



IAC-FH-AR-V1

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

Appeal Number: IA/43413/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6th April 2016**

**Decision & Reasons Promulgated
On 28th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

**C S U
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Canter, Counsel, for 1215 Chambers, London
For the Respondent: Miss Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria, born on [] 1974. He appealed against the Respondent's decision dated 14th October 2014 refusing him a residence card on the basis of being in a durable relationship with Agnieszka Dworak, an EEA citizen. His appeal was heard by Judge of the First-tier Tribunal Easterman on 7th May 2015. The appeal was dismissed in a decision promulgated on 25th August 2015. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal Hollingworth on 19th January 2016. An application for permission to appeal was lodged with the Upper Tribunal and permission was granted by Judge of the Upper Tribunal Perkins on 23rd February 2016. The permission states that it is arguable that the First-tier Tribunal Judge wrongly limited himself to a reviewing rather than a deciding role and wrongly ignored the Appellant's Article 8 rights when considering how discretion should have been applied. The permission goes on to state that

the judge may have erred by failing to consider the impact that refusal of a residence card would have on the Sponsor's rights as an EEA national.

2. There is a Rule 24 response on file dated 10th March 2016. The response makes reference to the Secretary of State's discretion which is dealt with in the refusal letter. The refusal letter is quoted in the response at page 2, (the last seven paragraphs thereof), and the first paragraph of page 3. The response states that the judge considered the factual matrix and concluded that the Secretary of State was justified in not exercising her discretion in the Appellant's favour. The response refers to the case of **Aladeselu and Others (2006 Regulations - Regulation 8) (Nigeria) [2011] UKUT 00253** and the response goes on to state that it is not clear how the refusal of a residence card to the Appellant would hamper the Sponsor exercising her treaty rights as there is currently no removal decision.

The Hearing

3. The application is for the issue of a residence card to the Appellant as an extended family member. The Appellant's partner is Polish. The Appellant's representative handed to me the cases of **RH (Jamaica) [2010] UKUT 423 (IAC)** and **Aladeselu and Others**.
4. Counsel submitted that the judge did not decide if the Secretary of State should have exercised her discretion differently. I was referred to paragraph 40 onwards in the decision. He submitted that at paragraph 49 the First-tier Tribunal Judge states that the issue to be considered is whether the Secretary of State should be required to issue a residence certificate in the face of the Appellant's bad behaviour in the past over which the Secretary of State has discretion. He submitted that that is not really the issue. The issue is whether the judge, on re-exercising his discretion, should have allowed the appeal. I was referred to paragraph 53 of the decision in which the judge states that the Appellant is Nigerian. At paragraph 54 the judge states that the issue is whether the Secretary of State should, where the Appellant has lied about his nationality, lied about his name and provided a passport which he bought with a forged Home Office stamp on it, be obliged to issue such a person with a residence card. The First-tier Tribunal Judge states that notwithstanding the durable relationship, the Secretary of State is not obliged to issue a residence card. Counsel submitted that the Secretary of State and the judge have a discretionary power. There is a durable relationship and this is accepted by the judge. Counsel submitted that the judge should have considered the matter again and exercised his own discretion. He submitted that the only reasoning by the First-tier Tribunal Judge relates to the Respondent's discretion and this must be an error.
5. I was referred to paragraph 55 of the decision. Counsel submitted that what the judge appears to be saying is that discretion should have been exercised in favour of the appellant but it was not. He submitted that the way this paragraph is worded is not clear and this is an error.

