



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Barnett and others (EEA Regulations: rights and documentation) [2012] UKUT 00142 (IAC)**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination Promulgated**

**On 5 March 2012**

.....

**Before**

**UPPER TRIBUNAL JUDGE PETER LANE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

*Appellant*

**and**

**BEVERLY ANTOINETTE BARNETT**

**DARRIEUX RAJIV MURPHY**

**NASTASSIA MELLISSIA MURPHY**

*Respondents*

**Representation :**

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondents: Mr A Burrett, Counsel, instructed by AJA Solicitors

(1) In applications under the Immigration (European Economic Area) Regulations 2006, care must be taken to identify both the relevant rights being asserted and the relevant documentary confirmation which is being sought in respect of those rights.

(2) The requirement in regulation 17(1)(a) and (2)(a) for the production of a valid passport relates to the passport of the applicant, not the EEA national.

(3) The “proof” that the Secretary of State can lawfully require in applications under regulations 17 and 18 in order to entitle a non EEA national to a residence card (regulation 17) or a permanent residence card (regulation 18) may, nevertheless, depending on the circumstances, entail the production of the passport or other identity document of an EEA national; but it is unlawful to refuse applications merely because such documentation is not forthcoming. The Secretary of State needs to show a valid reason why it is required.

(4) This is particularly so in the case of regulation 18, given that there is likely to be relevant material relating to such documentation on file from a previous, successful, application.

## **DETERMINATION AND REASONS**

### **Introduction**

1. The respondents are citizens of Jamaica. The first respondent is the mother of the second and third respondents. On 24 May 2011 the respondents applied to the Secretary of State to be issued with a permanent residence card, pursuant to the Immigration (European Economic Area) Regulations 2006, on the basis that the respondents were the family members of a Polish citizen, Marcin Bialachowski, and that the respondents had resided in the United Kingdom with him in accordance with the 2006 Regulations for a continuous period of five years (regulation 15(1)(b)). The first respondent married Mr Bialochowski in London on 19 March 2005 and she and the other respondents (who are her dependants) thereafter lived with him for what appears to be accepted by the Secretary of State as a period of at least five years.

2. On 22 September 2011 the Secretary of State refused the respondents' applications. The respondents appealed against that decision and on 21 November 2011 their appeal was heard at Taylor House by a Judge of the First-tier Tribunal. The judge allowed the respondents' appeals under the 2006 Regulations. On 13 December 2011 the First-tier Tribunal granted permission to the Secretary of State to appeal to the Upper Tribunal against the decision of the First-tier Tribunal Judge.

3. The notice of immigration decision put the matter starkly, as follows:

“As you have not produced a valid passport or national identity card of a qualified person, you do not qualify for Permanent Residence as the family member of an EEA national.

You do not have a basis of stay in the United Kingdom under the Immigration (European Economic Area) Regulations 2006.”

4. The reasons for refusal letter had this to say:

“Regulation 15 of the Immigration (European Economic Area) Regulations 2006 makes provision for acquiring the right to reside in the United Kingdom permanently for EEA nationals and their family members. A family member of an EEA national who is not an EEA national and has resided in the United Kingdom with the EEA national family member in accordance with these Regulations for a continuous period of 5 years may acquire permanent residence.

On final consideration of your application, it is clear that your EEA family member has exercised Treaty Rights in the United Kingdom over a continuous five year period. It is also clear that you and your 2 children have resided in the United Kingdom over the same five year period and meet these parts of the criteria for issuing Permanent Residence under Regulation 15 of the Immigration (European Economic Area) Regulations 2006.

However this department wrote to your representatives on 18 August 2011 requesting that they submit a valid passport or national ID card for your EEA family member as evidence of their nationality or identity. Your representatives replied and stated that the ID card that was originally submitted with your application was still valid.

Checks undertaken by this department with the UKBA national forgery documentation unit have revealed that your EEA family members [sic] national ID card is no longer accepted as a valid form of ID. It is now UKBA policy to refuse entry to Polish citizen [sic] attempting to travel to the UK on the type of ID that your EEA family member submitted in support of your application.

Your application for Permanent Residence is therefore refused on the basis that insufficient ID has been provided to demonstrate that you are still related to a qualified EEA national as claimed.

Therefore, it has been decided to refuse to issue the confirmation that you seek with reference to Regulation 17(1)(A) [sic] of the Immigration (European Economic Area) Regulations 2006.”

