



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

Appeal Number: UI-2023-002321  
EA/04738/2022

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 August 2023**

**Decision & Reasons  
Promulgated  
On 12 September 2023**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR MAMADI FAYE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms Cunha, Senior Home Office Presenting Officer  
For the Respondent: Mr Hingora, Counsel instructed by Queens Court Law

**DECISION AND REASONS**

1. This is an appeal against the decision issued on 23 March 2023 of First-tier Tribunal Judge Nightingale which allowed the appellant's appeal against a decision of the respondent refusing him leave under Appendix EU of the Immigration Rules as having retained rights of residence.
2. For the purposes of this decision, we refer to the Secretary of State for the Home Department as the respondent and to Mr Faye as the appellant, reflecting their positions before the First-tier Tribunal.
3. Mr Faye is a citizen of Senegal. He was born on 18 November 1982.
4. The respondent refused the appellant's application for leave as someone with retained rights of residence as provided under Appendix EU of the Immigration Rules in a decision dated 2 April 2022. The respondent maintained that the appellant had not provided the required proof of the relevant EEA citizen's identity and nationality in the form of a valid passport or valid national identity card.
5. The appellant appealed that decision to the First-tier Tribunal. Judge Nightingale was careful in her approach to the appeal where the parties themselves were uncertain as to the core outstanding issue that had to be decided; see paragraph 32 of the decision. That issue was whether the appellant, someone seeking leave on the basis of retained rights of residence and not as a family member of an EEA national, was required to provide proof of the relevant EEA citizen's identity and nationality in the form of a valid passport or valid national identity card. The First-tier Tribunal concluded in paragraph 32 that it had not been shown that there was such a requirement within the provisions of Appendix EU and allowed the appeal on the basis of that finding.
6. The respondent appealed against the decision of the First-tier Tribunal and was granted permission to appeal by the First-tier Tribunal.
7. Before us, Mr Hingora conceded for the appellant that the respondent's grounds had merit as there was a requirement in Appendix EU for the appellant to provide proof of the relevant EEA citizen's identity and nationality in the form of a valid passport or valid national identity card. The requirement is set out in the definition of "required evidence of family relationship" in Annex 1 of Appendix EU. This provides (our emphasis):

"(b) where the applicant is a non-EEA citizen without a documented right of permanent residence, or is an EEA citizen (in accordance with sub-paragraph (a) of that entry in this table) without a documented right of permanent residence who relies on being (or, as the case may be, for the relevant period on having been) a family member of a qualifying British citizen (or, as the case may be, a family member of a relevant EEA citizen, a family member who has retained the right of residence or a joining family member of a relevant sponsor), the required evidence of family relationship must include:

(i) the following proof of identity and nationality of (as the case may be) the relevant EEA citizen”

8. Sub paragraphs (aa) and (bb) then provide that the required evidence is either a valid passport (aa) or a valid national identity card (bb).
9. Mr Hingora accepted that the decision of the First-tier Tribunal disclosed a material error of law as it had proceeded on the basis that there was no requirement for a valid passport or identity card of the appellant’s former spouse.
10. Mr Hingora also pointed out the further provisions in the definition of “required evidence of family relationship” which allowed for the exercise of discretion where a valid passport or identity card were not available. The respondent required a valid passport or identity card:

“unless (in any case) the Secretary of State agrees to accept alternative evidence of identity and nationality where the applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling practical or compassionate reasons; and  
(ii) evidence which satisfies the Secretary of State that:  
(aa) where the applicant is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen, that EEA citizen is (or, as the case may be, for the relevant period was) a relevant EEA citizen as described in the applicable entry for ‘relevant EEA citizen’ in this table, and is (or, as the case may be, was) such a relevant EEA citizen throughout any continuous qualifying period on which the applicant relies as being a family member of a relevant EEA citizen ... .”

11. Mr Hingora and Ms Cunha were in agreement that if it was found that the applicant had not provided a valid passport or identity card for his former spouse, it still had to be decided whether there was evidence that should lead the respondent to agree to the requirement being met on the alternative basis set out above.
12. Mr Hingora and Ms Cunha both submitted that *de novo* findings on whether the appellant’s former spouse had been resident in the UK at the time of the instigation of the divorce had to be made as the findings made previously were unclear. They also maintained that findings were required on the document issue and, potentially, on whether the appellant should be allowed to provide alternative evidence so as to meet the “required evidence of family relationship” requirement. Where that was so, they submitted that the appeal should be remitted to the First-tier Tribunal as the core findings of fact in the appeal had to be remade afresh.
13. We were satisfied that the concessions made regarding the legislation and the error of law were correct and found that the decision of the First-tier Tribunal had to be set aside to be remade. Having considered the

provisions of the Senior President's Practice Statement, it was also our view that the appropriate disposal of the appeal here was for the remaking to take place in the First-tier Tribunal given the fact finding that remained outstanding.

**Notice of Decision**

14. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.
15. The appeal is remitted to the First-tier Tribunal to be remade.
16. The applicant requests that the First-tier Tribunal makes an Amos direction in order for information about his former spouse's residence in the UK to be provided where he cannot reasonably be expected to obtain that information himself.

Signed: S Pitt  
Upper Tribunal Judge Pitt

Date: 23 August 2023