Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01852/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision& Reasons Promulgated**
On 07 February 2018	**On 10 April 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ASAD UR REHMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S. Mustafa, instructed by Prime Law Solicitors
For the respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision considers whether the Secretary of State can refuse an application for a residence card under The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") on the sole ground that specified evidence relating to the EEA national sponsor was not provided in accordance with regulation 21 and regulation 42.

2. The appellant is a Pakistani national who was issued with a residence card as the spouse (family member) of an EEA national on 12 March 2014. On 16 October 2017 he applied for a residence card to recognise a right of

residence as a family member who has retained a right of residence following divorce.

3. The respondent refused the application in a decision dated 13 February 2018 in the following terms:

> "Your application has been assessed and it has been noted that you have failed to provide a valid passport or identity card as evidence of your sponsor's identity and nationality.
>
> While it is accepted that you are divorced from your sponsor, you have failed to provide any evidence that you have in any way attempted to obtain the ID document required for this application. As such, this department is unable to establish that you have exhausted all routes to demonstrate that you have are (sic) a former family member of an EEA national who has retained the right of residence in the UK.
>
> Furthermore it is noted that although your divorce was finalised on 19 June 2017, you have provided this department with evidence of employment and residence in the name of your sponsor from 05 April 2014 to 24 June 2017; with this therefore showing us as a department that you had contact with your sponsor after your divorce, and that your sponsor is therefore more than willing to co-operate with your application.
>
> Without sight of a valid passport or ID card for your sponsor this department cannot accept that you are the former family member of an EEA national as claimed and therefore that you have any right to rely on the provisions of the EEA Regulations."

4. The appellant appealed the decision. He asked the First-tier Tribunal to determine the appeal on the papers. His grounds of appeal argued that regulation 18 of the EEA Regulations 2016 did not require him to produce the passport of his former spouse.

5. First-tier Tribunal Judge G.A. Black ("the judge") dismissed the appeal in a decision promulgated on 18 June 2018. The judge concluded:

> "7. There was no issue taken with any of the provisions under Regulation 10(5) EEA Regs. The appellant argued that he had provided the respondent with the required documentary identity evidence at the time his residence card was issued in 2014. The appellant has not provided any explanation or documentation of any attempts that he has made to contact his former wife in order to get the necessary passport or identity card of the EEA national. Regulation 18 requires a valid passport to be produced. The respondent's guidance states that the decision maker must be satisfied that the applicant cannot get the evidence themselves and at that stage the respondent will make their own enquiries.
>
> 8. The appellant has failed to provide any explanation as to why he is unable to produce the passport or valid identity card of his ex-spouse. It is not sufficient to simply rely on the divorce itself as a

> reason why the identity documentation cannot be produced. The appellant has not stated whether or not he has made attempts to contact her at home or work, and whether there was any animosity between them and if he has made contact with her what is her reason for not wishing to produce the documentation."

6. The appellant appeals the First-tier Tribunal decision on the ground that he was not required to produce a valid passport or identity document of his former spouse in order establish a retained right of residence under European law.

Legal Framework

The Citizens Directive

7. Article 3 of the Citizens Directive (2004/58/EC) recognises a right of residence as the family member of an EEA national who is exercising rights of free movement under European law.

8. Article 13 of the Directive sets out the circumstances in which a family member retains a right of residence following divorce. The provisions are transposed into UK law in regulation 10 of the EEA Regulations 2016.

9. Article 14 also deals with retained rights of residence.

> '1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
>
> 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
>
> In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
>
> …'

10. Recitals 14 and 15 of the Directive state:

> (14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.
>
> (15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partner- ship. With due regard for

family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

11. Article 10 of the Directive deals with the documents required for a residence card to be issued.

> 1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.
>
> 2. For the residence card to be issued, Member States shall require presentation of the following documents:
>
> (a) a valid passport;
>
> (b) a document attesting to the existence of a family relationship or of a registered partnership;
>
> (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
>
> (d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
>
> (e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
>
> (f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

12. Article 25 also sets out general provisions for the issue of residence documents.

> '1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.'

