



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

Appeal Number: EA/08088/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 15th November 2018**

**Decision & Reasons
Promulgated
On 30th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

**JOSEPH OWUSU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Mardner, Counsel

For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ross promulgated on 14th August 2018 dismissing the Appellant's application for confirmation of a residence card on the basis that he has retained the right of residence following a divorce. The decision of Judge Ross was

appealed and permission to appeal was granted by First-tier Tribunal Judge Parkes in the following terms:

- “2. The Judge found the Appellant had not provided a copy of his wife’s passport or identity card and had no discretion, the appeal was dismissed.
 3. The grounds argue that the Judge did not have regard to regulation 42. It is not clear that this was brought to the Judge’s attention during the hearing but it is relevant and should be considered.
 4. The grounds disclose an arguable error of law and permission to appeal is granted”.
2. I was not provided with a Rule 24 reply by the Secretary of State but was given the indication that the appeal was resisted.

Error of Law

3. At the close of the hearing I indicated that I would reserve my decision, which I shall now give. I do not find that there is a material error of law in the decision, such that it should be set aside. My reasons for so finding are as follows.
4. In respect of the sole ground of appeal the complaint made by the Appellant’s representatives is that the judge did not consider Regulation 42 of the Immigration (EEA) Regulations 2016. Miss Mardner who appeared before the First-tier Tribunal and has again appeared before me today was commendably frank and forthcoming in disclosing that she did not argue that the judge should take account of, or have regard to Regulation 42 of the 2016 Regulations when this matter was before the First-tier Tribunal. It therefore came to pass that as a consequence of that acceptance by Ms Mardner, there was no error of law in the judge’s reasoning as the argument was not raised before the First-tier Tribunal. Having heard from Mr Wilding whom had sympathy for the appeal and whom took a pragmatic stance as to what the future may hold for the Appellant, suggestion was made that the Appellant could reapply and seek to take advantage of Regulation 42 in a further application. Upon hearing this, Miss Mardner indicated that the Appellant would likely follow this suggestion made on behalf of the Respondent and would duly make a further application.
5. I observe that, although the matter was not raised below, had it been there would have been an error of law in the decision given that the terms of Regulation 42 do specify as follows under the heading “Alternative evidence of identity and nationality”:

“where a provision of these Regulations requires a person to hold or produce a valid national identity card issued by an EEA State or a valid passport, the Secretary of State may accept alternative

evidence of identity and nationality where the person is unable to obtain or produce the required document due to circumstances beyond the person's control".

Thus, it is plain from the language of Regulation 42 that alternative evidence of the Appellant's former European national spouse may have been accepted if he had shown that production of her identity document was beyond his control.

6. I further note that the Secretary of State has published guidance entitled "Free movement rights: retained rights of residence Version 3.0" published 7th February 2017 (and still in force as far as I am aware) which on pages 20 to 21 discusses the subject of applicants who are unable to provide all of the evidence from their EEA Sponsor. On page 21 under the heading "Applications for registration certificates or residence cards" it is specifically stated that additional enquiries can be made but that an applicant must give as much detail as they can about the EEA national sponsor. It is further stated that:

"If they cannot provide proof of the EEA national sponsor's identity, nationality or proof of relationship, then you must check existing records on CID to see if their identity has been established in any previous applications".

7. Thus, the language of the guidance indicates that if an EEA national has established their identity in a previous application, that identification would be an acceptable form of establishing their identity in a future application.
8. I was told by Miss Mardner that evidence of such a nature had now come into the Appellant's hands, albeit that evidence was not before the First-tier Tribunal. I was told that the Appellant had now obtained, by indirect means from his former spouse, a smartphone photo of her current EEA passport which had apparently been sent to him via a 'WhatsApp' message which had emanated from her and been passed to a sibling and had reached the Appellant's mobile phone after being passed through several hands. I was provided with a printout of that photo by Miss Mardner which I am grateful for and which I have placed on file. The photo reveals that the EEA national's current Belgium passport was issued on 7th December 2017 and was due to expire on 6th December 2024. Thus it seems eminently sensible that the Appellant should put forward this printout of the photo of the passport and clarify how it came into his possession and submit that best evidence in a further application to the Secretary of State and pray in aid Regulation 42 of the 2016 EEA Regulations as well as the relevant guidance, which may perhaps result in a different outcome, however at the Secretary of State's ultimate discretion. That, as I say, is a matter for the Appellant and is not within my purview, but I have recorded this evidence which was shown to me at Ms Mardner's request.

9. As mentioned above, given that these matters were not before and were not raised before the First-tier Tribunal, no material error of law arises from Judge Ross's decision.
10. Therefore, in light of the above findings, the appeal against the decision of the First-tier Tribunal does not reveal a material error of law such that the decision should be set aside.

Notice of Decision

11. The appeal to the Upper Tribunal is dismissed.
12. The decision of the First-tier Tribunal is hereby affirmed.
13. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Saini

25 November 2018