



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

**Appeal Number: IA/02740/2015**

**THE IMMIGRATION ACTS**

**Heard at** Field House  
**On** 29 January 2016

**Decision & Reasons Promulgated  
On** 11 February 2016

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**HABIBULLO MUSURMONOV  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer  
For the Respondent: Miss L Appiah (counsel) instructed by Vine Court Chambers

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier

Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Majid, promulgated on 12 August 2015 which allowed the Appellant's appeal.

### Background

3. The Appellant was born on 17 May 1986 and is a national of Uzbekistan. On 7 January 2015 the Secretary of State refused the Appellant's application for an EEA residence card.

### The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Majid ("the Judge") allowed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 16 December 2015 Frankish gave permission to appeal stating *inter alia*

"2. The application for permission to appeal asserts that the F-tTJ wrongly exercises his discretion under Reg 17 as to the issuing of a residence card when specified evidence must first be seen, which the respondent has not seen; further, the discretion, in any event, applies only to Reg 29A whereby the respondent may accept alternative identity evidence which this appellant does not have; reversed burden of proof by requiring the respondent to solve the appellant's problems with an imaginative exercise of discretion.

3. The core of the determination ([15]) is that "discretionary relief can bring joy to this young couple and I find it eminently suitable to exercise discretion in their favour." This is an arguable misapplication of the 2006 regulations."

### The Hearing

6. (a) Ms Fijiwala, for the respondent, moved the grounds of appeal. She told me that the only issue in this case was the production of a valid passport or alternative identification, which the appellant did not produce with his application nor did he produce at the hearing on 22<sup>nd</sup> of July 2015. She took me to [10] of the decision where the Judge says that he is exercising his discretion, and from there to [12] where the Judge states that the issue in this case "*... can easily be solved by an imaginative exercise of discretion*".

(b) Ms Fijiwala told me that the only discretion which could be exercised is the power given to the Secretary of State to exercise discretion under regulation 29A of the 2006 regulations. She told me that it is clear from the refusal letter that that discretion had not been exercised in this case. She told me that there was no discretion for the Judge to exercise and that the error made by the Judge amounts to a material error of law. She urged me to set the decision aside.

7. Miss Appiah, for the appellant, told me that the decision does not contain a material error of law. She reminded me that the appellant produced a letter from the Ministry of Internal Affairs of the Republic of Uzbekistan together with an apostille, and argued that the Judge accepted that it would be impossible for the appellant to obtain a passport. She reminded me that the reasons for

refusal letter does not contain reference to any discretion and argued that if I was to find an error, it could not be a material error of law. She told me that, in the alternative, the Judge could have granted this appeal to the extent of remitting the case to Secretary of State so that she could exercise her discretion.

### Analysis

8. Regulation 17 (1) & (2) provide

“17.— (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.”

9. The only discretion it can be exercised his discretion available to the Secretary of State to set out in regulation 29A as follows

“Alternative evidence of identity and nationality

29A.— (1) Subject to paragraph (2), 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.

(2) This regulation does not apply to regulation 11.”

10. At [7] the Judge summarises the appellant’s oral evidence. His conclusions, based on that evidence are found at [10(a)] where he finds “..... *The appellant will certainly have serious problems to get the new passport from his home country to meet the requirements of the EEA regulations.*”

11. The Judge does not make a finding that the appellant will be “*unable to obtain or produce*” the passport. The Judge’s findings amount to a finding that the passport can be obtained, but it will be difficult.

12. The discretion contained with in regulation 29A is a discretion available to the Secretary of State when the appellant is unable to obtain a passport. It is not a discretion which can be exercised if a passport can only be obtained with some difficulty.

13. At [12] the Judge resolves to use "*an imaginative exercise of discretion*". He defines that discretion at [13] by reference to the European Convention on Human Rights. At [14] the Judge refers to the potential removal of the appellant, and at [1] the Judge identifies the decision as a refusal of leave to remain in the UK.

14. This appeal concerns a decision under the Immigration (EEA) Regulations 2006. The appellant does not face the prospect of removal as a result of the decision. The decision is not a refusal of leave to remain in the UK. The 1950 convention has no relevance to this appeal. In Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 it was held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. In TY (Sri Lanka) [2015] EWCA Civ 1233 the Court of Appeal agreed with Amirteymour At paragraph 35 the Court said "*It is impossible to say that the Secretary of State's decision to withhold a residence card (a decision which is correct under the EEA Regulations) will or could cause the UK to be in breach of the Refugee Convention or ECHR. The UK will only be in breach of those Conventions if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or the tribunals incorrectly reject*". At paragraphs 26 and 27 the Court of Appeal said that "*...The appellant would only have such a right (to proceed under Article 8) if the Secretary of State had served a one stop notice pursuant to section 120 of the 2002 Act and paragraph 4 (8) of Schedule 2 to the EEA Regulations....Since there is no section 120 one stop notice, the appellant is confined to the subject matter of the original decision*".

15. Not only is there no foundation for the Judge's purported exercise of discretion, the Judge incorrectly identifies the decision appealed against and appears to consider the 1950 Convention - which has no relevance to this appeal. These are all material errors of law. I must therefore set the decision aside.

16. There is sufficient information before me to enable me to substitute my own decision.

17. The facts in this case are that the appellant is a national of Uzbekistan. The appellant's Uzbek passport was issued on 9 June 2003, and expired in 2013. The appellant's wife is a Spanish national who is present in the UK exercising treaty rights of movement as a worker. In order to renew his passport, the appellant will have to return to Uzbekistan and apply at the regional office of the Ministry of internal affairs where he is permanently registered.

18. On 2 October 2014 the appellant submitted an application for a residence card. In support of his application he tendered his wife's passport, his marriage certificate, his birth certificate, wage slips and bank statements for his wife, and a letter from the Embassy of Uzbekistan confirming that he will have to return to Uzbekistan to renew his passport.

19. It is not impossible for the appellant to renew his passport, but it may well be expensive and inconvenient.

#### Conclusion

20. The appellant cannot fulfil the requirements of regulation 17(1)(a) of the 2006 regulations. The appellant is able to renew his passport.

#### **Decision**

**21. There is a material error on a point of law in the decision of the First-tier Tribunal. I therefore set that decision aside**

**22. I substitute the following decision.**

**23. The appellant's appeal under the Immigration (EEA) Regulations 2006 is dismissed.**

Signed

Date 8 February 2016

Deputy Upper Tribunal Judge Doyle