



Upper Tribunal

(Immigration and Asylum Chamber)

Nkrumah (OFM – annulment of residence permit) Ghana [2011] UKUT 00163 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

On 25 February 2011

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Before

THE PRESIDENT MR JUSTICE BLAKE

SENIOR IMMIGRATION JUDGE McGEACHY

Between

BRIGHT KOFI NKURMAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: N O'Brien instructed by Joseph Thaliyan and Co

For the Respondent: Lawrence Tarlow Senior HOPO

1. Where a residence card has been issued in a passport on an application duly made it becomes a valid document if it has not been cancelled before it is communicated to the applicant.
2. An application for a residence card cannot be lawfully refused if it has already been issued.
3. A residence card may be revoked if it is shown that it was issued by mistake to someone not entitled to it.

DETERMINATION AND REASONS

1.

The appellant is a national of Ghana born in 1970. He has a sister who was born in Ghana in 1966 but is now a national of the Netherlands. The sister came to the United Kingdom in July 2003 and has been living in accommodation in Reading with the appellant. She is in employment. The appellant has studied here and says that his sister has supported him in this country and continues to do so and has previously sent remittances to his parents in Ghana and that he was supported from those remittances before he came to the United Kingdom.

2.

In 2008 the appellant applied to the Home Office for an EEA residence card as a member of his sister's extended family within the meaning of regulation 8(2) of the Immigration (EEA) Regulations 2006 (the Regulations).

3.

On the 21 October 2009 a residence card valid for five years until October 2014 was stamped in the appellant's passport. The passport was retained in the Home Office until December 2009 when it was sent to the appellant with a letter stating that the application was refused and affording a right of appeal.

4.

The appellant appealed the decision to refuse the residence permit, even though he had a residence permit that had not been cancelled or revoked in his passport. The IJ was not satisfied on the evidence presented that the appellant was entitled to a residence card. The appeal was dismissed.

5.

Before us, the submissions have focused on a short point: is the residence card stamped in the passport a valid card unless or until it is revoked?

6.

Mr Tarlow submitted that the grant of a residence permit was a mistake; the mistake in this case must have been obvious to the appellant who would have known that residence card had not in fact been granted because of the accompanying letter. Accordingly it could not be said that there was a valid residence card and the operative decision was the refusal.

7.

We do not agree. The position was confusing but this was not a case of two letters simultaneously issued and contradicting themselves as to whether a card would or would not be granted. Here a residence card was unambiguously stamped in the passport. The grant of a residence card in extended family cases is a matter of discretion for the Secretary of State. By analogy with cases of leave to remain, where a residence card is issued, it takes effect when communicated to the applicant: see Rafiq v SSHD [1998] INLR 349 at 355 and discussion in McDonald Immigration Law and Practice (Eight Edition) at 4.31. The fact that it may have been granted by mistake does not make it a nullity. There is no suggestion that it was obtained by misrepresentation.

8.

It would be possible to annul a residence card issued by mistake up to the moment when it is communicated. It is clear that the residence card was stamped in the passport some two months before the date of the refusal letter. If that was an administrative error and the intention was to refuse the application, in our judgment it was necessary for the Home Office to cancel the document before communicating the refusal.

9.

Once residence card has been issued it retains its validity as authority to remain unless or until it expires, lapses by reason of prolonged absence or is revoked under regulation 20. The Tribunal has considered the circumstances when a residence card may be revoked in the case of Samsam v Secretary of State [2011] UKUT 00165 IAC heard on the same day as this appeal.

10.

Accordingly we find that the failure of the IJ to recognise that a residence card had been validly issued and communicated to the appellant was a material error of law. We set aside the decision to dismiss the appeal and we remake it.

11.

The consequence of our conclusion on the validity of the residence card is that the refusal of the application was not in accordance with the law. In our judgment it is unlawful to refuse an application that has already been granted without first cancelling or revoking it. Cancellation without communication would have been effective to annul the grant but this did not happen.

12.

It is still open to the Secretary of State to cancel Mr Nkrumah's residence card if minded to do so. The previous grant of the residence card does not prevent revocation on the basis of a demonstrated lack of entitlement. Although the case law on other family members (OFMs) has given rise to some difficulty (see MR and ors (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC)), the jurisprudence of this Tribunal establishes that pre-entry dependency is necessary before a person can qualify for the favourable exercise of discretion under regulation 8: see VN (Macedonia) [2010] UKUT 380 IAC and RK (OFM-membership of a household-dependency) India [2010] UKUT 421.

13.

Dependency means financial support needed to meet essential living requirements: see SM (India) v ECO Mumbai [2009] EWCA Civ 1426 applying the case of Lebon [1987] ECR 2811. If the evidence does establish pre-entry dependency the appellant may qualify for the grant of the card if can show either continued dependency or continued membership of his sister's household.

14.

For these reasons we remake the decision by:

a.

declaring that Mr Nkrumah is currently the holder of a residence card valid until October 2014.

b.

setting aside the refusal of the residence card application.

This appeal is **allowed**.

Signed Date

Judge of the Upper Tribunal