



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

Appeal Number: IA/41210/2013

**THE IMMIGRATION ACTS**

**Heard in Glasgow**

**On 11<sup>th</sup> August 2014  
Decision given orally**

**Determination  
Promulgated**

**On 20<sup>th</sup> August 2014**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**ADEYEMI KOIKI**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Bradley, Solicitor, Peter Farrell Solicitors

For the Respondent: Miss M O'Brien, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a national of Nigeria where he was born 26 September 1981. He has been granted permission to appeal the decision of First-tier Tribunal Judge Kempton who, for reasons given in a determination dated 2

February 2014, dismissed the appeal against the respondent's decision refusing to issue a derivative residence card under the Immigration (European Economic Area) Regulations 2006, in particular reg. 15A(4A)(a) (b) and (c), and (7b)(i). The appellant had sought recognition as the primary carer of his wife Tracy Koiki, a British citizen. The judge concluded at [20] that she did not consider the appellant had made out a *prime facie* case to show that he is the carer of his wife within the meaning of the Regulations and EU law. The appellant had also relied on grounds under Article 8 of the Human Rights Convention.

2. At [23] of her determination she indicated

“I do have the locus to consider that Rule in the context of this peal and would have been willing to do so. However, considering the issue further, I believe that a new application with much more objective information in relation to the children and the effect of them on the removal of the appellant requires to be submitted. At present, on the basis of the information before me, I cannot say with any accuracy what is in the best interests of the children.”

3. Permission to appeal has been granted by Upper Tribunal Judge MacLeman in response to grounds that the judge had failed to make a decision on the best interests of the children and had failed to determine the Article 8 grounds.
4. The background facts are that the appellant arrived in the United Kingdom as a student on 15 October 2004. Although he applied unsuccessfully for an extension of leave to remain he was successful when on 4 March 2006 the Secretary of State granted leave until 31 October 2009.
5. The appellant then made a further application for leave to remain as the spouse of a settled person which was refused on 15 December 2011. A number of applications for a derivative right or residence card were made in 2012, the most recent being on 11 October that year which led to the decision under appeal dated 18 September 2013. That decision was a refusal to issue a derivative residence card in pursuance of Regulation 15A(4A)(a),(b) and (c) and (7)(b)(i) of the Immigration (European Economic Area) Regulations 2006.
6. In the accompanying Reasons for Refusal Letter the respondent explained why she contended the appellant had not satisfied the criteria for a derivative right of residence. She also explained that consideration had not been given to whether the appellant's removal from the United Kingdom would breach Article 8 and indicated that a decision not to issue a residence card did not require the appellant to leave the United Kingdom if he could otherwise demonstrate he had a right to reside under the regs.
7. The respondent continued her reasons in the anti-penultimate paragraph in these terms:

“Reg. 26 of the EEA Regulations 2006 can close a right of appeal against this decision. However this does not mean, that if you chose to appeal you will be entitled not remain in the United Kingdom whilst the appeal is being considered.”

8. The First-tier Tribunal Judge declined to make a decision on Article 8 grounds although she considered she had the locus to do so. She could not say with any accuracy what was in the best interests of the children.
9. In the course of argument before me today I invited the parties to address me on the issue whether the First-tier Tribunal had jurisdiction in the light of the limitation on the right of appeal in the 2006 regulations despite the indication by the Secretary of State that such a course was available. I gave Mr Bradley time to consider the point which arose because the appellant had sought a derivative right of residence card in respect of an adult. Reg. 26(3A) provides:

“If a person claims to be a person with a derivative right of residence he might not appeal under these regs. unless he produces a valid national identity card issued by an EEA state or a passport, and either –

(a) an EEA family permit; or

(b) proof that –

- (i) where the person claims to have a derivative right of residence under reg. 15A(2), he is a direct relative or guardian of an EEA national who is under the age of 18;
- (ii) where the person claims to have a derivative right of residence under reg. 15A(3), he is the child of an EEA national;
- (iii) where the person claims to have a derivative right of residence under reg. 15A(4), he is a direct relative or guardian of a child of an EEA national;
- (iv) where the person claims to have a derivative right of residence under reg. 15A(5), he is under the age of Article 8 and is a dependant of a person satisfying the criteria in (i) or (ii)”

10. Mr Bradley argued that the appellant did have a right of appeal because he was a direct relative of his wife’s children by virtue of his role as stepfather, and in the alternative as a guardian. I am not persuaded that despite this argument the appellant is able to establish that he is a direct relative in the light of the manner such relatives are characterised in regulation 7. His role as a stepfather is an informal one and the evidence does not establish that he has status as a guardian. It is undisputed that there has been no formal adoption proceedings and therefore he is unable

to come within the category of direct relative which might otherwise be the case.

11. Mr Bradley also argued that pursuant to s.92 of the 2002 Act the appellant was entitled to a forum in order to rely on Article 8 grounds. This too does not avail him. This is not a statutory appeal triggered by s.82 of the 2002 Act. It is an appeal under the 2006 regulations.
12. In the light of these matters my conclusion is that the First-tier Tribunal never had jurisdiction to determine the appeal and that the Secretary of State was misconceived in explaining the appellant had this opportunity. My conclusion is that the Tribunal erred in proceeding to determine the appeal at all. Its decision is set aside and of no legal effect.
13. Accordingly the appeal by the appellant in the Upper Tribunal is dismissed since it is seeking to challenge a decision of the First-tier Tribunal which it had no jurisdiction to make.

Signed

Date 19 August 2014

A handwritten signature in blue ink, appearing to read 'Dawson', with a horizontal line extending to the right.

Upper Tribunal Judge Dawson