



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29340/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16 October 2015 and
16 December 2015

Decision and Reasons Promulgated
On 7 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JANAKAN NADARAJAH
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tufan (Senior Home Office Presenting Officer)

For the Respondent: Mr M Murphy (counsel instructed by Waran and Co Solicitors)

DECISION AND REASONS
FINAL HEARING

1. These proceedings arise from the appeal of Janakan Nadarajah, a citizen of Sri Lanka born 20 June 1976, against the decision of the Secretary of State of 8 July 2014 to refuse his application for a residence card confirming his right of residence based on being the spouse of his French wife Rathini Pankiras. The First-tier

Tribunal having allowed the appeal, the Secretary of State now appeals to the Upper Tribunal with permission.

2. The application was originally refused because of suspicions held by the Secretary of State that the marriage was one of convenience, and additionally because no valid identity document had been provided: “there is no reason why a new, valid Sri Lankan passport cannot be obtained by yourself.”
3. The First-tier Tribunal accepted the reality of the relationship between the couple, and went on to find that there was satisfactory evidence before it that Mr Nadarajah had handed in his passport to the interviewing officer at his asylum interview, and concluded that this disposed of the issue of his possession of a valid passport, notwithstanding that it was unclear whether the document was still valid.
4. The Secretary of State appealed, Judge Pooler of the First-tier Tribunal granting permission on 13 February 2015, because it was arguable that the Appellant had failed to produce a valid document.
5. At the error of law hearing Ms Willocks-Briscoe relied on the grounds of appeal as endorsed by the grant of permission, essentially contending that it had been Mr Nadarajah’s responsibility to produce a valid passport whereas Mr Murphy argued that there was no material error of law here, as the Secretary of State was not disputing his identity.
6. Regulation 17 of The Immigration (European Economic Area) Regulations 2006 provides:

“(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.”
7. Regulation 29A of addresses “Alternative evidence of identity and nationality” and provides that, subject to a scenario not within the scope of this appeal, that “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.”
8. I found that the decision of the First-tier Tribunal was indeed flawed by error of law. The provision of a passport is a requirement of an application for a residence card. The discretion to relieve an Applicant of the obligation of so doing applies only where its production is not possible due to circumstances beyond the applicant’s control. This is not simply a matter of domestic law as the requirement finds its basis in the Citizens Directive, Article 10 of which addresses the issue of residence cards stating at 10(2)(a) that “Member States shall require presentation of the following documents ... a valid passport”.

9. The First-tier Tribunal assumed, without any evidential foundation, that the passport remained valid (or alternatively treated the matter as irrelevant), notwithstanding the statement in the refusal letter that the application could only be granted if “a new, valid Sri Lankan passport” was provided. The expiry of his passport is a matter that can reasonably be supposed to have been within the knowledge of the Appellant, and yet he provided no evidence as to why he was unable to obtain a new passport from his national authorities. The First-tier Tribunal failed to direct its mind to the requirements of Regulation 29A.
10. A further witness statement was supplied at the appeal hearing which set out that the Appellant having been issued an entry clearance on 2 December 2008, the Entry Clearance Officer having been satisfied as to his identity. He handed over his passport on 30 May 2012 when he sought asylum and was given an asylum registration card. He went to the High Commission of Sri Lanka to apply for a new passport. He had learned that the Home Office’s policy was not to release documents for a person who had been refused asylum.
11. At the continuation hearing the Appellant gave evidence. Having adopted his witness statement which set out his failed attempts to obtain documentation from the Sri Lankan High Commission, he said that when he attended that office they were satisfied as to his identity but still maintained they required a letter from the Home Office or proof of his lawful residence in the United Kingdom before issuing him with a new passport. His solicitors had written to the Presenting Officers Unit asking for his passport to be returned to him or for some other facilitation of his efforts (there was indeed a letter to such effect provided in the Appellant’s bundle) but there had been no reply. He felt that there was more that he could do to progress his attempt to obtain a passport.
12. Cross examined he confirmed that he provided his old passport to the Home Office when he claimed asylum: it had expired in May 2012. He confirmed that he had been refused asylum and excluded from refugee status due to his LTTE activities, the appeal originally being allowed to a limited extent leaving the decision outstanding before the Home Office, against whose re-refusal he did not appeal. He had given all his available documents to the Sri Lankan authorities including his identity card. They had not justified their refusal to help him on the grounds that he was a LTTE member.
13. Mr Tufan submitted that it was improbable that the Appellant's national authorities would not issue him with a passport: it was unclear why they would need the confirmation from another government of his legal status before issuing such a document. There was no expert evidence to confirm that this was their likely stance. He had never had a valid passport in this country. If it was accepted that there was a valid reason calling into play the Regulation 29A discretion, then this should be remitted to the Home Office to reconsider, given that arguably the Respondent had not exercised the discretion hitherto. Mr Murphy submitted that the Appellant was in a “Catch 22” situation, caught between the authorities of Sri Lanka and the United Kingdom who between them had failed to advance his wish to document himself.

Findings and reasons

14. Having heard oral evidence, and bearing in mind that the Appellant was previously accepted as credible in the First-tier Tribunal, I accept the account that he has advanced of his difficulties with the Sri Lankan authorities. I do not consider there is anything inherently surprising about them insisting upon seeing evidence of lawful residence in the United Kingdom before issuing a new document: officialdom the world over is known to insist on formalities of this nature. Nobody familiar with immigration appeals (or indeed with unlawful detention claims) can fail to be aware of the difficulties that individuals often face in satisfying their national authorities of their entitlement to a passport: even the Secretary of State often fails to secure the cooperation of foreign authorities notwithstanding her best efforts.
15. In this appeal the Home Office has not answered the Appellant's request to support his application, and so have not assisted themselves in preventing him from satisfying the burden of proof to show, on balance of probabilities, that he is unable to obtain the required document due to circumstances beyond his control. I accept, therefore, that the decision maker should have considered the Regulation 29A discretion.
16. When one reviews the original refusal letter, Regulation 29A is cited, so it is clear that the Respondent was alive to its potential exercise: but no affirmative discretion was exercised in the Appellant's favour. So this is not an appeal where the Upper Tribunal's powers are limited to allowing the appeal because of the original decision's failure to accord with the law; it can review the exercise of discretion by the Home Office, by analogy with *Aladeselu and Others (2006 Regs - reg 8) Nigeria* [2011] UKUT 00253(IAC) referencing another discretion within the EEA Regulations at [31]: "Whilst we can consider whether a discretionary power should have been exercised differently, we cannot seek to do that if there has as yet been no exercise of that power."
17. It seems to me that the discretion should have been exercised in the Appellant's favour, given that he has done all within his power to secure the relevant document, in circumstances where the Secretary of State has never disputed his identity and yet failed to herself issue a letter that might have resolved the difficulties far sooner.

Decision:



Signed:
Deputy Upper Tribunal Judge Symes

Date: 16 December 2015

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, I make a full fee award of £140.00.

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 15 December 2015