



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

Appeal Number: EA/00602/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 30 January 2020**

**Decision & Reasons Promulgated
On 26 February 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**AFOLASHADE SEMIAT AJAYI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Amgbah, Legal Representative, UK Law Associates
For the Respondent: Ms Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Nigeria, is the former wife of an EEA national (a citizen of Bulgaria).
2. On 11 November 2013 the appellant was issued with a residence card as the family member of her (then) husband.
3. On 5 April 2016 the appellant and her former husband divorced.
4. On 12 November 2018 the appellant applied for a permanent residence card to confirm she is the former family member of an EEA national who

has retained a right of residence under Regulation 10(5) of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”).

5. The application was refused. The reason it was refused is that, when making her application, the appellant submitted her former husband’s Bulgarian ID card, in accordance with Regulation 21(5) of the 2016 Regulations. However, information held by the respondent showed that the ID card she submitted had been reported lost or stolen on 23 November 2015. The application was refused on this basis only. The respondent’s refusal letter of 17 January 2019 stated:

“Because your application falls for refusal on this basis [under Regulation 21(5)], no further consideration has been given to any other evidence that you may have supplied in support of your application. If you are able to supply the necessary identity document, you may wish to submit a further application for consideration.”

6. The appellant applied to the First-tier Tribunal where her appeal was heard by Judge of the First-tier Tribunal Cohen (“the judge”). In a decision promulgated on 15 August 2019 the judge dismissed her appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

7. The appellant’s explanation before the First-tier Tribunal for submitting an invalid identity card to the respondent was that her former husband had, whilst they were still married, reported his ID card as stolen but had then found it. She stated that her former husband had, following the divorce, agreed to assist her and had provided her with the ID card that she submitted but that he subsequently refused to assist her by providing his new ID card or passport, or to have any contact with her.
8. The judge found the appellant’s evidence to not be credible. He stated that she had not provided any reasonable explanation as to why her former husband was willing to assist her in November 2018 (when she made the application) but not a few months later; and that she had not adequately explained the efforts she had made to obtain his assistance. The judge stated that the appellant gave vague evidence and described her as “an unconvincing and unimpressive witness”.
9. The appellant argued in the First-tier Tribunal that, following the Upper Tribunal decision in *Rehman (EEA Regulations 2016 – specified evidence)* [2019] UKUT 000195 (IAC), it was not necessary for her to provide her former husband’s identification document, as the respondent had already accepted that she had been married to him when she was previously issued with a residence card. The judge found that this appeal was distinguishable from *Rehman*. At paragraph 19 he stated:

“I note the case law in respect of *Rehman* above. I however find that the extant case can be distinguished from the circumstances prevailing

in that case. In *Rehman* the appellant met all other requirements of the Regulations which has not been demonstrated before me particularly noting that I have not been provided with any evidence of the sponsor exercising treaty rights in the UK at the date of commencement of divorce proceedings or otherwise. Secondly, in *Rehman* the appellant did not submit any identity card for his former spouse which had been recorded as being lost or stolen. I find that the appellant's actions in doing so in this case are damaging to her credibility and have not been adequately explained."

10. The judge concluded at paragraph 21:

"I find that the appellant has failed to discharge the burden of proof to indicate that the identity document for the sponsor relied upon is genuine and I find that the appellant therefore has not established that she is the former family member of an EEA national who exercised treaty rights in the UK and I find that the application under the Regulations is bound to fail on this basis."

Grounds of Appeal

11. The appellant advanced four grounds of appeal.

12. The first ground submits that the decision was inconsistent with *Rehman*, where it was found that in circumstances such as these there was no necessity to provide an identity document for a former spouse.

13. The second ground of appeal submits that the appellant submitted evidence of her former husband exercising treaty rights in the UK for the last five years to the respondent and therefore she met all of the requirements of the 2016 Regulations. It is argued that the fact that these were not produced in the First-tier Tribunal by either the appellant or the respondent was sufficient for the judge to realise that this was not an issue before him and therefore was not a sustainable basis to refuse the appeal.