6. I was referred to paragraph 57 of the decision in which the judge states that the Respondent's decision is in accordance with the law. Counsel submitted that it is not clear from this what the judge's view is and this is where the material error of law comes in. He submitted that the judge has omitted an essential stage in his decision and has materially erred in law as he has not given his own view.
7. Counsel then referred to the assessment of the impact of the decision on the EEA national partner. He submitted that this assessment stems from her right of free movement. I was referred to the said case of **RH (Jamaica)** at paragraph 28. I was referred to the second head note in this case which refers to the proper exercise of discretion afforded by Regulation 17(4) of the Immigration (EEA) Regulations 2006 and states that the decision maker has to take into account whether or not the effect of the refusal of a residence card would hinder or frustrate the continuing exercise of the free movement rights of the EEA family member/union citizen. He submitted that the Appellant is the EEA national's extended family member. They have entered into a six year relationship although they are not married.
8. I was then referred to paragraph 52 of the said case of **Aladeselu**. This states that the judge has to consider all the circumstances when deciding whether it is appropriate to issue a residence card, which circumstances include the extent of the Appellant's financial and emotional dependency on the Sponsor, the fact that the Appellant was unlawfully in the United Kingdom before he made his application and any evidence as to the importance of the Appellant's residence in the exercise of the Sponsor's rights of free movement and residence. Counsel submitted that the judge did not deal with this. This is something he should have considered and he submitted that this is a material error of law and had he considered it he would have had to look at the Sponsor perhaps having to leave the United Kingdom and move to Nigeria if a residence card is not issued to the Appellant. The Sponsor's only alternative would be staying in the United Kingdom with someone who has no right to be here. He submitted that if she does this, the Sponsor will be facilitating a criminal offence. He submitted, therefore, that to refuse the residence card must be a restriction on the Sponsor's free movement rights. He submitted that there is another issue and that is that the Appellant cannot work. He submitted that the judge did not consider any of these matters.
9. With regard to whether Article 8 can be considered since the case of **Amirteymour and Others [2015] UKUT 00466** Counsel submitted that Article 8 has to be considered when the exercise of discretion is dealt with. He submitted that the Appellant has been in the United Kingdom for fourteen years. He and his partner have lived together for six years. His first application was in January 2013 and Counsel submitted that he and his partner are still together and this has to be taken into account by the judge. He submitted that the judge erred by not looking at the wider factors in this claim and that this is a material error of law. He submitted that had he done so the his decision might have been different.

10. The Presenting Officer made her submissions referring to discretion.
11. I was referred to paragraph 44 of the decision in which the judge states that, based on the case of **FD (Algeria) [2007] UKAIT 00049**, discretion was never intended to be appealable and that it can only be appealed on the basis of **Wednesbury** unreasonableness. She submitted that it was on this basis that the judge made his findings on discretion and whether the Secretary of State should have exercised her discretion differently. She submitted that the judge exercised his discretion on the facts before him, as did the Secretary of State. I was referred to paragraph 45 of the decision and she submitted that in this paragraph the judge does not just adopt what the Respondent has stated but has considered the facts and “dealt with the exercise of discretion in his view”. She submitted that the First-tier Tribunal Judge made his own findings on the exercise of discretion.
12. I was referred to paragraph 57 of the decision and paragraph 55 and she submitted that paragraph 55 cannot be taken on its own, it has to be considered with the rest of the First-tier Tribunal Judge’s decision and looked at in the round.
13. The Presenting Officer referred to the second two grounds referred to in the permission, in particular the EEA national’s ability to exercise free movement. At paragraph 16 of the decision the judge refers to the findings of Judge of the First-tier Tribunal Fox in the original appeal decision, which led to First-tier Tribunal Judge Easterman having to make the decision relating to the Secretary of State exercising her discretion appropriately.
14. At paragraph 54 of the decision the judge refers to there being a durable relationship and she submitted that the First-tier Judge has taken this relationship into account along with the other factors in the claim. She submitted that the residence card has been refused and in these circumstances the EEA national can return to Poland or stay in the United Kingdom with the Appellant although he has no right to be here or she can apply to go to Nigeria with the appellant. She submitted that the situation before this application was made was no different to this. The Appellant had no leave to remain then and has no leave to remain now.
15. The Presenting Officer submitted that there have been issues from the start about the Appellant's identity. The Presenting Officer submitted that the EEA Sponsor is in no worse a position than she was before the application was made, relating to free movement. She submitted that if the judge finds that the sponsor’s right to free movement is affected by the refusal of the residence card then every application for an EEA residence card would have to be allowed. The Appellant has been in a relationship with the Sponsor for six years and this application has made no difference to the EEA national’s situation. She submitted that the Sponsor can travel anywhere she wants to in the EU and there are no

removal directions so the Appellant can reapply for a residence card. He may wish to apply on a different basis because of the refusal of his claim.