The EEA Regulations 2016

13. Regulation 18 of the EEA Regulations 2016 sets out the following requirements for the issue of a residence card recognising a retained right of residence.

> '18 (2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—
>
> (a) a valid passport; and
>
> (b) proof that the applicant is a family member who has retained the right of residence.
>
> (3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State must immediately issue the applicant with a certificate of application for the residence card and the residence card must be issued no later than six months after the date on which the application and documents are received.'

14. Regulation 21 is a new addition, which sets out procedural and evidential requirements for applications for residence documents made under regulation 12 (issue of a family permit) and Part 3 of the EEA Regulations 2016 (residence documentation). Although slight amendments were made by the Immigration (European Economic Area) (Amendment) Regulations 2018 soon after, at the date the First-tier Tribunal decided the appeal on 18 June 2018, the wording was as follows:

> '21 (1) An application for documentation under this Part, or for an EEA family permit under regulation 12, must be made—
>
> (a) online, submitted electronically using the relevant pages of www.gov.uk; or
>
> (b) by post or in person, using the relevant application form specified by the Secretary of State on www.gov.uk.
>
> (2) All applications must—
>
> (a) be accompanied or joined by the evidence or proof required by this Part or regulation 12, as the case may be, as well as that required by paragraph (5), within the time specified by the Secretary of State on www.gov.uk; and
>
> (b) be complete.

(3) An application for a residence card or a derivative residence card must be submitted while the applicant is in the United Kingdom.

(4) When an application is submitted otherwise than in accordance with the requirements in this regulation, it is invalid.

(5) Where an application for documentation under this Part is made by a 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 an EEA national, the application must be accompanied or joined by a valid national identity card or passport in the name of that EEA national.

(6) Where —

(a) there are circumstances beyond the control of an applicant for documentation under this Part; and

(b) as a result, the applicant is unable to comply with the requirements to submit an application online or using the application form specified by the Secretary of State,

the Secretary of State may accept an application submitted by post or in person which does not use the relevant application form specified by the Secretary of State.'

15. Part 6 of the EEA Regulations 2016, relating to appeals, contains a miscellaneous provision under regulation 42 relating to alternative evidence of nationality and identity.

'(1) Subject to paragraph (2), 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.

(2) This regulation does not apply to regulation 11.'

16. The Explanatory Memorandum for the EEA Regulations 2016 says the following about the purpose of the new administrative provisions.

'Part 3 (residence documentation: regulations 17 to 22) provides for the issue of residence documentation to those who satisfy the conditions in Part 2. A new regulation 21 permits the Secretary of State to require applications for residence documentation under these Regulations to be made using a specified application form, or pursuant to a particular process. Regulation 21(3) requires an applicant for a residence card or derivative residence card to make the application from within the United Kingdom.'

Case law

17. In *British Gas Trading Ltd v Lock and Anor* [2016] 1 CMLR 25 the Court of Appeal reviewed relevant case law relating to 'conforming interpretation' of EU and human rights law and considered the core principles outlined in *Marleasing S.A v LA Commercial Internacional de Alimentacion S.A.* [1992] 1 CMLR 305, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 and *Swift (trading as A Swift Move) v Robertson* [2014] 1 WLFR 3438.

18. In *Vodafone 2* the Court of Appeal approved the summary of the principles of conforming interpretation prepared by counsel for the HMRC.

> "37. …
>
> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p. 126B);
>
> (b) It does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p. 126B and Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32);
>
> (c) It is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115);
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's case,* at para 31);
>
> (e) It permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H–121A; per Lord Oliver in the *Litster* case, at p 577A); and
>
> (f) The precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)
>
> …
>
> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
>
> (a) The meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v. Godin-Medoza* [2004] 2 AC 557, para 53; Dyson LJ in *Revenue and Customs v. EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord

> Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v. Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and
>
> (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.""

