



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

Appeal Number: IA/43426/2013

THE IMMIGRATION ACTS

Heard at Manchester

On 10th July 2014

**Determination
Promulgated**

On 2nd September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR HASSAN BUYONDO
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L Bashow, Legal Representative

For the Respondent: Mrs K Heaps, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Uganda born on 6th January 1988. The Appellant states that he is the unmarried partner of his Sponsor who has Hungarian and Romanian nationality. It is contended that the Appellant and the Sponsor met in August 2010 and have lived together since 2011.

On 29th January 2013 the Appellant applied for an EEA 2 residence card on the basis that he was the unmarried partner of an EEA national who is exercising treaty rights. That application was refused on 1st October 2013. In refusing the application the Secretary of State noted that the Appellant had not provided firstly a valid national passport issued in his name and that the ARC card submitted with the application was not acceptable as evidence of his identity. Secondly the document submitted by the Appellant's purported partner was not accepted as being a Hungarian identity card that could be used for travel and thirdly it was noted that the Appellant claimed to be the unmarried partner of his Sponsor and it was not accepted the Appellant and Noemi Timea Majoros were cohabiting in a relationship akin to marriage.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Brookfield sitting at Manchester on 1st April 2014. The Immigration Judge dismissed the Appellant's appeal for want of jurisdiction.
3. On 16th October 2013 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended:-
 - (i) That the Immigration Judge had failed to properly interpret Regulation 26 of the 2006 EEA Regulations.
 - (ii) Had failed to properly interpret Regulation 29A and the meaning of "circumstances beyond his control".
 - (iii) Had shown unfairness in the proceedings particularly with regard to the Appellant not having the opportunity to give oral evidence as to why he was unable to produce a passport which may have persuaded the judge that he was unable to produce a passport due to circumstances beyond his control.
4. On 19th May 2014 First-tier Tribunal Cox granted permission to appeal. He considered the grounds were arguable having regard in particular to *Barnett and others (Jamaica) [2012] UKUT 142 (IAC)*. He considered that it was arguable that the judge had misdirected herself to the proper interpretation of Regulations 26 and 29A and that the points raised were ones of some general importance.
5. On 9th June 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. Whilst noting that the Grounds of Appeal criticised the Immigration Judge's interpretation of Regulation 26 and made reference to the authority of *Barnett* stating that it was unlawful to simply refuse to issue a residence card because no passport was produced it reminded the Tribunal that the refusal letter listed three reasons for refusing the application including the Appellant's claim to be the unmarried partner of his Sponsor. The Secretary of State noted that ground 2 raised concern over the Immigration Judge's interpretation of Regulation 29A but that paragraphs 12(ii) and 12(iii) clearly explained why

the judge did not consider the Appellant to be in “circumstances beyond his control” regarding proof of his identity. The Secretary of State pointed out that it was for the Appellant to establish his position in this regard and he had failed to satisfy the judge. Further it was contended in the Rule 24 response that the judge had found correctly in paragraph 12(iv) that no immigration decision had been issued and that there was no right of appeal.

6. It is on this basis that the appeal comes before me. The Appellant appears by his instructed legal representative Miss Bashow. Miss Bashow is very familiar with this matter. She appeared before the First-tier Tribunal on the Appellant’s behalf and she is also the author of the Grounds of Appeal to the Upper Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mrs Heaps.
7. The initial issue is whether or not the First-tier Tribunal Judge erred in law in finding that the Appellant had no right of appeal. It brings into question the two relevant Rules. It is important that the correct version of the Rules are considered. These are:

Regulation 26(2)(A)

If the person claims to be in a durable relationship with an EEA national, he may not appeal under these Regulations unless he produces:-

- (a) A passport and either
 - (i) an EEA family permit or
 - (ii) sufficient evidence to satisfy the Secretary of State that he is in a relationship with that EEA national.

Regulation 29A

Where a provision of these Regulations requires a person to hold or produce a valid 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 his or her control.

Both these provisions came into force on 8th November 2012. They are recited at paragraphs 8 and 9 of the First-tier Tribunal Judge’s determination.