16. Counsel submitted that he accepts that the decision has to be read as a whole. He submitted that when this is done no discretion has been exercised by the judge.
17. He submitted that the judge considered the relationship and found it to be durable. He submitted that the judge did not take into account the effect of the refusal of the residence card on the EEA national. With regard to the Sponsor having no difficulty exercising free movement he submitted that that is not the case. I was referred to the two statements from the Sponsor, being the statements made for the first appeal heard by Judge Fox and the second appeal heard by Judge Easterman. In these statements the Sponsor states that because of the Appellant's unresolved immigration status she feels uneasy and stressful and is prevented from making future plans and this deprives her of the basic right to work and move freely from one country to another. She also states that due to the Appellant's unresolved immigration status, their situation remains difficult both on personal and financial levels. She is the only person bringing an income into the household and so they have an interest only mortgage.
18. Counsel submitted that the situation is taking its toll on her physical and mental health. Not only is the Sponsor frustrated and stressed, so is the Appellant. The Sponsor states that she has problems staying focused at work although she tries to remain positive and he submitted that these are extreme difficulties. He submitted that the Sponsor is here lawfully working and it cannot be right to expect her help her partner commit a criminal offence.
19. I was referred to paragraph 55 of the decision in which the First-tier Tribunal Judge states that the Appellant has been left in limbo and yet he makes his decision against the Appellant.
20. I was asked to find that there are material errors of law in the First-tier Tribunal Judge's decision and to set that decision aside.

Decision and Reasons

21. The judge's findings of fact have not been challenged. Judge Fox found that the Appellant was in a durable relationship with the Sponsor and this has been taken into account by Judge Easterman in his decision. There is no question but that the Appellant has a poor immigration history. This has to be taken into account when discretion is being exercised. I have to decide whether the discretion contained in Regulation 17(4) has been exercised correctly by the Respondent and by the First-tier Tribunal Judge. The refusal letter deals with the Respondent's exercise of discretion. I was asked to consider the said case of **RH (Jamaica)** but the facts are very different in this case and there are no children in this case. In that case

there was a deportation order whereas in this case there is not even a removal decision.

22. The Directive which the Regulations are intended to transpose states that the host member state shall facilitate entry and residence for certain persons. One of these persons is a partner with whom the union citizen has a durable relationship. That is the case here but the host member state shall undertake an extensive examination of the appellant's personal circumstances and shall justify any denial of entry or residence to these people. The respondent did that in her decision and I have to decide whether the judge has also done.
23. The Appellant's argument is that the judge had to consider for himself whether discretion should have been exercised differently rather than determining whether the Respondent's exercise of discretion is lawful. The Appellant's stance is that the judge did not do this. The judge states at paragraph 43 that the Appellant has to show that he is an extended family member because he is in a durable relationship but being in a durable relationship is not enough. The Secretary of State still has to exercise her discretion. The judge goes on at paragraph 44 to state that in his view the discretion should not have been exercised differently on the facts before him. Counsel for the Appellant states that what the judge has done is considered the Respondent's decision and has not made his own decision but I find from the wording at paragraph 44 that is not the case.
24. The judge goes on to deal with the facts. The Appellant was encountered working and gave a false name. A passport was found in another name. This was a South African passport. The passport had a counterfeit, indefinite leave to remain, vignette thereon and the Appellant was imprisoned for using false documents. It is not clear whether the Appellant was subject to a deportation order or not but it then transpired that his identity as per this passport was wrong as the Appellant is not South African, he is Nigerian. At paragraph 49 the First-tier Tribunal Judge states that none of this is denied by the Appellant and that the Secretary of State, based on this, had discretion as to whether to issue the residence card or not. The judge goes on to find that because of the Appellant's history the Respondent was correct to refuse the issue of a residence card and the judge then states that in his view there were good reasons for her declining to exercise her discretion in the Appellant's favour. That is his view and he has considered whether discretion ought to have been exercised in favour of the Appellant or not and has found that it should not have been exercised in the Appellant's favour. The judge finds that it is unsatisfactory that the Appellant is left in limbo but when this is read with the rest of the decision this is only because the Respondent has not made a removal direction.
25. The judge states that he cannot consider Article 8 relating to private and family life but he should consider Article 8 when considering the issue of discretion. He states that based on the evidence before him the Appellant