19. In *Swift* the Supreme Court considered the Court of Justice of the European Union decision in *Schulte v Seutche Bausparkasse Badenia AG* (Case C-350/03) [2003] All ER (EC) 420, which summarised the core interpretative principle as follows.

> "When hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive."

20. In *Barnett and Others (EEA Regulations; rights and documentation)* [2012] UKUT 00142 the Upper Tribunal considered what evidence could be required under European law to support an application for residence documentation under The Immigration (European Economic Area) Regulations 2006. The head note summarised the conclusions as follows:

> "(1) In applications under the Immigration (European Economic Area) Regulations 2006, care must be taken to identify both the relevant rights being asserted and the relevant documentary confirmation which is being sought in respect of those rights.
>
> (2) The requirement in regulation 17(1)(a) and (2)(a) for the production of a valid passport relates to the passport of the applicant, not the EEA national.
>
> (3) The "proof" that the Secretary of State can lawfully require in applications under regulations 17 and 18 in order to entitle a non EEA national to a residence card (regulation 17) or a permanent residence card (regulation 18) may, nevertheless, depending on the circumstances, entail the production of the passport or other identity document of an EEA national; but it is unlawful to refuse applications merely because such documentation is not forthcoming. The Secretary of State needs to show a valid reason why it is required.
>
> (4) This is particularly so in the case of regulation 18, given that there is likely to be relevant material relating to such documentation on file from a previous, successful, application."

Decision and reasons

21. Recital 14 of the Directive makes clear that the competent authority responsible for issuing residence documentation can put in place administrative procedures to "avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members". However, as the Upper Tribunal in *Barnett* observed, the "supporting documents required" cannot go beyond the requirements of the Directive or what is strictly necessary to establish the relevant right of residence under European Union law.

22. Article 10 of the Directive relates to family members who are not nationals of a Member State. In establishing a right of residence as a family member the Directive allows Member States to require (i) a valid passport (to establish the identity of the applicant); (ii) a document attesting to the existence of a family relationship or of a registered partnership; (iii) the registration certificate or any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining; and (iv) any documentary evidence necessary to show that the conditions for residence as a 'family member' or as an 'extended family member' are met.

23. The documents outlined in Article 10 of the Directive relate to the essential elements needed to establish a right of residence as a 'family member' or an 'extended family member'. The requirement for some evidence relating to the position of the Union citizen is central to an assessment of the rights of residence of family members given that they can only be derived from the Union citizen exercising their right of free movement. The documentary requirements outlined in Article 10 focus on the rights of 'family members' and 'extended family members' and do not refer to retained rights of residence.

24. Article 25 of the Directive sets out general provisions concerning residence documentation. It makes clear that a requirement to hold a residence card may under no circumstances be made a pre-condition for the exercise of a right or the completion of an administrative formality because entitlement to rights may be attested by "any other means of proof".

25. The general principles outlined in the Directive make clear that an administrative process can be put in place by a Member State for the issuing of residence documentation. A non-EEA national is required to provide proof of his or her identity with an application, but the documents necessary to establish a right of residence will depend on the nature of the right the applicant is seeking to establish.

26. Regulation 18 of the EEA Regulations 2016 reflects these principles. The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence if they produce (i) a valid passport; and (ii) proof that the applicant is a family member who has retained the right of residence. The provision relates to an application made by a non-EEA national. The plain

wording suggests that the "valid passport" must relate to the non-EEA national applicant to establish their identity. If it meant the passport of the EEA national it would say so. The second requirement to show that the non-EEA national has retained a right of residence can be attested by "any other means of proof", which might include a need for evidence to show that they were married to a person who was exercising rights of free movement but might not depending on the circumstances of the case.

27. This case considers the applicability of regulation 21(5) and regulation 42 of the EEA Regulations 2016. The general principles outlined above may be equally applicable to other provisions but are beyond the scope of this decision.

