



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

Appeal Number: IA/19475/2014

THE IMMIGRATION ACTS

Heard at Field House

**On 5 January 2014
Oral judgment given**

**Decision & Reasons
Promulgated
On 17 February 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**AWAIS KHALIQ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Heybrook, Counsel, instructed by Eden Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a determination of First-tier Tribunal Judge Andrew promulgated on 6 October 2014 following a hearing on 29 September 2014 at Sheldon Court in Birmingham. The Appellant at that hearing was represented by Mr C A Mahmood the Respondent by Ms Anwar.
2. The appeal is against a refusal by the Secretary of State, dated 14th April 2014, to issue a Residence Card to Mr Khaliq on the basis he had not

established he was entitled to have such a document issued to him as an extended family member of an EEA national exercising treaty rights in the UK. The reasons for the refusal are set out in the comprehensive refusal letter dated 14 April 2014.

3. The grounds of appeal to the First-tier Tribunal raise two issues. The first of which is that the decision was wrong. In paragraph 5 of the grounds the Appellant asserts he provided all relevant documents to confirm the relationship with sponsor qualifies under Regulation 8 of the Immigration (EEA) Regulations 2006 as a dependent of an EEA national.
4. The original grounds of appeal do not raise Article 8 ECHR but it appears that when the matter came before the Judge further discussion occurred and submissions were made regarding the scope of the hearing. Paragraph 1 of the determination is in the following terms:

“The appellant is a citizen of Pakistan who was born on 1 May 1991. He appeals against the decision of the respondent on 14 April 2014 to refuse to grant him a residence card as a confirmation of his right to reside in the United Kingdom. At the commencement of the hearing the appellant's representative confirmed the appellant could not meet the provisions of the EEA Regulations as he was neither accompanying the EEA national to the United Kingdom nor did he wish to join him here. The appellant would, however, rely on Article 8.”
5. The Judge sets out the conduct of the proceedings, her legal direction, and findings from paragraph 5 of the determination.
6. The issue of the EEA Regulations is also mentioned in the determination where the Judge makes her findings. At paragraph 6 she refers to 14 March when the Appellant applied for a residence card. The wording indicates there had been a previous refusal. In paragraph 7 is confirmation of the concession at the hearing that the Appellant cannot meet the EEA Regulations and that he thus relies on Article 8.
7. The Judge proceeded to dismiss the appeal by reference to Article 8 and made no findings in relation to the EEA Regulation other than the reference in paragraph 7. It is clear, however, from the decision at the end of the determination that Judge Andrew dismissed the appeal.
8. Permission to appeal was sought on two grounds, the first of which relates to the EEA Regulations, the 2006 Regulation point. The first paragraphs of the Grounds set out the wording of the Regulation and maintain there were two issues before the Judge.
9. Paragraph 13 refers to the quote from the initial part of the determination that I have referred too above and in paragraph 14 it is submitted that the First-tier judge erred when making such a conclusion.

10. The grounds state the Appellant's representative confirmed that it was common ground that the Appellant entered the UK as a student. However he maintained that this is not relevant to the issue of whether the Appellant is an EEA extended family member for the purposes of the Regulations. On the contrary, the Appellant's representative argued that the only issue that arises is whether there was prior dependency before arrival in the UK and dependency in the UK.
11. In accordance with the guidance recently confirmed by the President of the Upper Tribunal Mr Justice McCloskey, regarding the situation in which an Appellant has a representative and where an allegation of procedural irregularity against a Judge arises, the representative Mr Mahmood has provided a statement dated 5 December 2014. In this he confirms that the appeal was heard by Judge Andrew and refers to the findings at paragraph 7 of the determination that it was common ground, as confirmed by the representative, that the Appellant cannot meet the EEA Regulations.
12. Mr Mahmood states that he confirmed at the hearing that it was an indisputable fact that the Appellant entered the United Kingdom as a student. However the issue before the Judge remained that of whether the Appellant is an EEA extended family member for the purposes of the Regulations. It is stated that the only issue that arose is whether there was prior dependency on the sponsor before his arrival in the UK and present dependency in the UK. The above is said to be further evident from the skeleton argument submitted on behalf of the Appellant which at paragraph 2 states that the Appellant entered the United Kingdom on 20 October 2010 as a student and that he has been dependent on his brother-in-law, a Spanish national, with whom he is currently residing.
13. Further, paragraph 3 gives details of the Appellant's dependency on his brother-in-law prior to the Appellant's arrival in the UK, namely the Appellant's brother-in-law sending money to him in Pakistan on a regular basis via money transfer services. Paragraph 4 of the skeleton argument submits that the primary issue which stands to be determined in this appeal is a dispute of fact whether the Appellant is an extended family member of the EEA national and had been continually dependent upon the EEA national prior to entering the United Kingdom.
14. At paragraph 5 is a declaration of truth.
15. It is an interesting statement because Judge Andrew maintains that a specific statement was made by the representative that reliance was being placed solely upon Article 8 family and/or private life as the only issue she was being asked to determine. If so, the statement in the skeleton argument that there may have been pleadings to a different effect or in different terms is arguably irrelevant. Whilst a skeleton argument may have been produced prior to the hearing before Judge Andrew and may have informed the representative's view of the matters that were considered relevant at that time, they can be superseded by events that occurred during the course of the hearing. A statement that an

issue is not being pursued and in relation to which no submissions are made entitled the Judge to treat it as abandoned.