14. The third ground of appeal submits that the judge found that the appellant had not explained why her former husband stopped being willing to assist her without considering her evidence on this issue concerning her former husband refusing to have contact with her since he began cohabiting with a new partner.

15. The fourth ground of appeal submits that the judge erred by failing to have proper regard to the attempts the appellant made to obtain the identification document from her former partner.

Analysis

16. The decision of the First-tier Tribunal involved the making of an error on a point of law. However, the error was not material and therefore I have not set aside the decision.

17. The error in the decision is that the judge did not correctly follow *Rehman* when considering the implications of the appellant failing to provide with her application a valid identity document for her former husband.
18. *Rehman* is a recent Upper Tribunal decision which considered the consistency of regulation 21(5) of the 2016 Regulations (requiring submission of a former partner's ID document) with EU law. The appellant in *Rehman* (like the appellant in this appeal) had been issued with a residence card as a family member of an EEA national while he was still married. The Upper Tribunal Judge stated at para. 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.”
19. Mr Amgbah argued that it is plain from *Rehman* that the appellant did not need to produce her former partner's identity card and therefore the fact that she provided an out-of-date card was irrelevant. Ms Jones argued that the case is distinguishable from *Rehman* because in this appeal, unlike in *Rehman*, the appellant had submitted an invalid card.
20. I agree with Mr Amgbah. On 11 November 2013 the respondent issued the appellant with a residence card as a family member of an EEA citizen exercising his right of free movement. At that time, the appellant would have been required to produce her (then) husband's identification document. The conclusion reached in *Rehman*, which was binding on the First-Tier Tribunal, is that in such circumstances it is not necessary for an appellant to submit an identity document for their former spouse. The judge therefore fell into error by dismissing the appeal on the basis of non-compliance with Regulation 21(5).
21. However, the error was not material because it was not sufficient for the appellant to show that Regulation 21(5) did not need to be complied with. She also needed to establish that she satisfied the conditions of regulation 10(5), which, inter alia, require her to demonstrate that her former husband was a qualified person exercising Treaty rights up until the date of the commencement of divorce proceedings. See *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088.

22. The respondent did not concede that the appellant's former husband was exercising Treaty rights. This is made clear in the part of the refusal letter quoted above at paragraph 5. In the absence of a concession by the respondent it fell to the appellant to prove her case. However, she did not do so because evidence of her former husband exercising Treaty rights was not submitted to the First-tier Tribunal. This was correctly noted by the judge at paragraph 19 where he stated that he had "not been provided with any evidence of the sponsor exercising treaty rights in the UK".
23. Mr Amgbah argued that it was sufficient that the appellant had provided evidence of her former husband's employer to the respondent. He submitted that the judge was aware the evidence existed on the basis that within the bundle of documents before the First-tier Tribunal was the appellant's application form and cover letter to the respondent, both of which referred to evidence of her former husband's employment being enclosed. However, as noted by Ms Jones, although these documents indicate that evidence of the former husband's employment was sent to the respondent, that is not a substitute for the judge being a position to determine for himself whether the evidence established that he was in fact exercising Treaty rights as required by Regulation 10(5). The evidence needed to be put before the First-tier Tribunal, but it was not.
24. Accordingly, even though it was an error of law for the judge to dismiss the appeal because of non-compliance with Regulation 21(5), the error did not effect the outcome of the appeal because the evidence before the First-tier Tribunal did not establish that the conditions in Regulation 10(5) were satisfied.

Decision

25. The appeal is dismissed.
26. The decision involved the making of an error on a point of law. However, in accordance with Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (pursuant to which I may - *but need not* - set aside the decision of the First-Tier Tribunal where an error of law has been made) I do not set aside the decision because the error of law was not material to the outcome.
27. No anonymity direction is made.

Signed

Upper Tribunal Judge Sheridan

Dated: 13 February 2020