28. The Explanatory Memorandum that accompanies the EEA Regulations 2016 asserts that the new regulation 21 permits the Secretary of State to require applications for residence documentation in a specific form and "pursuant to a particular process". It seems that the provision is intended to put in place a structured process for administrating applications for residence documentation. The Directive makes clear that this is permissible and desirable to ensure consistent decision making and that there are no undue obstacles to the exercise of rights by Union citizens and their family members. However, provisions introduced for administrative convenience must not go beyond what is required to establish a right of residence.

29. Regulation 21(4) states that when an application is submitted otherwise than in accordance with regulation 21 it will be treated as invalid. Regulation 21(5) requires a person who is not an EEA national to produce a valid national identity card or passport in the name of the EEA national. If a person cannot produce the specified evidence, regulation 42 provides for the submission of alternative evidence of identity or nationality where the person is "unable to obtain or produce the required document due to circumstances beyond the person's control".

30. The principles outlined in *Barnett* are equally applicable to the EEA Regulations 2016. The provisions contained in regulations 21 and 42 must be interpreted to conform with European Union law. If the provision does not conform with European Union law on the facts of a case, it must be read to conform. In some cases, this might involve ignoring the requirement for specified evidence altogether if a document is not in fact required to establish a right of residence.

Conclusion

31. Neither the appellant nor the First-tier Tribunal were assisted by the fact that the decision letter did not refer to the specific provisions contained in regulation 21 and 42 of the EEA Regulations 2016. The provisions were highlighted for the first time at the hearing before the Upper Tribunal. Given that the appeal before the First-tier Tribunal was determined without a hearing, and the judge did not have the benefit of oral

submissions from a Home Office Presenting Officer, it is hardly surprising that she focussed on regulation 18 and did not consider the terms of regulations 21 and 42.

32. However, even a plain reading of the wording of regulation 18 does not disclose a requirement for the appellant to produce the passport of the EEA national spouse. The appellant was only required to produce (i) a valid passport establishing his identity; and (ii) proof that he is a family member who has retained a right of residence. The finding made by the First-tier Tribunal at [7], that the appellant was required to produce the passport of his EEA national former spouse, discloses an error of law. The judge failed, through no fault of her own given the opaque nature of the decision letter, to consider the provisions contained in regulations 21 and 42. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside.

33. The respondent accepted that the appellant met the requirements of regulation 10(5) as a family member who has retained a right of residence following a divorce. The only reason given for refusing the application was the fact that the applicant had not produced his former spouse's EEA passport pursuant to the specified evidence required by regulation 21(5) and failed to provide an explanation as to why he was unable to obtain or produce the required document due to circumstances beyond his control pursuant to regulation 42.

34. The analysis set out above shows that the appellant was only required to produce the documents necessary to establish a retained right of residence following divorce. On 12 March 2014 the respondent issued the appellant with a residence card as a family member of an EEA citizen who was exercising her right of free movement. At that stage the appellant would have been required to produce evidence to show that he was the family member of an EEA national, which was likely to include his wife's passport or other form of identity and evidence to show that she was exercising rights of free movement in the UK.

35. On 16 October 2017 he applied for a residence card recognising a retained right of residence. To establish this right, the appellant was only required to produce (i) a valid passport to confirm his identity; and (ii) proof that he is a family member who has retained the right of residence.

36. If there was any doubt that the appellant had been married to an EEA national as claimed the respondent could lawfully require the production of his former wife's passport, but this was not an issue in this case. The respondent accepted that the appellant was married to an EEA national when he issued the previous residence card. Indeed, the respondent accepted that the appellant met the requirements of regulation 10(5). As such, the appellant had already provided the necessary proof to establish his right of residence. A blanket application of regulation 21(5), without proper analysis of what proof was required to establish the relevant right of residence, cannot be used as a reason for refusal if the appellant was

not in fact required to produce his former spouse's EEA passport to show that he had retained a right of residence. If he was not required to produce his former spouse's passport, nor could he be required to provide an explanation for his failure to produce it under regulation 42.

37. For these reasons I conclude that the decision breaches the appellant's rights under the EU Treaties in respect of his entry to or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is ALLOWED on EU law grounds

Signed  Date 08 April 2019
Upper Tribunal Judge Canavan