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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27998/2014

THE IMMIGRATION ACTS

At Field House
On 18th August 2015

Decision and Reasons Promulgated
On 29th October 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

HI
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. I make the order because there is a child involved. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Miss S.Haji, Counsel, instructed by Nathan Aaron, Solicitors.
For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Nigeria, born on 25th February 1996. Applications were made on 18 February 2014 and the 5 March 2014 seeking confirmation she had the right to reside by virtue of European Treaty provisions. The first application was rejected because the appropriate fee had not been paid. The importance of the first application lies in the fact that at that stage the appellant was under the age of 18 whereas in the second application she was over 18. At the same time these applications were made applications were also made for AO said to be her mother.

2. The basis of the applications was a claim to derived rights from Master A. He was born in the United Kingdom on 1 August 2006 and was entitled to a British nationality through his father. The claim made by AO was that she was his mother and that it was necessary for her to be in the United Kingdom to care for him. AO claimed that HI was her daughter and so the half sister of Master A.

3. The relevant provisions in the Immigration (EEA) regulations 2006 (the `2006 regulations') are as follows:

> 'Derivative right of residence
>
> 15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
>
> (2) P satisfies the criteria in this paragraph if—
>
> (a) P is the primary carer of an EEA national ...
>
> (3) P satisfies the criteria in this paragraph if—
>
> (a) P is the child of an EEA national ...
>
> (4) P satisfies the criteria in this paragraph if—
>
> (a) P is the primary carer of a person meeting the criteria in paragraph (3) …
>
> (4A) P satisfies the criteria in this paragraph if—
>
> (a) P is the primary carer of a British citizen ("the relevant British citizen");
>
> (b) the relevant British citizen is residing in the United Kingdom; and
>
> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.
>
> (5) P satisfies the criteria in this paragraph if—
>
> (a) P is under the age of 18;
>
> (b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

(7) P is to be regarded as a "primary carer" of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P—

(i) is the person who has primary responsibility for that person's care ...

...

18A. (1) The Secretary of State must issue a person with a derivative residence card on application and on production of—

(a) a valid identity card issued by an EEA State or a valid passport; and

(b) proof that the applicant has a derivative right of residence under regulation 15A.'

4. The respondent gave decisions in respect of the 5 March applications on the 1st July 2014. AO's application was refused because it was not accepted she was the mother of Master A. In the alternative, the respondent was not satisfied his father could not care for him. The respondent noted he had been placed with carers and did not accept AO was his primary carer.

5. The respondent did not accept that AO was HI's mother. In any event HI was unable to derive a right of residence as a dependent of AO (had she been accepted as Master A's primary carer) because she was over 18 at the time of the 5th March 2014 application. Aside from her age it was noted that she had been placed in a boarding school for several years which called into question any dependency upon AO.

6. The appeal against that decision was heard by First-tier Judge Place sitting at Nottingham on 2 October 2014. In a decision promulgated on 14 October 2014 the judge allowed the appeal of AO, finding that she was the mother of Master A, a British citizen, who would not be able to remain in the United Kingdom was held her. Consequently she was entitled to a derivative residence card under regulation 15A.

7. Judge Place decided that HI was not entitled to a derivative residence card because she was over 18 when the March 2014 was made. The judge noted there had been an application a week before her 18th birthday but the only comment was that the situation was confused. The judge did accept that AO was her mother; that she was financially dependent upon her and in full-time education.

8. The judge proceeded to consider HI's freestanding Article 8 rights. No argument was advanced under the immigration rules. The judge stated that whilst there were no

removal directions the logical consequence of the respondent's decision was that eventually she would be removed.

9. The judge concluded that family life was not engage because she was over 18 and had not demonstrated more than the usual ties of dependency between herself, her mother and her half brother.

10. It was accepted that she has an established private life in the United Kingdom and that her education would be interrupted by removal. Reference was made to section 117B of the National, Immigration and Asylum Act 2002. The judge concluded that the decision was proportionate as her education with not at a critical stage and she could reapply for entry clearance as a student.

The Upper Tribunal

11. HI obtained permission to appeal granted on the basis the judge did not deal adequately with the rejected application of the 18th February 2014, made when she was under 18. It was also arguable that the judge erred in concluding family life did not exist given that she was dependent of her mother and still in education. In carrying out the proportionality exercise it was arguable that the judge failed to factor in that she may have been entitled to a derivative right of residence before she was 18.