Submissions/Discussions on Error of Law

8. Miss Bashow submits that the judge is required to look at Regulation 26 to proceed by way of Regulation 29A and that the judge took a too literal approach to the reading of Regulation 26 pointing out that Regulation 26 was amended to include the provision that a durable partner must provide a passport in order to appeal and the judge should have considered

Barnett and others (EEA Regulations: rights and documentation) Jamaica [2012] UKUT 142 as this dealt with the situation where identity documents are required for the purposes of issuing a residence card. However Miss Bashow does concede that that was under Regulation 17 or 18.

9. Mrs Heaps is most helpful in her approach to this matter. She acknowledges that the First-tier Tribunal Judge has not taken evidence from the Appellant and that it may well have been prudent for her to do so and on that basis the Secretary of State will not press too strongly if I set aside the decision and proceed to rehear it.

Findings on Error of Law

10. The First-tier Tribunal Judge did not take evidence from the Appellant and I accept the submissions that are made to me that what is necessary to be construed in this case is what constitutes a “circumstances beyond his control” under Regulation 29A. The Grounds of Appeal set out examples of what those circumstances beyond his control should include but of course they have never been tested and the correct approach is therefore to set aside the decision of the First-tier Tribunal and to find that there should have been evidence taken and that an appeal should take place. I gave due consideration as to whether the correct approach was to remit the matter back to the First-tier Tribunal but the general view expressed by both legal representatives was that the matter should be retained within the Upper Tribunal and heard by myself. A substantial bundle of documentation has been filed in readiness for this hearing and on that basis both in the interests of justice and of the economic disposition of this matter I proceed to rehear the matter.

Evidence

11. The Appellant attended court and confirmed his name and address and his witness statement. That witness statement dated 5th June 2014 seeks to clarify the reason that he does not have a passport namely that he arrived in the UK as a child and the person who brought him had all of his documents in his possession. The agent who brought him did not leave them with him and that that is the reason why he cannot get a passport. He then sets out at paragraphs 3 and 4 of his witness statement why he is not able to obtain a passport from the Ugandan Embassy and confirms at paragraph 9 of his witness statement that there has never been a dispute about his nationality or identity and that he has previously been issued with an immigration status document and he has an ARC card which he submitted to the Home Office with his EEA application.
12. Mrs Heaps cross-examined the Appellant. She enquired as to whether the Appellant had any proof of his identity other than the ARC card and he replied that he did not. She enquires as to whether he has ever used any previous name and he says that he has not. He is asked if it is correct that he has previous convictions in the UK and he confirms that he does. He is asked what they were for and he replies for having false documents and

claiming benefits whilst working and using false papers in order to obtain employment.

13. Mrs Heaps returns to cross-examine on the Appellant's witness statement enquiring that the Appellant appears to be stating he has telephoned the Ugandan Embassy and that they have set out the basis upon which a passport would be issued to him. He confirms that that is correct. He confirmed that he told them he was born in Uganda and that he asked them the procedure that needed to be followed. Mrs Heaps enquires as to whether any questions were asked of the Appellant and he states that he does not remember.

Submissions

14. Mrs Heaps maintains the contention that there is no right of appeal. She reminds me that Regulation 26 requires the person who claims to be in a durable relationship for the production of a passport and that that is qualified by Regulation 29A(i) of the Immigration (European Economic Area) Regulations 2006. She points out Regulation 29 indicates that the Secretary of State MAY accept alternative evidence. In this case the Appellant has simply produced an ARC card and having used his papers to obtain employment in the UK then the Secretary of State must exercise extreme caution in accepting alternative evidence. She submits that the authority in *Barnett* can easily be distinguished and should not be followed. She points out firstly that *Barnett* was a case dealing with Regulation 17/18 and not Regulation 26 and 29A and secondly it was a case involving someone applying for permanent residence and that it was in any event the EEA national's documents that were the issue and not the applicant for a residence card.
15. There is also before me a supplemental bundle including an opinion from the Aire Centre which I have given due consideration to. Mrs Heaps points out that this is an opinion nothing more nothing less that I should give it no more than read through consideration. She submits that the correct approach is to find that there is no right of appeal in this matter and to uphold the decision of the First-tier Tribunal.
16. Miss Bashow submits that it is appropriate to go back to Regulation 26. She accepts that that Regulation stipulates that a durable partner must provide a passport in order to appeal but maintains the contention that *Barnett* is a good example of how that Regulation should be interpreted. She submits that there is evidence of living together in the bundle and seeks to refer me to extracts from authorities in particular *Von Coulson and another v Land Nordrhein-Westfalen [1984] EUECJ 14/83* at paragraph 26 and paragraph 23 of *Litster and others v Forth Dry Dock and Engineering Co Ltd [1988] UKHL 10* as being of assistance as to interpretation within the Regulations. She then goes on to point out that the Appellant has never had a dispute as to his identity and that it is open to this Tribunal to accept his ARC card.

