



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

Appeal Number: EA/01741/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 27th February 2018**

**Decision & Reasons
Promulgated
On 15th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**MR DARSHAN NARESHKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative

For the Respondent: Mr J McGill, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mr Darshan Nareshkumar Patel against a decision of First-tier Tribunal Judge Jones, promulgated on the 1st June 2017, to dismiss his appeal against refusal of an EEA Residence Card on the ground that there was no valid appeal.

2. The text of Judge Jones' decision reads as follows:

- “1. The Appellant was born on 6th August 1985 and is a citizen of India. He applied for a residence card as the spouse of a Portuguese national exercising free movement rights in the United Kingdom. A Notice of Refusal was issued by the Respondent on 26th January 2016 and an appeal lodged.
2. The parties were represented as noted above. At the outset of the hearing I sought to identify the parties and the extent of the papers. It became quickly evident to me on reviewing the file of papers that the Respondent's basis of refusal in terms of Regulation 17 of the Immigration (EEA) Regulations 2006 included, amongst other things, the fact that the Appellant produced an expired passport. However, Regulation 17(1)(a) requires a current passport to be produced as evidence of identification.
3. I asked the Appellant if this was the case, if he had renewed his passport and he said that he had thought about it but had not got round to it. He had made enquiries on Capita and other websites as to how to go about it, but he had failed to do this (even up to the time of this hearing of which he has had considerable notice), though he realised this is one of the reasons why the Respondent had refused to consider his application.
4. Regrettably, I had to inform the Appellant that, pursuant to Regulation 26(2) of these Regulations, it is clear that the Appellant does not have a right of appeal unless he has produced such a document. He has not produced a document any more than he has it available to him today for the purposes of the hearing, and I advised him that the Tribunal, regrettably, has no jurisdiction to hear his appeal. Ms Weston concurred. Accordingly, I advised the Appellant that I am obliged to dismiss his appeal and he would need to give further consideration to his legal position, taking legal advice as he sees fit without delay. Whilst there is nothing in the present notice which suggests he is liable to be removed, he should bear in mind that he would need to take steps if he wished to renew any application, or preserve any other rights, so that he might remain in the United Kingdom, lest the Respondent takes steps to remove him and/or restrict any right of appeal to an out of country appeal.
5. There is therefore no valid appeal before the Tribunal. When the Tribunal makes such a decision it shall take no further action, save to send the parties to the appeal a copy of this Notice.”

3. The principal (if not the only) complaint made in the Grounds of Appeal is that the judge quoted the wrong subparagraph of Regulation 26. Subparagraph (2) of that Regulation is applicable only to EEA nationals which, as the appellant correctly observes, he is not. Rather, he is the family member of an EEA national. However this distinction is immaterial given that precisely the same requirement is contained within subparagraph (3) of Regulation 26; namely, that he produces a passport.

4. I quote now from the grant of permission to appeal by Judge Landes:

“1. This is an in-time application by the appellant for permission to appeal against a decision of Judge of the First-tier Tribunal T Jones promulgated on 1 June 2017 dismissing the appellant’s appeal for want of jurisdiction.

2. As is correctly identified in the grounds, the judge referred to the incorrect regulation – 26(2) EEA regulations. Regulation 26(2) is relevant to the position of EEA nationals only.

3. I have considered carefully whether any error could only be immaterial as whereas the relevant regulation appears to be regulation 26(3), regulation 26(3) also refers to the production of a passport. However whilst the appellant is likely to have had difficulties succeeding under regulation 17 if he did not have a valid passport, the question of jurisdiction is a different one. Bearing in mind that:

(i) the wording in regulation 26(3) is ‘passport’ as opposed to ‘valid passport’ and the appellant had produced an expired passport to the respondent;

(ii) the judge did not expressly consider the terms of regulation 29A EEA regulations;

(iii) the EEA regulations fall to be interpreted in accordance with the Directive which provides that the persons concerned should have access to procedures to enable them to appeal or seek review of any decision.

I cannot say that any error made by the judge can only have been immaterial to the question of jurisdiction.”

5. I emphasise that I have made my decision on the basis of the arguable errors of law identified by Judge Landes rather than the rather narrow point that was taken by the Appellant in his grounds (see paragraph 3, above).
6. I say straight away that I do not think it is arguable that the judge made an error of law in failing to give express consideration to the terms of Regulation 29A of the EEA Regulations. I say this because whilst Regulation 29A makes provision for alternative proof of identification, this is only in the context of applications considered by the Secretary of State. It is not therefore relevant to the issue of the jurisdiction of the Tribunal to entertain an appeal from the Secretary of State.
7. However, the matters raised by Judge Landes at sub-paragraphs (i) and (iii) of paragraph 3 of the grant of permission to appeal are, in my judgment, highly relevant. Whereas Regulation 17 (which governs the grant of applications) refers to a “valid passport”, Regulation 26 (which governs the right of appeal) refers only to a “passport”. On the assumption that the word “valid” equates in this context to the word “current”, the issue in this appeal turns upon the question of whether its omission from Regulation 26 is significant. In my judgment it is. This is because, as Judge Landes pointed out, the EEA Regulations fall to be interpreted in accordance with the Directive that requires member states

to ensure that the persons concerned have an effective right of appeal or review. I therefore conclude that the purpose of the requirement under Regulation 26 to provide a passport is merely to establish the person's identity. It need not therefore be 'current' in the sense of authorising future cross-border travel. This may also explain why it is unnecessary for Regulation 26 to make provision for alternative means of identification, in contrast with the position under Regulation 29 [see paragraph 6, above].

8. Returning to the facts of this appeal, the position is that the Appellant had produced a passport (albeit not a current one) and he therefore fulfilled the requirements under Regulation 26 for the making of a valid appeal. It was therefore an error of law for the judge to hold otherwise.
9. The next question is how to proceed further. Given that the First-tier Tribunal has never entertained or considered the substantive merits of the Appellant's appeal, it seems to me that the appropriate course is for this appeal to be remitted to the First-tier Tribunal for it to carry out that task. This is because the Appellant is in the first instance entitled to receive a decision upon the merits of his appeal from the First-tier Tribunal. Only then might it become appropriate for the Upper Tribunal to review the merits of his application. On behalf of the Home Office, Mr McGill indicated that he did not oppose this course.

Notice of Decision

10. The appeal is allowed.
11. The decision of the First-tier Tribunal is set aside and remitted for the appeal to be heard at Taylor House before any judge other than Judge Jones.

No anonymity direction is made.

Signed

Date: 14th March 2018

Deputy Upper Tribunal Judge Kelly