



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/12819/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 25 June 2018

Decision Promulgated  
On 26 June 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

CHIJOKE CHUKA NDULUE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:

Miss K. McCarthy, instructed by M & K Solicitors

For the respondent:

Mr P. Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant entered the UK in his current identity on 12 March 2005 with entry clearance as a visitor. The appellant made an application for entry clearance as a student. He admits that this was a false application made from abroad when, in fact, he was still in the UK. On 25 July 2005 he was granted entry clearance as a student,

which was valid until 31 October 2008. However, the appellant had to return to Nigeria to collect his passport with the entry clearance endorsement. To do so he obtained a false passport in the UK. On 18 September 2005 he was stopped when boarding a plane to Nigeria and was arrested for using a false passport. He admits to having lied in interview, claiming that he had entered the UK in July 2005 on a passport in the name of Vincent Okaneme. On 21 October 2005 he was sentenced to 18 months' imprisonment. On 14 April 2006 he was deported in the identity of Emeka Chinedu. When the appellant arrived in Nigeria he collected his passport in what he claims is his real identity, Chijioke Chuka Ndulue. He says that he re-entered the UK in breach of the deportation order only three weeks after his removal. It is unclear on what basis the appellant entered the UK, but I note that the entry clearance as a student that the appellant obtained on a false premise, was likely to still be valid.

2. On 10 January 2011 the appellant was issued a residence card as the family member (spouse) of an EEA national. The appellant claimed to be in a genuine marriage with a Portuguese citizen. The residence card was issued in his current identity of Chijioke Chuka Ndulue. It is unclear why the appellant's previous identity, and the fact that he had returned to the UK in breach of a deportation order, was not discovered at that stage. It seems clear that the appellant must have deliberately concealed his past immigration history when he made the application for a residence card. The marriage was dissolved by decree absolute on 27 May 2015.
3. The appellant made an application for a permanent residence card on 17 December 2015. At this point the respondent matched the appellant's biometric details to his earlier identity of Emeka Chinedu. In view of his immigration history, the respondent decided to interview the appellant. The application was refused in a decision dated 11 October 2016. The respondent was not satisfied that the appellant gave a credible account of his relationship with an EEA national and concluded that the marriage was one of convenience. The decision letter went on to state:

"A person who would normally have an automatic right to reside under European law, but has proven themselves to be a present and serious threat to the society of the United Kingdom, may be refused a document confirming a right of residence under regulation 20 of the Immigration (EEA) Regulations 2006 ("the Regulations"). A refusal under this regulation requires the application of a 'public policy test' to determine whether or not a refusal would impinge upon the rights of the applicant under Directive EC/2004/38 ("the Free Movement Directive").

However, in cases where it is considered that the applicant does not have an automatic right to reside under European law, any criminality would fall to be considered under domestic law, specifically paragraph 322(5) of the Immigration Rules."

4. The decision letter went on to state that, even if substantive consideration was to be given to the application, the respondent "noted" the discretion set out in regulation 17(4) of the EEA Regulations 2006. At the hearing before the First-tier Tribunal accepted the Home Office Presenting Officer accepted that it was incorrect to decide the application with reference to the general grounds for refusal contained in the immigration rules. I also note that regulation 17 would not apply to this case, because

it did not involve an application made by a person claiming to be an 'extended family member'.

5. Some question mark must be raised about the Home Office decision-maker's understanding of the relevant legal framework. As I mentioned to Mr Duffy at the hearing, the respondent may want to reconsider decision letter with reference to the correct policy. It is a matter for the respondent whether he wishes to review the matter and to decide which policy is applicable. The most recent policy statement that appears to be relevant is the policy on "EEA decisions on grounds of public policy and public security" (Version 3.0 - 14 December 2017) at pg.34. It outlines the respondent's approach when individuals have previously been deported under the Immigration Act 1971. Whether the respondent decides to review the decision letter is a matter for him, but he may want to ensure that the decision is taken on the correct basis.
6. The appellant appealed the respondent's decision dated 11 October 2016 to refuse to issue a permanent residence card as the family member of an EEA national who retained a right of residence following divorce. First-tier Tribunal Judge Page ("the judge") dismissed the appeal in a decision promulgated on 31 October 2017. He made the following findings:

