



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/02856/2018

THE IMMIGRATION ACTS

Heard at: Field House  
On: 11<sup>th</sup> January 2019

Decision Reasons Promulgated  
On: 4<sup>th</sup> February 2019

Before

UPPER TRIBUNAL JUDGE KEBEDE  
UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

[D T]

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Karim, instructed through Direct Access

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's decision of 28 March 2018 refusing to issue him with a document certifying permanent residence under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), it was found, at a hearing on 13 November 2018, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside.

2. The appellant is a national of Portugal, born on 6 August 2011 in the UK to a Portuguese father and a Nigerian mother. He applied on 13 March 2018 for a document certifying permanent residence in the UK under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”), relying on the evidence of his father having exercised treaty rights for five years.

3. In his application form the appellant stated that the sponsor’s place and country of birth was Portugal and that he was submitting a certified copy of his sponsor’s identity card because his sponsor was not in the country. The sponsor’s declaration was not signed by the sponsor, as it was said that he was travelling. A copy of the sponsor’s Portuguese identity card was produced, certified as a true copy by the notary of the Registry Office of Baixa Da Banheira.

4. The appellant’s application was considered under regulation 19 of the EEA Regulations 2016 and was refused on 28 March 2018. The respondent accepted that the appellant was the son of [FT], but noted that there was no valid identification to show his sponsor’s nationality and considered that he had therefore not provided adequate evidence to show that he qualified for a right to reside as the family member of his EEA sponsor.

5. The appellant appealed against that decision. He requested that the appeal be determined on the papers without an oral hearing and produced a skeleton argument making the following legal arguments.

6. Firstly, there was no requirement for the appellant to provide his father’s identity documents as part of the application to qualify for permanent residence under regulation 19(1) and (2) of the Regulations. Secondly, the appellant did provide the valid identity of his father, which was all that was required under the Home Office Guidance “Free Movement Rights: direct family members of European Economic Area (EEA) nationals”, Version 5.0 of 21 April 2017 at page 8. Thirdly, the respondent should have considered their existing records which would reveal the EEA national’s identity as seen in 2010, as confirmed in Barnett and others (EEA Regulations: rights and documentation) [2012] UKUT 00142. Fourthly, with regard to regulation 42, there were circumstances outside the appellant’s control which prevented him from providing his father’s original documents, which the respondent had failed to consider.

7. In a decision promulgated on 5 July 2018, First-tier Tribunal Judge Carroll relied upon the Home Office guidance, version 6.0, of 21 April 2017: “Processes and procedures for EEA documentation applications” at page 159 of the appellant’s appeal bundle. Page 37 of that guidance stated that passports and identity documents must be originals and at page 35 stated that alternative evidence of identity and nationality could be accepted in circumstances beyond the person’s control. The judge did not accept that such circumstances arose in the appellant’s case as there was no evidence of contact between the appellant’s mother and father or of any efforts made to obtain the sponsor’s original identity card. The judge found, therefore, that the provisions of regulation 19 had not been met and dismissed the appeal.

8. The appellant sought, and was granted, permission to appeal to the Upper Tribunal. Following an error of law hearing on 13 November 2018, errors of law in the judge's decision were found and the decision was set aside on the following basis:

"10. Whilst the appellant, in his skeleton argument before the First-tier Tribunal, raised four distinct arguments, it seems that the judge engaged in only one of those arguments, the last one. In regard to the findings she made on that last argument, her findings were particularly limited and, in considering regulation 42 and the requirement for there to be circumstances beyond the person's control, she did not engage with the assertion that such circumstances existed as a result of the appellant being a minor.

11. Accordingly, the judge's decision fails to engage in much of the arguments made before her and is simply unsustainable. I set aside the judge's decision in its entirety.

12. As indicated at the hearing, if I was not able to re-make the decision on the papers before me, I would have the appeal listed for a resumed hearing. I have decided that a resumed hearing is required to clarify various points."

9. Directions were made for the resumed hearing, for the appellant to provide further details and evidence of the application said to have been made by the sponsor in 2010 and the documents submitted in support of that application, and for the respondent to provide details of the regulations and guidance relied upon in requiring the appellant to produce the originals of the EEA national sponsor's identification documents and to confirm whether any issue was taken with the EEA national's status within the EEA Regulations.

