IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48686/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th October 2014	**On 12th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANTHONY DENNIS SUNDAY
(NO ANONYMITY ORDER WAS REQUESTED OR MADE)

Respondent

Representation:

For the Appellant: Mr Nath, Home Office Presenting Officer
For the Respondent: Mr Olubisose, Solicitor

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the determination of First-tier Tribunal Judge Herbert OBE. I have referred to the parties as they appear in the First-tier Tribunal Determination.

2. The Appellant is a citizen of Nigeria born on 23rd September 1988. The Appellant first entered the United Kingdom on 18th December 2009.

Thereafter the Appellant appears to have entered on various dates under a student visa, which was valid until 31st August 2011.

3. On 12th December 2012 the Appellant made application for a residence card under the Immigration (European Economic Area) Regulations 2006. By decision taken on 5th November 2013 that application was refused.

4. The Appellant sought to appeal against that decision. The appeal appeared before Judge Herbert. By decision promulgated on 23rd July 2014 the judge found that the Appellant was not entitled to an EEA residence card. Judge Herbert went on to consider the matter on the basis of the Immigration Rules and Article 8 and allowed the appeal on Article 8 grounds.

5. The Secretary of State for the Home Department appealed against that decision. By decision of 23rd September 2014 First-tier Tribunal Judge Lever granted permission to appeal. Thus the appeal appeared before me to determine in the first instance whether or not there was an arguable error of law in the original determination.

6. The original application by the Appellant was for a residence card on the basis of his marriage to an EEA national namely Miss Alexandra Jennifer Emmanuellle Devillechase. As is evident from the determination at the time of the hearing the Appellant's situation had wholly changed. The Appellant was no longer in a relationship with Ms Devillechase.

7. A marriage certificate had been submitted which disclosed that the Appellant and Ms Devillechase had married on 16 November 2012. The application for an EEA residence card by the Appellant was dated the 5 December 2012.

8. A marriage interview had been arranged for the Appellant and the Sponsor in January 2013 and the Appellant and the Sponsor failed to attend for the marriage interview. It was claimed at that stage that they were both suffering from minor health problems.

9. The Respondent considered the case on the basis of the documentation presented and determined that the Appellant could not succeed under the Immigration (European Economic Area) Regulations 2006. The application was therefore refused.

10. The Respondent in the refusal letter dated 5th November 2013 had pointed out that attempts to verify that the EEA national was genuinely working had established that the company she was allegedly working for had been dissolved by Companies House on 27th August 2013. According to the evidence the company had ceased trading in April 2013. The company was owned by a Dr James Akoro.

11. Dr Akoro has known the Appellant since 2003 in Nigeria. Dr Akoro sponsored the Appellant through school including providing him with accommodation and maintenance. In May 2010 Dr Akoro had sponsored

the Appellant coming to the United Kingdom on a student visa. However in September 2010 Dr Akoro was diagnosed with prostate cancer and his sponsorship of the Appellant ceased.

12. At the time of that the EEA national had ceased to be a qualified person, April 2013 when the employer had ceased trading, the relationship between the Appellant and the EEA national, a marriage of 5 months, also ceased. The Appellant commenced to live with Ms Clatworthy. It is the basis of the relationship of the Appellant to Ms Clatworthy and her three children that now forms the basis for the Article 8 family and private life.

13. In the refusal letter the requirements for the Immigration Rules Appendix FM and paragraph 276ADE and Article 8 of the ECHR were pointed out to the Appellant. The Appellant at that stage had not submitted any evidence to found any family or private life apart from his relationship to Miss Devillechase.

14. The refusal letter specifically states:-

> "If you wish the UK Border Agency to consider an application on this basis you must make a separate charged application using the appropriate specified application form FLR(M) for the five year partner route, or FLR(O) for the five year parent or ten year parent or parent route, or FLR(O) for the ten year private life route."

Accordingly the letter of refusal specifically pointed out that the Appellant should make application for further consideration of his case under the Immigration Rules Appendix FM and paragraph 276ADE but would have to make a charged application in order to do so. The Notice of Decision stated that if the appellant made an application under the Immigration Rules consideration will be given to that application and any decision to remove made would carry a right of appeal.

15. As is evident from the determination the basis upon which the Appellant pursued the appeal was that he was no longer in a relationship based upon his marriage to an EEA national but was in a subsisting relationship akin to marriage with a UK citizen, a relationship that had lasted from April 2013 to July 2014. He had therefore been living with Miss Clatworthy as a civil partner at premises in Hampshire since April 2013. He had been living there with Miss Clatworthy and her children.

16. Miss Clatworthy was a full-time employee and care assistant at Caremark where she had been working for about eight months. She has three children by a previous relationship. The parties claim that the Appellant is now an integral part of the household and that the children regard him as their father.

17. In his determination Judge Herbert noted that the Appellant and his partner had not been in a relationship for two years or more and therefore were not eligible under the Immigration Rules specifically Appendix FM or

paragraph 276ADE. The judge thereafter refers to the fact that there would be insurmountable obstacles to continuing family life in Nigeria and that the effect upon the three children and the Appellant's partner would be extremely harsh. The judge does not at that stage specifically set out what constitutes the insurmountable obstacles or what would be the extremely harsh consequences. The judge does not in detail set out the reasons for finding that the removal of the Appellant would not in all the circumstances be in the best interests of the children.

18. I would note at that point that there is no decision to remove the Appellant. The only decision taken at the moment is for the Appellant to be refused an EEA residence card. Whilst the judge makes findings with regard to the relationship of the Appellant to Miss Clatworthy and the children and the relationship of the Appellant to a Dr Akoro, those are not directly relevant to the issues of whether or not the Appellant is entitled to an EEA residence card. The judge thereafter goes on to consider Article 8.