16. The representative's statement does not say "I did not say reliance is solely being placed on Article 8". It states he confirmed that it was an undisputed fact the Appellant entered the United Kingdom as a student. However the issue before the First-tier Judge remained that of whether the appellant is an EEA extended family member for the purposes of the Regulations. That statement is factually inaccurate if what the Judge recorded is correct, namely that it did not remain a live issue before the Judge because the Appellant's representative had told the Judge he was not seeking to rely upon it during the course of the hearing.
17. In addition to the wording of the determination I have the Judge's Record of Proceedings which has been shown to both representatives and which is commendably clear. The first line of that note reads: "reliance is solely on Article 8". It is clearly a recording by the Judge of a statement that was made to her regarding the scope of the hearing which is not likely to have been made by the Presenting Officer in relation to whom the notes of questions and submissions appears later on. It is also interesting to note that in the Judge's notes regarding the Appellant's submissions, the Appellant's representative refers to "providing documents; that the Appellant has a sister in the UK; he has close ties with the sponsor living with them in the UK; the children are attached; which fulfils all the requirements of Article 8. The appeal should be allowed under Article 8". The Judge does not record any submissions having been made by the representatives in relation to the EEA point, or a point under the EEA Regulations.
18. The Judge's record is also supported by the note made by the Home Office Presenting Officer handed up by the representative of the Secretary of State this afternoon. The representative's note under the heading "Preliminary Issue" states "Reps agree don't meet EEA Regulations and only Article 8 to consider".
19. I therefore have a Judge, an experienced Salaried Judge of the First-tier Tribunal at Birmingham, recording at two places in her determination where she states in paragraph 1 the point regarding the preliminary issue reflected in the Presenting Officer's note and at paragraph 7 repeating what she describes as being common ground i.e. conceded that the Appellant could not meet the EEA Regulations. This is supported by a legible Record of Proceedings where the Judge has noted that she was told reliance is solely on Article 8 and submissions which appear to relate solely to the appeal under Article 8.
20. On the other side of the scales is a statement from Mr Mahmood of Eden Solicitors which I have referred to earlier which is not cast in such direct terms. The fact he may have confirmed at the hearing the Appellant entered the United Kingdom as a student is irrelevant to this issue. He refers to the issue before the Judge remaining that of whether the Appellant is an EEA family member but it does not appear in direct terms.

He denies having made the statement that was recorded by the Judge and by the Presenting Officer. It has been submitted today that the Appellant's case is no such concession was made and I have considered the matter on the basis that what I am being asked to find is that Mr Mahmood's evidence should be given greater weight to the effect it should be found that no such concession was made even though such a finding flies in the face of the weight of the evidence recorded by the Judge and by the Presenting Officer that in fact such a statement was made by Mr Mahmood.

21. This is my first finding in relation to assessing whether a legal error has been made.
22. I prefer the version of events recorded by Judge Andrew in the determination and supported by the Record of Proceeding of both the Judge and the Presenting Officer as being the most reliable record of events. I find Mr Mahmood's recollect is inaccurate and disingenuous. Although the grounds of appeal refer to the EEA Regulations, as do the skeleton argument, the question is whether it an error for the Judge not to go on and deal with that matter when it was pleaded before her by way of a concession or statement that it was not being relied upon. The answer is "no" it is not.
23. Further submissions made before the Upper Tribunal have been considered. Counsel did touch on matters which were not pleaded and grounds for which permission to appeal had not been given. Even taking all such matters into account I find no basis for finding that Judge Andrew made any material legal error in her decision to dismiss the appeal under Article 8. There is a forthcoming decision of the Upper Tribunal which is to consider whether in a refusal of a residence card appeal, which is an appeal against a refusal to grant a document recognising a right that must already exist in EU law, Article 8 ECHR even arises, as it is said by some it does not; but that is awaited. Judge Andrew set out clear and legally sustainable findings on the basis this was a live issue before her which has not been shown to be infected by arguable material legal error.

Notice of Decision

There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand

No anonymity direction is made.

Signed

Date: 15th February 2015

Upper Tribunal Judge Hanson

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Upper Tribunal Judge Hanson