has not discharged the burden of proof and the Respondent's decision is in accordance with the law.

26. With regard to discretion it is difficult to see what the judge could have done differently. The judge found the Appellant and his partner are in a durable relationship but also found that there are many reasons for refusing to issue a residence card. This will of course have an impact on the Appellant's and his partner's private and family life but based on the judge's findings and the facts of the case I do not find that he has made an error of law by not specifically referring to Article 8 when dealing with discretion. I find that these two points are merely disagreements with the judge's decision.
27. The said case of **FD** states that when extended family members are considered under the EEA Regulations the Tribunal is not confined to considering whether the decision is a lawful one and I find that in this case the judge has complied with this. It was for the Appellant to show that the Secretary of State's discretion should have been exercised differently. In this case, as in the said case of **FD**, the Appellant entirely fails to persuade the judge that discretion should have been exercised differently.
28. The third issue is whether the judge erred by failing to consider the impact that the refusal of a residence card will have on the Sponsor's rights as an EEA national. The Appellant and the Sponsor have been together for six years. When the relationship started the Appellant had no right to be in the United Kingdom. He had entered illegally using false documents and had a conviction against him. He had acquired leave to remain by deception and the judge has taken all this into account and has taken into account the fact that his partner must have known about this. The Sponsor knowingly and willingly entered into a relationship on this basis and to say that the Sponsor's free movement is affected because a residence card has not been issued to the Appellant cannot be how the Regulations are supposed to be considered. I have noted the Sponsor's statements for the previous hearings and it is clear that as the Appellant has not been issued with a residence card this may impact on the Sponsor exercising her rights of free movement if she wants to continue in the relationship. Her rights however have been affected since she took up with the Appellant. The Appellant does not have a right of residence without a residence card and the Secretary of State and the First-tier Tribunal Judge both found that he was not entitled to a residence card. The Sponsor has always known that she was likely to be faced with either having to leave the UK with the Appellant or remaining here with him in the knowledge that he has no right to be here which is what she has been doing. There has been no change. He has been unable to work lawfully in the United Kingdom since she met him. It is true that they are in a durable relationship but when the circumstances of the case are considered there is no error of law in the First-tier Tribunal Judge's decision. The skeleton argument states that the Appellant accepts his adverse immigration history is relevant to the exercise of discretion but the Appellant's Sponsor entered into a relationship with him by choice knowing the situation and

knowing that previous applications had been refused. The refusal of a residence card affects the EEA national and her rights of free movement but by refusing the application and the appeal the EEA National is in no worse a position than she has been for the last six years. Crucially, there is no removal decision.

29. At paragraph 55 the judge states “Whether overall it is desirable to decline to issue such a certificate and fail to issue removal directions is a matter I have taken into account.” He finds that it leaves the Appellant in limbo but as previously stated, the judge’s meaning is clearly, from the wording of this paragraph, that not only should the residence card have been refused, removal directions should have been issued.
30. I find that the First-tier Tribunal Judge’s reasons for his decision justify the refusal of the residence permit.

Notice of Decision

31. There is no material error of law in the judge’s decision and the decision promulgated on 25th August 2015 must stand.
32. Anonymity has been directed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray

TO THE RESPONDENT
FEE AWARD

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

Signed

Date

Deputy Upper Tribunal Judge I A M Murray