### **The proceedings in the First-tier Tribunal**

5. As is unfortunately so often the case, the First-tier Tribunal Judge did not enjoy the benefit of hearing representations from the Secretary of State, because no Presenting Officer was provided. Under a heading entitled “My Findings of Credibility and Fact” the judge said this:

“12. Only the first appellant [i.e. now the first respondent] gave evidence to the Tribunal.

13. The respondent [i.e. the Secretary of State] has not produced a copy of the policy referred to in the refusal decision. I do not know the value or effect of the policy as regards this appeal.

14. The appellants appear to meet the appropriate requirements of the 2006 regulations.

15. The first appellant’s husband is working in Ireland at the present moment and requires his passport. The first appellant and the EEA national are having much matrimonial difficulties and he is unwilling to send his passport the purpose of this hearing [sic]. In any event it would be illegal to do so.

16. The respondent has accepted the EEA national's identity cards in the past as a valid form of identification. He has provided a copy of his passport. It is unclear why the identity card that was acceptable in the past is no longer acceptable now.

17. Although there has been reference to the national forgery documentation unit, there is no implication that the documents produced by the EEA national are false in any way.

18. All of the appellants meet the 2006 regulations. I therefore allow the appeals under the 2006 regulations.”

6. The relevant paragraphs of the Secretary of State's grounds of application for permission to appeal are as follows:

“3. It is submitted that for the ‘Issue of a residence card’ under regulation 15 it is necessary (EEA Regulation 17 1(a) to produce a valid passport and (b) proof that the applicant is such a family member [sic].

4. It is submitted that a failure of the appellant(s) to produce that valid passport cannot be ignored by the judge who relies on the Polish ID card, that is not acceptable, for the appellant(s) to succeed in their appeals.

5. It is submitted that the judge’s failure to consider the relevant EEA Regulation/Rule leads him into a material misdirection in law.”

7. In granting permission to appeal, the First-tier Tribunal considered that the -

“ Judge of the First-tier Tribunal could not understand why the identity card which had apparently been previously acceptable to the respondent was no longer acceptable. Whether or not that had been the position in the past, in relation to proving other things, this application appears to require the production of a valid passport, see below Regulation 17.

‘ 17. - (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’.”

### **The 2006 Regulations - rights and documents**

8. As emerged at the hearing on 5 March 2012, the question of the lawfulness of the UKBA's policy towards certain Polish ID cards, although potentially interesting, has no relevance to the respondents' applications and the subsequent appellate proceedings. In order to understand why this is so, it is necessary to look at the structure of the 2006 Regulations and of the EP and Council Directive 2004/38/EC (“the Citizens Directive”) to which those Regulations are intended to give effect.

9. The Regulations follow what is a broadly logical sequence. After a series of interpretative provisions in Part 1, Part 2 deals with “EEA Rights”. Regulation 11 concerns the arrival in the United Kingdom of an EEA national who “must be admitted ... if he produces on arrival a valid national identity card or passport issued by an EEA state”.

10. Regulation 11(2) makes similar provision in respect of a family member of an EEA national, a family member who has retained the right of residence and persons (whether EEA nationals or family members) who have secured a permanent right of residence in the United Kingdom under regulation 15. Such persons must, like the EEA national, produce on arrival a valid passport, as well as an EEA family permit, a residence card or a permanent residence card (regulation 11(2) and (3)).

11. Thus, from the very beginning of Part 2 of the 2006 Regulations, it can be seen that there is a high degree of interconnection between, on the one hand, rights and, on the other, official forms of documentation. The EEA national arriving in the United Kingdom needs, first of all, to prove his identity as such a national by means of a valid national ID or passport issued by the EEA State. Although the question of what is meant by the validity of such documentation is not directly in issue in the present appeals, it seems to me that in order for an ID card or passport to be “valid” it needs (a) to have been formally issued as such by the EEA State; (b) genuinely to relate to the individual seeking to rely upon it; and (c) not to have expired.

12. The references in regulation 11(2)(b) to an EEA family permit, residence card and permanent residence card are highly significant in the context of the present appeals. The requirements for the issue of an EEA family permit are set out in regulation 12. They cover both a “family member” and an “extended family member”, as defined in regulations 7 and 8 respectively. Thus, for example, provided he or she meets certain requirements, a family member who wishes to accompany the EEA national to the United Kingdom is entitled to the issue of an EEA family permit so that, on arrival, this document can be presented for the purposes of regulation 11(2), together with the holder's passport.

