



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

Appeal Number: EA/08231/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 October 2018**

**Decision &  
Promulgated**

**On 16 October 2018**

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**OBASANJO REMILEKUN KUDORO  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Jesurum, of Counsel, instructed by D J Webb & Co  
Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a Nigerian national born on 27 November 1981. He challenges the determination of First-tier Tribunal Judge Veloso, promulgated on 24 April 2018, dismissing his appeal against the respondent's refusal to grant him a residence card as the former family member of an EEA national.

2. Permission to appeal against the determination of the First-tier Tribunal was refused by First-tier Tribunal Judge Davidge on 23 May 2018 but granted on renewal by Deputy Upper Tribunal Judge Hutchinson on 30 July 2018. The matter then came before me on 11 October 2018.

3. **The Hearing**

4. I heard submissions from the parties. A full note of the submissions is set out in my Record of Proceedings. Essentially, the crux of Mr Jesurum's submission was that there was no requirement in law for the production of the passport of the former EEA spouse to be adduced when an application for retained rights of residence was made. This was absent from the Directive and indeed the preamble made it clear there was no rational reason why it should have to be produced given that the respondent had already seen it previously when a residence card had been issued. He submitted that in the appellant's case, the respondent had seen the passport on three previous occasions. The judge had relied on Ullah [2017] EWHC 1999 (Admin) but that was unfair as the parties had not been given an opportunity to respond to that authority. It was also submitted that that there had been a failure to consider the proportionality of the refusal for the absence of the document.
5. In response, Ms Everett acknowledged that the Regulations were more restrictive than the Directive. She submitted, however, that there was scope for an exception where the required documents could not be obtained but the appellant would have to show why he could not do so.
6. Mr Jesurum replied. He submitted that the safety valve Ms Everett referred to would only come into play once a rationale for the production of the passport had been shown, otherwise it was an undue obstacle and it was clear from the Directive that the objective was to remove obstacles and facilitate free movement.
7. That completed the hearing. I reserved my determination which I now give.

8. **Discussion and Conclusions**

9. The first two grounds for permission relate to the judge's reliance on Ullah; the first to the unfairness in relying on a case that was not part of the evidence and the second to her misapplication of it.

10. The judge placed heavy reliance on the judgment in making her decision. It is correct that this was an authority which had not been placed before the parties and there is no indication that they were alerted to it during the course of the hearing or given the opportunity to make submissions on it. That placed the appellant, at least, at a disadvantage and has led to unfairness. It is of course open to a judge to rely on a judgment that neither party has adduced but prior warning must be given. This was not done in this case. On that basis alone, the determination is not sustainable.
11. In the circumstances, it is not necessary to consider the other criticisms made. However, it would be helpful if the respondent's guidance on obtaining documentary evidence in cases of retained rights is made available for the next hearing as this may be pertinent to the applicant's claim that he was unable to obtain his former spouse's passport.
12. **Decision**
13. The First-tier Tribunal made errors of law. The decision is set aside. It shall be remade by another judge of the First-tier Tribunal at a date to be arranged.
14. **Anonymity**
15. I have not been asked to make an anonymity order and see no reason to do so.

Signed



Upper Tribunal Judge

Date: 11 October 2018