



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

Appeal Number: IA/38867/2013

THE IMMIGRATION ACTS

Heard at Field House

On 21 July 2014

Determination

Promulgated

On 1st Aug 2014

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD NOMAN TARIQ

Claimant

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Claimant: no appearance

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge P J Clarke promulgated on 15 May 2014 in which he allowed the claimant's appeal against the decision of the Secretary of State made on 5 September 2013 to refuse to issue him a residence card as confirmation as his right of permanent residence in the United Kingdom

as the dependant of his father, Mehmood Tariq, a citizen of Netherlands. The claimant's case is that his father has been living and working in the United Kingdom continuously since 1 July 2004 although with some absences in 2005. The claimant joined him here as did his wife but she died in 2007. The sponsor was in May 2012 convicted of drugs related offences and released in March 2014. It appears that his appeal against the deportation was successful.

2. The claimant's case is that as the minor dependant of an EEA national who had been exercising treaty rights for a period of five years, during which they had both lived in the United Kingdom, he was entitled to a residence card as confirmation of that right.
3. The Secretary of State refused the application on the basis that it was not established that the sponsor was a qualified person for the relevant five year period.
4. On appeal Judge Clarke found:-
 - (a) that the sponsor was not a credible witness [12] and he was not satisfied that he had been a qualified person for the five year period before his arrest in 2011;
 - (b) that he was not satisfied in the absence of more evidence than that that had been produced to him that the sponsor was currently in employment [16] and thus was not satisfied that the claimant was entitled to a derivative right of residence pursuant to paragraph 15(a) of the EEA Regulations; that he was obliged in the circumstances to consider human rights issues [20] and found the claimant satisfied the requirements of paragraph 276ADE of the Immigration Rules [20];
 - (c) that the appeal was to be allowed on human rights grounds.
5. The Secretary of State sought permission to appeal on the grounds that:-
 - (a) that the judge had materially misdirected himself in law with respect to paragraph 276ADE as he had not mentioned or considered all the requirements of the relevant sub-Sections as he had failed to consider paragraph 276ADE(iv) which required him to consider whether it would be reasonable to expect the applicant to leave the United Kingdom;
 - (b) that it would not be unreasonable to expect the claimant to leave the United Kingdom given that he is an adult who is able to lead an independent life, could return to Pakistan and make an application to return.
6. Permission to appeal was granted by Judge Bartlett on 3 June 2014.
7. There is no cross-appeal nor any response pursuant to Rule 24 from the claimant.

8. When the matter came before me there was no appearance on behalf of the claimant. Upon enquiries being made, I received a letter from Stanley Richards Solicitors, advising that they were no longer representing the appellant, attaching a copy of a letter from MA Consultants of 145 Alum Rock Road, Birmingham to the effect that they had been instructed by the claimant to take over conduct of his case. That letter requests that they forward a complete file of papers concluding:

“Please note that our client doesn’t have much time for his appeal submission and he kindly requests that you forward all the above documents asap”.

9. The natural inference to be drawn from this letter is that the claimant and MA Consultants were aware of the hearing on 21 July 2014, the hearing notice having been sent out on 16 June 2014.
10. There is no explanation from MA Consultants for their failure to attend and I note that at no stage has the claimant given an address other than that of his former representatives.
11. In the circumstances, I am satisfied that the claimant’s representatives had been given proper notice of the appeal and that it would be appropriate to proceed in his absence and in the absence of representation from him.
12. I heard brief submissions from Mr Tarlow who accepted that the grounds did contain an error in that the claimant is aged 17 and is not an adult.
13. Paragraph 276 ADE of the Immigration Rules provides, so far as is relevant:-

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

...

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) **and it would not be reasonable to expect the applicant to leave the UK** [emphasis added]; or

...

14. It is clear that in purporting to allow the appeal pursuant to paragraph 276ADE of the Immigration Rules that Judge Clarke erred in failing to make any finding about whether or not it would be reasonable to expect the claimant to leave the United Kingdom. He was, as the grounds aver, under a duty to consider whether the applicant met *all* the requirements of paragraph 276ADE(iv)
15. On that basis and in his failure to do so, it is evident the determination involved the making of an error of law clearly material to the outcome.

16. Given that the only basis on which the judge considered the decision was not in accordance with Article 8 arises from his finding that the applicant met the requirements of paragraph 276ADE, it is not sufficiently or adequately reasoned, and so that finding is unsafe and must be set aside.
17. In the circumstances, it is necessary to remake the decision. I was satisfied that I could do so without the need to adjourn the hearing as, on the basis of Judge Clarke's findings of fact, the claimant cannot meet the requirements of paragraph 276ADE.
18. The claimant has been present in the United Kingdom as the dependant of an EEA national. At no time has he been granted leave to remain in the United Kingdom. A stay in this country under the EEA Regulations is not leave to remain under the Immigration Rules or the Immigration Acts, and so it appears he has never been granted leave to enter or remain within the meaning of the Immigration Acts or Immigration Rules.
19. Paragraph 276ADE of the Immigration Rules requires an applicant under the age of 18 to have spent a continuous period of seven years in the United Kingdom. The "continuous residence" for the purposes of paragraph 276ADE means

"Residence in the United Kingdom for an unbroken period, and for these purposes, the period should not be considered to have been broken where an applicant is absent from the United Kingdom for a period of six months or less or at any one time, provided that the applicant in question had existing limited leave to enter or remain upon their departure and return, but to be considered to have broken if the".
20. "Lived continuously" means "continuous residence" by virtue of paragraph 276A(c).
21. Accordingly, as it was found that the applicant had left the United Kingdom at various times during his time here, he cannot have been continuously resident for a period of seven years prior to the date of application and thus does not meet the requirements of the Immigration Rules.
22. Whilst I accept that the claimant has lived in the United Kingdom for a substantial period, he does not meet the requirements of the Immigration Rules.
23. Further, as this decision is to be promulgated after 28 July 2014, I am required by Section 117A of the Nationality, Immigration and Asylum Act to apply Section 117B and C of that Act. Section 117B has little relevance here given it is not in dispute that the applicant speaks English and where his father is an EEA national. The father has the right to seek working here but as Judge Clarke found that the father was not exercising treaty rights, it does not necessarily follow that it is unreasonable to require the claimant and his father to go and live in the Netherlands or Pakistan and

no evidence has been adduced before me to say why they should not be expected to do so.

24. I am of course conscious that there is nothing to stop the claimant's father from obtaining employment and thus, if he is exercising treaty rights, the claimant cannot be removed.
25. Accordingly, for these reasons, I find that the claimant has failed to satisfy me that his removal would be in breach of his rights pursuant to Article 8 of the Human Rights Convention. I therefore dismiss the appeal on all grounds.

SUMMARY OF CONCLUSIONS

- 1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
- 2 I remake the decision by dismissing the appeal on all grounds.

Signed

Date 1 August 2014

Upper Tribunal Judge Rintoul