10. The appeal then came before us on 11 January 2019, by which time the appellant had filed further evidence, namely evidence of the EEA national sponsor exercising treaty rights in 2010 and a copy of the sponsor's Portuguese citizen card, which it was said had been sent in original form to the Home Office in 2010. The respondent had not responded to the directions, which we considered to be highly unsatisfactory. Mr Kotas produced a skeleton argument at the hearing, together with the Home Office guidance "Processes and procedures for EEA documentation applications" Version 7.0 of 24 July 2018.

11. We asked Mr Kotas for confirmation that the only issue in this case was the validity of the documentation required to show the sponsor's nationality and that there was no issue with the sponsor having exercised treaty rights for five years during the appellant's residence in the UK. Mr Kotas confirmed that that was the case.

12. Mr Karim submitted that Regulation 19 talked about the applicant and that there was no requirement therein for the sponsor to produce original documentation. However, even if there was such a requirement, the Home Office guidance made it clear that the Secretary of State could accept copies of the documentation if the originals had previously been seen. In the appellant's case, the sponsor's original document had been provided to the respondent in 2010. The respondent had not responded to the Tribunal's directions to state otherwise. The appellant was entitled to permanent residence.

13. Mr Kotas submitted that the case of Barnett had no application as it related to the 2006 Regulations, whereas those regulations had been revoked under the EEA Regulations 2016. He submitted that it could be said that the wording of Regulation 19 was not as

unambiguous as Mr Karim was submitting and it could be said that the appellant's position was parasitic upon that of his father, so that it was a prerequisite for his father's identification document to be produced. Mr Kotas relied on the 24 July 2018 Home Office guidance at page 37 which required original documents to be produced and page 34 which required acceptable evidence of identity of the EEA national sponsor. Alternative documentation could be accepted only in limited exceptional circumstances, whereas the explanation provided in the appellant's case, that his father was abroad, was not sufficient.

14. Mr Karim, in response, reiterated his submission that regulation 19 provided no obligation on the applicant to produce original documentation. There was no risk to the respondent in accepting a copy, as the original document had been seen previously. There were in any event exceptional circumstances, as the appellant was a minor whose father was travelling.

15. The appellant's mother explained to us that she had had no contact with her son's father since he had provided the photocopied documents. She had no contact details for him and neither had his sister.

16. In response to our enquiries, Mr Kotas confirmed that the respondent accepted that the Secretary of State had seen the sponsor's original Portuguese identity card in 2010, that the sponsor was the appellant's father, that the sponsor was an EEA national and no issue was taken with the sponsor's five years of exercising treaty rights whilst the appellant was in the UK.

### **Legislative Framework**

17. In so far as they are relevant, the EEA Regulations 2016 state as follows:

**"Issue of a document certifying permanent residence and a permanent residence card**

19.- (1) The Secretary of State must, as soon as possible, issue an EEA national with a right of permanent residence under regulation 15 with a document certifying permanent residence on application and the production of –

- (a) a valid national identity card or passport issued by an EEA State; and
- (b) proof that the EEA national has a right of permanent residence.

(2) The Secretary of State must issue a person who is not an EEA national who has a right of permanent residence under regulation 15 with a permanent residence card no later than six months after an application is received and the production of –

- (a) a valid passport; and
- (b) proof that the person has a right of permanent residence."

...

**"Alternative evidence of identity and nationality**

- 42.- (1) Subject to paragraph (2), where a provision of these Regulations requires a person to hold or produce a valid national 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 the person's control.
- (2) This regulation does not apply to regulation 11. "

### Consideration and discussion

18. Whilst the ground given in the respondent's decision for refusing the appellant's application was "*we have determined that you have not provided adequate evidence to show that you qualify for a right to reside as the family member of your EEA sponsor*", the only reason given was the absence of the sponsor's identity document confirming his nationality. There was otherwise no issue taken in the decision with the appellant's entitlement to permanent residence.

19. That was precisely the issue arising in the case of Barnett, where the Upper Tribunal stated the following:

"25. The requirement of proof may, indeed, entail proving the identity of the EEA national. However, by the time one comes to an application under regulation 18, it is likely that the issue of identity will already have been satisfactorily resolved for the Secretary of State's purposes. Indeed, it is common ground in the present appeals that the respondents' earlier successful applications were accompanied by Mr Bialachowski's passport. As a general matter, the Secretary of State cannot lawfully insist under regulation 18 on an applicant's producing the EEA national's passport or other identity document, unless the same is genuinely required in order to prove the right which the applicant is asserting, in order to be granted the permanent residence card."