13. Regulations 13, 14 and 15 deal respectively with the initial right of residence, extended right of residence and permanent right of residence, all of which logically follow the initial right of admission

to the United Kingdom. The initial right of residence under regulation 13 is, in the case of the EEA national, dependent upon that national holding a “valid national identity card or passport issued by an EEA State” (regulation 13(1)). In the case of a family member, the initial right depends on the holding of a “valid passport” (regulation 13(2)).

14. Following the initial right of residence, regulation 14 considers the extended rights of residence, after the initial three month period. At this point, we turn to the concept of the “qualified person” defined in regulation 6 to include what might be regarded the paradigm categories of workers, job seekers and the self-employed. The family member of a qualified person is entitled to reside in the United Kingdom for as long as he or she remains such a family member; the same is true of the family member of an EEA national with a permanent right of residence.

15. As for permanent rights of residence, as we have already seen, these are covered by regulation 15. The main way in which a permanent right of residence may be acquired is through continuous residence in the United Kingdom for five years “in accordance with these Regulations”. In the case of a family member, that residence has to be “with the EEA national” (regulation 15(1)(b)).

16. Part 3 of the Regulations is entitled “Residence Documentation”. Regulation 16 concerns the issue of a “registration certificate”, both in relation to an EEA national and in relation to a family member. The EEA national has to provide a valid identity card or passport, together with proof that he or she is a qualified person (regulation 16(1)). For the purposes of regulation 16, the family member also has to be an EEA national (regulation 16(3)).

17. To what particular right does regulation 16 correspond? The answer is given by Articles 7 and 8 of the Citizens Directive. The former sets out the circumstances in which Union citizens “shall have the rights of residence on the territory of another Member State for a period longer than three months”. Those requirements correspond with regulation 14 of the 2006 Regulations, read with the relevant definitions in Part 1. Article 8.1 of the Directive states that “for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities”. The rest of that Article describes the ambit of the requirements that Member States may impose for the issue a registration certificate. They include requirements to present “a valid identity card or passport” (7.3, 7.5). In the case of the United Kingdom, regulation 16 represents the result of the United Kingdom’s decision to impose such a requirement.

### **The residence card**

18. For family members who are not EEA nationals, the formal document recognising that he or she has an entitlement to reside in the United Kingdom pursuant to the extended rights of residence described in regulation 14, is a “residence card”. Although regulation 17(1) has been set out in the grant of permission to appeal, it is helpful at this point to set out paragraphs (1) and (2) in full.

“17. – (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.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of -

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.”

### **Whose passport?**

19. Whose passport is referred to in regulation 17(1)(a) and (2)? Given that, throughout the Regulations, proof of the identity of an EEA national can be given, either by means of a valid ID card or a passport, it is, I consider, clear that the passport in question is only that of the family member who is making application under regulation 17. There is nothing in Article 10 of the Citizens Directive (issue of residence cards) that requires or even suggests a contrary interpretation.

20. As we have already seen, the Secretary of State, in her grounds of application, and the First-tier Tribunal, in its grant of permission, expressly identified the requirement in regulation 17(1)(a) to produce a valid passport as applying in the present appeals to the passport of the first respondent's husband. But the above analysis makes plain that, even if regulation 17 did apply to the present appeals (which, as I shall explain, it does not), the Secretary of State cannot point to regulation 17(1)(a) as constituting a requirement for the respondents to produce Mr Bialochowski's passport.

### **Which regulation?**

21. In fact, regulation 17 does not apply in the present cases. Although a superficial reading of regulation 17(1) might suggest that the regulation concerns applications by family members for permanent rights of residence, that is not so. The words “permanent right of residence” in regulation 17(1) are part of the phrase “an EEA national with a permanent right of residence”. For the issue of a residence card, the family member must be the family member of either (1) “a qualified person” or (2) “an EEA national with a permanent right of residence under regulation 15”. The fact that is so is made clear by regulation 18, the relevant provisions of which read as follows:

#### **“ Issue of a document certifying permanent right of residence and a permanent residence card**

**18.** - (1) The Secretary of State must issue an EEA national with a permanent right of residence under regulation 15 with a document certifying permanent residence as soon as possible after an application for such a document and proof that the EEA national has such a right is submitted to the Secretary of State.

(2) The Secretary of State must issue a person who is not an EEA national who has a permanent right of residence under regulation 15 with a permanent residence card no later than six months after the date on which an application for a permanent residence card and proof that the person has such a right is submitted to the Secretary of State.”

22. Regulation 18 is, accordingly, the provision which deals with the documentation of the permanent right of residence under regulation 15. As can be seen, regulation 18 contains no reference to any requirement to produce “a valid passport” or “a valid national identity card”; nor does anything in Chapter IV of the Citizens Directive, which makes provision for the right of permanent residence.