17. In addressing the issue of circumstances beyond his control she submits that the Appellant still has a subjective view of the Ugandan authorities and that he is entitled to have his fear of the authorities and he cannot be expected to go to them. She points out there are practical reasons why he did not have a passport when he entered and that he entered with an agent. She refers me again to the information necessary for him to obtain a passport and the problem that he would face in going to the embassy. In relying on commentary from *Y (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362* she submits that due to the subjective reality and fear that the Appellant would face in going to the embassy than considerable weight should be given to that factor.

Findings

18. With the greatest of respect to Miss Bashow who has provided me with a wealth of jurisprudence the issue is a relatively straightforward one namely whether or not the judge was entitled to conclude that there is no jurisdiction for a ground of appeal. The error that the judge made and why I reheard the issue solely therefore on whether there was an error of law was as to whether or not the judge should or should not have taken evidence from the Appellant. It is effectively conceded by the Secretary of State that she should. I have now had the benefit of having heard that evidence and I have heard substantial additional submissions from Miss Bashow and more limited ones from Mrs Heaps on behalf of the Secretary of State.
19. The starting point relates to the interpretation of Regulations 26 and 29A. Regulation 26 requires that if a person claims to be in a durable relationship with an EEA national he may not appeal unless he produces a passport and an EEA family permit or sufficient evidence to satisfy the Secretary of State that he is in a relationship with an EEA national. That is the starting point. The word “and” is mandatory. He has to provide a passport. However there is a qualification provided by Regulation 29A(i) which would enable alternative evidence to be provided when the person is unable to obtain or produce the required document due to circumstances beyond his or her control.
20. It is of critical importance. It has to be remembered that there is a discretion for the Secretary of State to accept the alternative evidence. There is specific reference to the word “may”. Consequently there is no obligation on the Secretary of State to do so or of course on the First-tier Tribunal Judge. Much is made by Miss Bashow of the decision in *Barnett*. *Barnett* can very easily be distinguished for reasons set out above namely
- (i) it is to do with Regulations 17 and 18 and not Regulations 26 and 29;

- (ii) the case involves someone applying for permanent residence not just for a residence card; and
- (iii) the documents referred to therein that were required were those of an EEA national and not someone merely applying for a residence card.

21. In addition it is appropriate to look at the approach adopted by the Secretary of State. The Appellant has a criminal conviction. He has used false papers to obtain work. The Secretary of State was entitled to exercise extreme caution in accepting alternative evidence. It has to be remembered that the starting point here is the claim that the Appellant is in a durable relationship and that is not accepted by the Secretary of State. A very extensive bundle of documents has been produced running to some 484 pages by the Appellant's instructed solicitors. Nowhere within those documents is there any evidence relating to a durable relationship. The documents solely address issues of income and of even greater importance no evidence either written or oral has been produced with regard to that purported durable relationship.
22. In such circumstances I am satisfied firstly that the Appellant has failed to provide evidence that will comply with Regulation 26 and secondly that even taking into account the discretion available to the Secretary of State and to the Tribunal under Regulation 29A(i) that there is no evidence that has been produced to show that the Appellant is unable to produce the required document. To merely contend that he has phoned the Ugandan Embassy and cannot go and get the documentation for the reasons he sets out is effectively no reason at all. For all the above reasons this is an Appellant who does not meet the requirements of Regulations 26 and therefore does not have a right of appeal and the approach to seeking discretion pursuant to paragraph 29 has been properly exercised by the First-tier Tribunal Judge and the Secretary of State.

Decision

The appeal under the Immigration (European Economic Area) Regulations 2006 is dismissed.

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) The Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris