



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

Appeal no: **IA 40163-13**

THE IMMIGRATION ACTS

At **Field House**
on **23.05.2014**

Decision signed:
23.05.2014
sent out:
28.05.2014

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Marie Toumany DIALLO

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Dwain Coward* (counsel instructed by Thadvana Consulting, Croydon)

For the respondent: Mrs R Patterson

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Guy Robson), sitting at Bradford on 3 February, to allow on article 3 grounds an EEA appeal by a citizen of Guinea, born 2 September 1987, and married to a French lady. The sole reason why his application for a residence card, made on 2 May 2012, had been refused on 10 September 2013, was that, while his passport had been with the Home Office for that, it had run out on 2 December 2012.

2. Quite understandably, the judge did not see that as a state of affairs which could be allowed to stand; but it is agreed that his mistake was to deal with it by using article 8. There were no such 'exceptional' or 'compelling' features in the appellant's private or family life (see *Gulshan*

(Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC), and *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC)) as to require any free-standing consideration of article 8 at all; and of course the appellant could make a fresh application, as the husband of an EEA citizen, at any time.

3. What the judge should have done was simply to consider whether it was fair for the Home Office to make a decision against the appellant which was based on nothing more than their own default in keeping his passport from May 2012, when he made his application, past December, when it ran out, till September 2013, when they finally made their decision.
4. The appellate authorities' jurisdiction to consider such an issue is clearly set out in *Naved* (Student - fairness - notice of points) Pakistan [2012] UKUT 14 (IAC), reviewing *Sapkota & another* [2011] EWCA Civ 1320 and other authorities. This is what we said at paragraph 19, on a different set of facts, but the same principle applies:

The Court of Appeal has accordingly confirmed our appellate jurisdiction to conclude that a particular decision is unfair, and so not in accordance with the law. Applying that to the circumstances of the present case, the decision is not in accordance with the law, and accordingly a lawful decision has yet to be made ...
5. It is agreed that the same result should apply here. The Home Office must reconsider their decision, either on the assumption that the appellant will be able to get his passport renewed whenever they give it back to him, or by giving it back to him, so he can do it himself before they reach their decision. Either way no further fee should be payable to this country's authorities.

Home Office appeal allowed - decision re-made

Appellant's appeal allowed: decision under appeal remains to be made by Home Office



Tribunal)

(a judge of the Upper