20. Accordingly the Upper Tribunal in Barnett found there to be no requirement in regulations 17 and 18 for the production of the EEA national sponsor's passport or identity document.

21. Although the appellant's case falls within the 2016 Regulations and not the 2006 Regulations as in Barnett, it seems to us, contrary to Mr Kotas' submission, that the Upper Tribunal's observations and findings nevertheless apply to the equivalent provision in regulation 19 of the 2016 Regulations. Mr Kotas rightly pointed out that regulation 19 of the 2016 Regulations, unlike regulation 18 of the 2006 Regulations, specifically requires production of documentation, but we agree with Mr Karim that there is nothing in the wording of Regulation 19(1) to suggest that it is the identification documents of the EEA national sponsor which have to be produced. Regulation 19(1)(a) indicates that it is the valid national identity card of the EEA applicant himself which is required. Regulation 19(1)(b) requires proof that the EEA national has a right of permanent residence, but we cannot see how there is any dispute in that regard given that Mr Kotas unequivocally confirmed that the sponsor's original EEA identification document had been seen and accepted by the Secretary of State when he made an application in 2010, that it was accepted that he was an EEA national, that it was accepted that the sponsor was the

appellant's father and that it was accepted that the sponsor had exercised treaty rights for five years during the appellant's residence in the UK. Accordingly we agree with Mr Karim that there is nothing in the EEA Regulations 2016 specifically requiring the production of the EEA national sponsor's identity documentation, particularly in the circumstances of this case.

22. Nevertheless, the Home Office guidance does include certain requirements and Mr Kotas relied upon the most recent guidance "Processes and procedures for EEA documentation applications" Version 7.0 of 24 July 2018 in that regard. He referred to page 34 which states that "If the EEA national is applying as the family member of another EEA national, they must also submit acceptable evidence of identity for that EEA national". He also relied upon pages 6 to 8 and 35 to 37 in regard to the requirement to provide original documents and the circumstances in which alternative evidence of identity would be accepted.

23. We note, as Mr Kotas submitted, that the requirement at page 34 is for there to be "acceptable evidence of identity" of the EEA national sponsor. "Acceptable evidence of identity" is said to be a valid national identity card or passport. The appellant has provided evidence of his father's Portuguese nationality in the form of a certified copy of his Portuguese identity card, which, as Mr Karim submitted, is evidence of a valid EEA national ID card. We see no reason why that evidence should not satisfy the requirements in the guidance as to evidence of the sponsor's identity and nationality when the sponsor's original Portuguese identity card was seen and accepted by the respondent previously in 2010 and when the respondent accepts in any event, as confirmed by Mr Kotas, that the sponsor is an EEA national.

24. However, and in so far as the guidance, at page 37, requires that passports and identity documents must be originals, we take note of the "alternative evidence" exception at page 35 of the guidance and regulation 42 of the 2016 Regulations, permitting alternative evidence of identity and nationality where there are "exceptional reasons" why such documentation cannot be produced due to "circumstances beyond their control". We find, again, no reason why the certified copy of the sponsor's Portuguese identity card should not have been accepted as alternative evidence. Whilst we have some reservations about the appellant's mother's evidence that she has lost all contact with the sponsor and has no way of contacting him either directly or through his family members, we consider that the appellant, as a minor, has little or no control himself over the situation. We also consider that, in circumstances where the respondent takes no issue with the fact that the sponsor is an EEA national who was exercising treaty rights in the UK for five years at a time when the appellant resided here, that the respondent accepts the sponsor's EEA nationality and that the respondent accepts that the sponsor is the appellant's father, there is little to be gained by the appellant by lying about his inability to contact his father.

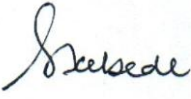
25. We also accept Mr Karim's submission that the risk attached to accepting photocopied documents, as referred to at page 35 of the guidance, is mitigated in this case by the fact that the respondent accepted the sponsor's EEA nationality and had seen his original identity card in 2010. Accordingly, in the particular and peculiar circumstances of

this case, it seems to us that the “alternative evidence of identity” provisions in the Home Office guidance and Regulation 42 are met.

26. For all of these reasons we find that the appellant is able to meet the requirements of regulation 19 of the 2016 Regulations so as to entitle him to a document certifying permanent residence in the UK.

### **DECISION**

27. The original Tribunal was found to have made an error of law. We re-make the decision by allowing the appeal under the EEA Regulations.

Signed   
Upper Tribunal Judge Kebede

Date: 14 January 2019