12. Section 8 of the application form is dated 18 February 2014. The first page of the application form contains two date stamps, namely 20 February 2014 and 6 March 2014. In the appellant's Upper Tribunal appeal bundle there is a letter from the respondent at page 53, dated 25 February 2014. It refers to receipt of the application form and states that if there is an issue over the application fee the application will be deemed to be invalid. There is a further letter at page 54, dated 1 March 2014 referring to the Immigration and Nationality (Cost Recovery Fees) Regulations 2011 and the Immigration and Nationality (Fees) Regulations 2011. The letter advised that from 1 July 2013 fees apply to EEA applications. The letter goes on to state that the application of 18 February 2014 made was invalid and was returned because the fee had not been paid.

13. The appellant's representative replied on 11 March 2014 refuting suggestions the fee had not been paid. The letter states that further payment is being made in the interests of the appellant .Page 65 is a copy of a cheque dated 5 March 2014 for the relevant amount,£110 for two applicants. The solicitor's provided their Lloyds bank statements showing encashment of this cheque on 12 March 2014. The statements ran from the 20th February 2014 and no earlier corresponding withdrawal is identified.

14. Page 66 of the appellant's bundle contains the final page of the application relating to payment. It is dated 18 February 2014 and indicated that payment was being made by Visa card. The cardholder was a member of the solicitors firm acting for the appellant. In the solicitor's letter it was suggested that the payment page had been removed from the application form when it was returned to their office.

15. I cannot determine what went wrong but on the balance of probabilities I find that the fee had not been paid the original application. If paid by visa debit card the appellant's representatives could have checked their statements to show payment. I can think of no reason why the respondent would not process an application if the proper fee were paid. Consequently, as the fee was not paid the first application was not valid.

16. In any event, the skeleton argument on behalf of the appellant does not consider regulation 15A properly. Master A is a British national. Under the definition section of the 2006 regulations "EEA national" means a national of an EEA State who is not also a British citizen. Consequently, he is not an EEA national for these purposes. Regulation 15A(5) applies where the claimant is under the age of 18 and their primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4). These paragraphs are concerned with EEA nationals. It is (4A) that is the relevant provision here. Consequently, the decision under the Treaty provisions was correct.

17. A separate issue relates to Article 8. For some time there has been uncertainty as to whether it is premature to raise Article 8 in a Treaty application when there are no removal Directions. There have been substantial changes to the appeal rights under the EEA Regulations which took effect on 6 April 2015. These changes are subject to transitional provisions in regulation 6 of the Immigration (European Economic Area) (Amendment) Regulations (SI 2015/694) to the effect that the changes have no effect in relation to an appeal against an EEA decision where that decision was taken before 6th April 2015.From then an appeal against an 'EEA decision' is on the ground that it breaches rights under the EU Treaties. Human rights, as part of their EEA appeal, can only be raised in response to a section 120 notice issued by the Home Office, or as a new matter raised before the Tribunal, but subject to the Secretary of State's consent.

18. Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) considered the issue of arguing Article 8 where no notice under section 120 of the 2002 Act has been served and no EEA decision to remove has been made. The conclusion was that an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. At para 69 and 70 it was stated:

> "70. We do not, therefore, consider that JM (Liberia) applies to these appeals. We remind ourselves of what was said in Patel at [62] (see above). An application made for a residence document as confirmation of an existing right and an application based on a claim that removal would be contrary to the United Kingdom's obligations under the Human Rights Convention are entirely different. To permit an appellant to do so would be precisely what the Supreme Court says section 85 (2) does not permit – the raising of an entirely different head of application outside the scope of the initial application.
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> 75. ... we conclude that, where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot in an appeal under the EEA Regulations bring a Human Rights challenge to removal."

19. This decision was not available at the time of the First-tier tribunal but from it the First tier Tribunal was wrong to consider Article 8 when there were no removal directions. At paragraph 32, Judge Place commented that there were no removal directions but felt entitled to proceed to consider Article 8 on the basis that the appellant would eventually be removed. However, if this arose there would be separate appeal rights.

20. In line with Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) Judge Place erred in considering the Article 8 claim. The judge is not to be faulted for this because at that stage the Upper Tribunal guidance was not available.

21. Had the Article 8 consideration been properly open to the judge then it was wrong to conclude that family life did not exist. The principal reason the judge excluded family life was because the appellant was 18. Rather than applying a blanket rule with regard to adult children each case should be analysed on its own facts (see Singh & Anor v Secretary of State for the Home Department [2015] EWCA Civ 630). However, as the issue should not have been considered this makes no material difference.

Decision.

The decision of First-tier Judge Place in relation to the EEA regulations is correct in law and shall stand.

The determination of the appellant's Article 8 rights is premature.

Anonymity Direction made

Deputy Upper Tribunal Judge Farrelly