23. In the case of the respondents, it is clear from the reasons for refusal letter and the respondents' bundle that they made application under form EEA 4 for “Permanent Residence”. It was, therefore, necessary for the Secretary of State to determine their applications by reference to regulation 18. However, as is plain from the last quoted paragraph of the refusal letter (paragraph 4 above), the Secretary of State wrongly determined the applications by reference to regulation 17(1)(a).

## **Proving the right**

24. Although there is no specific requirement under regulation 17 or 18 for the family member applicant to submit a valid passport or other identity document relating to the EEA national, both regulations, quite properly, require the applicant to adduce proof that he or she is entitled to a residence card or a permanent residence card. In the case of regulation 17, the proof required is that “the appellant is a family member who has retained the right of residence”. In the case of regulation 18, it is that the person in question provides “proof that the person has such a right” (i.e. a permanent right of residence under regulation 15).

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.

26. The present appeals are, in fact, a good example of where it is not reasonable for the Secretary of State to insist on seeing the passport or other identity document. Even if one were to assume that the reasons for refusal letter was issued with regulation 18 in mind, the requirement for proof of identity was completely unnecessary and, hence, unlawful. As can be seen from paragraph 4 above, the Secretary of State in fact accepted that the respondents met the requirements of regulation 15. In the circumstances, it was wholly unnecessary for the Secretary of State to require any identification document relating to Mr Bialachowski “to demonstrate that you [presumably the first respondent] are still related to a qualified EEA national as claimed”. Given that the respondents had lived for over five years with Mr Bialachowski and that no issue is taken as to whether, during that time, he remained a qualified person, it was irrelevant whether the first respondent thereafter remained married to him. She had already acquired a permanent right of residence. In any event, the Secretary of State took no issue with whether the parties were, in fact, still married or with Mr Bialachowski’s presence in Ireland (as to which it is noted that temporary absences not exceeding six months a year do not break continuity of residence- Article 16.2).

27. Mention needs to be made of Article 25 of the Citizens Directive. This provides as follows.

### **“General provisions concerning residence documents**

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a pre-condition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.”

28. As can be seen, Article 25 does not prohibit a Member State from requiring production of a valid identity card or passport in order to be entitled to a registration certificate etc. On the contrary, it would be odd if it did, since Articles 5 (right of entry), 6 (right of residence for up to three months)

and 8 (administrative formalities for Union citizens) all contain requirements to present or hold valid identity cards or passports and these requirements have been reproduced for the United Kingdom in the 2006 Regulations (see paragraph 16 above), wherever such a requirement is imposed or permitted to be imposed by the Directive. The point, however, is that, by the stage one reaches the issue of entitlement to the permanent right of residence, there is no longer any express requirement to submit identity documents or passports.

### **Conclusions**

29. The general conclusions that emerge may be stated as follows. (1) In applications under the 2006 Regulations, care must be taken to identify both the relevant rights being asserted and the relevant documentary confirmation which is being sought in respect of those rights. (2) The requirement in regulation 17(1)(a) and (2)(a) for the production of a valid passport relates to the passport of the applicant, not the EEA national. (3) The “proof” that the Secretary of State can lawfully require in applications under regulations 17 and 18 in order to entitle a non EEA national to a residence card (regulation 17) or a permanent residence card (regulation 18) may, nevertheless, depending on the circumstances, entail the production of the passport or other identity document of an EEA national; but it is unlawful to refuse applications merely because such documentation is not forthcoming. The Secretary of State needs to show a valid reason why it is required. (4) This is particularly so in the case of regulation 18, given that there is likely to be relevant material relating to such documentation on file from a previous, successful application.

### **Error of Law, setting aside and re-making the decision**

30. Although the First-tier Tribunal Judge reached the right result, in allowing the appeals, he did so in a way which is, in its own terms, difficult to follow and, in any event, failed to appreciate the correct regulation which was in play. The determination thus contains an error of law. I set it aside and re-make the decision in the appeals.

31. For the reasons I have given, the Secretary of State was not entitled to refuse the applications for the reasons she gave. On the contrary, as is evident from the reasons for refusal letter, she should have granted the applications, on the basis that the respondents had satisfied her that they were persons who had attained permanent rights of residence under regulation 15, and so were entitled to permanent residence cards under regulation 18. Their appeals are accordingly allowed.

Signed Date

Upper Tribunal Judge Peter Lane