- "19. The appellant is not an EEA national. He could not be an EEA national and a "qualified person" under Regulation 6 if he was. To be so he would have to be here in accordance with the EEA Regulations 2006 and that would be impossible in his circumstances because of the extant deportation order. It begs the question as to how he could sensibly, be so described, in circumstances where he had obtained a residence card upon marriage by deception, the deception being the nondisclosure that he was subject to a deportation order. In his circumstances he could not be in the United Kingdom in accordance with the EEA Regulations 2006. As a deported person he should not have been in the United Kingdom when he married, or now.
20. The burden of proof has been upon the appellant in this appeal on the issue of entitlement to a permanent residence card. If the judgment of the European Court in Metock had been a complete answer to the question as to how the appellant could be entitled to a residence card in these circumstances, I would have expected to have seen that point made in the skeleton argument prepared by Ms Akinbolu. In the absence of authority from the Upper Tribunal that the European Court judgment in Metock enables the appellant, the subject to a deportation order at the time of his marriage to an EEA national, I am not persuaded that it is arguable.
21. I need make no findings about whether the appellant's marriage was a sham. They are now divorced. As I am not satisfied that the appellant had any entitlement at the time of divorce if the marriage was genuine, I need not wade through the voluminous evidence of the sponsor's employment records, or the appellant's for that matter. In my judgment the appellant's application was void at the outset because he had obtained his residence card by deception upon marriage by not disclosing his true immigration history. If the appellant had informed the respondent in his application for a residence card after marriage that Metock rendered the respondent's deportation order null and void, the respondent would have refused the appellant's application. In my judgment, the later application for a permanent residence card that was refused on 11 October 2016, and under appeal, was flawed by the deception used in the first application and the fact that the appellant was not in the United Kingdom, and has never been in the United Kingdom, in accordance with the EEA Regulations 2006."

7. The appellant appealed the First-tier decision arguing that the judge failed to give adequate reasons for not applying the principles outlined in *Metock & Others (Area of Freedom, Security and Justice)* [2008] EUECJ C-127/08. The domestic courts are bound by decisions of the Court of Justice of the European Union.
8. First-tier Tribunal Judge Pooler granted permission to appeal in the following terms:

“It is arguable that the appellant was entitled to the benefits of the Directive on marriage to an EEA national. It is also arguable, if the appellant succeeded on that basis, that the judge erred by not deciding the other issues in the appeal, namely whether the appellant’s marriage was one of convenience and whether his spouse had been exercising treaty rights.”

### **Decision and reasons**

9. Rule 40(2)(a) states that the Upper Tribunal must provide a decision notice to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings. Rule 40(3) provides exceptions to the requirement to provide written reasons with the decision notice if the decision is made with the consent of the parties or the parties have consented to the Upper Tribunal not giving written reasons. In this case both parties agreed that the First-tier Tribunal decision involved the making of an error of law so it is not necessary to give detailed reasons.
10. In summary, the parties agreed that the judge failed to apply the principles outlined in *Metock* correctly. The judge failed to give adequate reasons for departing from those principles. The fact that the case was not referred to in counsel’s skeleton argument is hardly good reason not to address the principles outlined by the Court of Justice. The judge’s findings relating to the import of the deportation order made under the Immigration Act 1971 are confused and unclear. The decision fails to appreciate that domestic and European law are distinct legal frameworks. The confusion may have originated in the respondent’s decision letter, which also muddled the distinct frameworks of domestic and European law. It is not a prerequisite for the appellant to be in the UK lawfully to establish residence rights under European law. The establishment of European residence rights does not render a deportation order made under the Immigration Act 1971 “null and void”, but the respondent would have to consider whether it justifies revocation of an existing deportation order, and if not, whether there were public policy grounds to justify refusing the application for a residence card. If the respondent considered that there were public policy issues arising from the appellant’s entry in breach of a deportation order those concerns could and should have been raised in the context of the relevant public policy provisions contained in the Directive and the EEA Regulations. The judge failed to make findings in relation to issues that were material to a proper determination of the appeal i.e. whether the marriage was one of convenience.
11. I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. I agree with the parties that the nature and extent of judicial fact finding that is necessary to remake the decision is such that it is appropriate to remit the case

to the First-tier Tribunal for a fresh hearing (see paragraph 7.2 Practice Statement – 25/09/12).


**Directions**

12. The Upper Tribunal does not usually make directions relating to the conduct of the remitted appeal, but in this case, it is likely to assist both parties and general case management if the respondent is directed to produce a copy of the interview record relied upon in the decision letter. To this end the respondent is directed to serve a copy of the interview record/transcript by **Monday 23 July 2018** at the latest.

**DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted for a fresh hearing before the First-tier Tribunal

Signed   
Upper Tribunal Judge Canavan

Date 25 June 2018