19. During the course of the hearing I heard submissions from both representatives. The issue I was mainly concerned with was, as there were no removal directions, whether or not the issues with regard to Article 8 were in fact engaged.

20. The application was based on the Immigration (European Economic Area) Regulations 2006. The Appellant is no longer living with the EEA national. There was no evidence that the EEA national was working and was therefore a qualified person. The Appellant and the EEA Sponsor had not attended for interview to check whether or not this was a genuine marriage. The marriage had not subsisted for at least three years and it was clear that the marriage was over. The parties were separated. The Appellant could not meet the requirements of the Regulations with regard to Regulation 10 or Regulation 15. The Appellant therefore could not succeed under the EEA Regulations.

21. The right of appeal in respect of this matter arises under Regulation 26. Schedule 1 paragraph 1 of the Regulations provides that certain provisions of the 2002 Act have effect in relation to an appeal under the Regulations as if it were an appeal against an immigration decision under Section 82(1) of that Act. The provisions include the grounds of appeal under Section 84 (1), but excepting Section 84(1)(a) and (f). The consequence would be that an appellant has a right to appeal against an EEA decision on the basis that " removal" in consequence of only refusal to grant an EEA remedy would breach either rights under the Immigration Rules or under the ECHR.

22. However in respect of this matter there is no decision to remove and there is no Section 120 Notice, a notice under the 2002 Act requiring the appellant to set out all and any reason why removal would be in breach of Immigration Rules or rights under the ECHR.

23. In that respect I would draw attention to the case of Lamichhane v SSHD 2012 EWCA Civ 260 specifically paragraphs 39-41 wherein it is made clear that in the absence of a section 120 notice the grounds of appeal are limited to those forming the foundation of the decision.

24. As identified in the notice of decision and the reasons for refusal letter the appellant had not made any other basis other than rights emanating from his marriage to an EEA qualified person for appealing against the decision.

25. In any event even if such matters were properly engaged on the evidence as presented the Appellant's circumstances could not meet the substantive requirements of the Immigration Rules as acknowledged by the judge. The parties had not been living together for a period of two years before the hearing in the First-tier Tribunal. The Appellant could therefore not meet the requirements of Appendix FM.

26. The issue thereafter is whether or not Article 8 is engaged on the facts as presented. There was no decision to remove. Whilst given the provision of Schedule 1 paragraph 1 of the Regulations, Article 8 itself is not excluded in such a case from consideration as a matter of jurisdiction. However there is force in the argument as put by the Presenting Officer that there is no meaningful interference with an Appellant's right under Article 8 where all the Appellant has to do is submit an application open to him under the Immigration Rules. There can be no right under Article 8 of the ECHR to be excused from making an application. The result may not be in the Appellant's favour and if so then the Appellant would have a right of appeal provided a decision is made to remove the Appellant from the United Kingdom.

27. At the moment there is no decision to remove the Appellant from the United Kingdom. The circumstances therefore are that the Appellant would have a right to make an application to the Respondent to be entitled to remain in the United Kingdom. Once that application has been made as pointed out in the letter of refusal a decision would be made upon the Immigration Rules and upon Article 8. There is nothing that would entitle the Appellant to avoid making that application and it cannot be said that it is a breach of the Appellant's rights under Article 8 to be excused from making such an application.

28. Once that application has been assessed and decided upon it would be for the Respondent to make a decision to remove the Appellant. Once the Respondent has made such a decision the Appellant would have a statutory right of appeal and all the issues can be determined with regard to the Article 8 rights not only of the Appellant but of his other family members.

29. There is no substance in the allegations by the Appellant that he would have to leave the United Kingdom pending such a decision. The Appellant would be entitled to remain here until the Secretary of State has made a

decision upon the application. The refusal letter itself specifically invites the Appellant to make an application without returning to Nigeria.

30. In all the circumstances the facts of this case do not justify the grant of a residence card. It is clear that the Appellant no longer satisfies the requirements of the Immigration (European Economic Area) Regulations 2006. Thereafter the Appellant can make an application, as invited in the letter of refusal, for further leave to remain in the United Kingdom on the basis of the Immigration Rules Appendix FM and paragraph 276ADE as well as under Article 8 of the ECHR. At that stage the Secretary of State can make a decision based upon a proper assessment of those factors.

31. Accordingly the judge in considering this matter on the basis of Article 8 has made an error of law as it would require a further decision and a further assessment of those factors and a removal decision before such an issue were before the Tribunal.

32. There being a material error of law I invited the parties to address me on what should be done with regard to the case. As the only issue relates to factors under Article 8 and Article 8 is not yet properly before the Tribunal I am satisfied that I can determine this appeal on the basis of the evidence already before the Tribunal.

33. The Appellant is not entitled to relief under the EEA Regulations. The Appellant can make an application to the Secretary of State and upon that application would receive an appropriate decision. If the decision is adverse the Appellant would have a right of appeal against any immigration decision made to the Tribunal and at that stage the Article 8 rights of the party can be properly determined. However there is nothing that would excuse the Appellant from having to make that application. It would not be a breach of his Article 8 rights for the Appellant to have to make those applications.

34. Accordingly there is currently no breach of any Article 8 right of the Appellant's or of any party.

Notice of Decision

The determination of the First-tier Tribunal contains a material error of law and is therefore set aside. I substitute the following decision

The appeal is dismissed on all grounds.

No anonymity direction is made.

Signed Date **28th October 2014**

Deputy Upper Tribunal Judge McClure