or evidence of witnesses "etc." had been provided. She referred to the fact that the appellant's ex-husband had not signed the application form but found that that could have been for a number of reasons arising from the relationship breakdown. She concluded that there was no

evidence that the appellant had made every effort to provide the required documents, again save for her evidence.

32. The Ftj pointed out that there was no statement from the appellant's ex-sister-in-law. It is to be remembered that the appellant's case was that her ex-sister-in-law helped her to obtain at least some documents but, according to the appellant's witness statement, had flatly refused to make available his Italian passport. The fact that there was no statement from the appellant's ex-sister-in-law was a matter that the Ftj was entitled to take into account in assessing the extent to which the appellant had had the difficulties she suggests and had made every effort to obtain the required documents, as per the guidance.
33. Before me, Mr Osifeso said in relation to the lack of a witness statement from her ex-husband's sister, that his instructions were that she was ready to assist informally but not willing to go so far as to give evidence to a court. That however, is inconsistent with what the Ftj was told in evidence by the appellant at para 4.7. The appellant said that she had asked her sister-in-law to attend court but she was very busy and the appellant thought that she was "doing something else". There was no suggestion from the appellant along the lines of the information Mr Osifeso conveyed to me in terms of what his instructions were. At para 5.13 the Ftj referred to this aspect of the appellant's evidence in cross-examination, in terms of the fact that there was no witness statement from her. The Ftj was entitled to conclude that the appellant's evidence in relation to the difficulties she had in obtaining relevant identity documents was insufficient to trigger the application of the guidance in terms of the respondent making enquiries on behalf of the appellant.
34. Accordingly, I am not satisfied that there is any error of law in the Ftj's decision. She did not go on to consider the other reason given by the respondent for refusing the application, that is in terms of the unsatisfactory nature of the documentary evidence provided, being photocopies. However, it was not necessary for her to do so in the light of her conclusions in relation to the appellant's failure to produce her ex-husband's valid national identity card/passport. I also bear in mind that Mr Osifeso told me that that issue (of photocopied documents) "fell away" at the hearing before the Ftj, although it would have been helpful for the Ftj to have reflected any discussion of this issue in her decision.

Decision

35. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

dated 22/11/18