Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03855/2015
IA/03860/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On 5th February 2016

Decision & Reasons Promulgated
On 18th February 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR ADETOKUNBO DADA ONI ONI
MRS OLUNBUNFUMI OLUFUNKE ONI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Bazini (Counsel)
For the Respondent: Ms Fijiwala (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellants' appeal against the decision of First-tier Tribunal Judge M.J. Gillespie promulgated on the 4th August 2015, in which she dismissed the Appellants' appeals against the Respondent's decision to refuse to grant them Residence Cards under the Immigration (EEA) Regulations 2006.

2. Within the Grounds of Appeal it is argued on behalf of the Appellants, *inter alia*, that the decision which was before the First-tier Tribunal was whether or not there was a requirement for the Appellants to have lived in another member state with the sponsor and that within the original refusal the Secretary of State had not raised the questions as to whether or not the sponsor had transferred her centre of life to Belgium pursuant to Regulation 9 (2) (C) and it is argued that point had already been accepted when an EEA Residence Card had been issued to her husband. It is argued that had the First-tier Tribunal Judge decided to raise it at the hearing, he should have afforded the Appellants an opportunity of adducing evidence of the matter and that the Judge having raised the issue then also failed to acknowledge or take into consideration that the test must have been satisfied in relation to the Appellants' son Tobi, as through the same sponsor Olubunmi, daughter-in-law of the Appellants, Tobi had been granted a Residence Card in June 2014.

3. It is further argued that the First-tier Tribunal Judge's findings at [21] in respect of dependence failed to take account of what is said to be substantial evidence of dependence submitted within the Appellants' bundle and the consistent testimony in respect thereof. It is further argued that the Immigration Judge's findings on credibility at [19] was based on unsupported assumptions that someone who has qualifications suitable for responsible managerial position in banking would then seek to establish herself as a self-employed English Teacher. It is argued that dependence can be of choice rather than necessity and the evidence did show that the Appellants' were dependent upon the sponsor, in that the Appellants lived with the sponsor's husband at an address which she also used and that the Appellants relied upon the sponsor and her husband in order to meet the mortgage payments and all of their outgoings as evidenced by the witness statements produced, the sponsor and her husband's bank statements and receipts produced by the Appellants. It is also argued that the centre of life test is not mentioned in the EEA Directive 2004/38/EC and is incompatible with EU laws.

4. Within the Rule 24 response, it is argued that the First-tier Tribunal Judge directed himself appropriately and that Regulation 9 rights only arise by analogy with the Directive and that the Centre of Life test is in line with European Jurisprudence in respect of those rights in light of cases such as the ECJ case of O and B C-456/12. It was further argued that the issue of a Residence Card is a recognition of a right rather than the grant of a right and that there is no residual discretion to assess the rights under the Directive, if Regulation 9 has not been met. It was further argued that the Judge was entitled to take account of the factors at [17] of the decision and added addresses whether there was evidence of the existence of [18]. It is argued further, the complaint in respect of Regulation 7 simply amounts to no more than a disagreement with the Judge's findings.

5. Permission to appeal has been granted by First-tier Tribunal Judge McDade on the 10th December 2015 on the grounds that "the grounds of application for permission to appeal assert, *inter alia*, that the Judge erred in law by questioning whether the sponsor had transferred her Centre of Life to Belgium where it is said the Appellant was already settled and the Respondent did not raise the matter in the reasons for

refusal letter. The grounds also asserted that the Judge made unsupported assumptions regarding credibility for example that the judge found it lacking in credibility that a person with a managerial position in banking would choose to become a self-employed English Teacher. These points are arguable and there is an arguable error of law."

6. In his oral submissions, Mr Bazini argued that the attempt by the Respondent to bringing fresh grounds for refusal, in terms of the question as to whether or not the sponsor's Centre of Life had been transferred to Belgium and the questions of dependency, had only been raised after oral evidence had been given, in the closing submissions. He argued that if the Respondent sought to change the grounds of refusal, this should been done at the start of the appeal, and that the Appellant should have been given the opportunity of having an adjournment, if so desired, in order to consider whether fresh evidence was needed in order to meet the altered grounds for refusal. He argued that a matter of fairness, new grounds could not simply be relied upon during closing submissions, or by the Judge at the final stage of the case, when they had not been identified either by the Judge or by the Home Office Presenting Officer as being factors within the case at the start of the case and that if the evidence did come out that there was to be a change of grounds, the Appellant should have been given the opportunity to deal with this and the procedure adopted was unfair. He further sought to argue that in any event the Judge had failed to take account of the fact that Tobi had been granted a Residence Card on the basis of the sponsorship of the same sponsor, so that it must have been accepted previously by the Respondent that the sponsor's Centre of Life had been transferred to Belgium, and that this factor was not taken account by the Judge. He argued further, given that her husband had also been granted a Residence Card, there was an acceptance of the Centre of Life question there as well, and that her husband would not have been granted a Residence Card, had the sponsor not previously established that her Centre of Life had been in Belgium.

7. Mr Bazini further sought to argue that dependency had not been in dispute within the original Refusal Notice and that was why therefore full evidence had not been submitted within the Appellant's bundle in respect thereof, that there was in any event sufficient evidence within the bundle in respect of dependency, in terms of the statements that had been submitted, together with the household bills and that the evidence within the statements was that Michael used to support the Appellant, but following the death of his wife and child, had been unable to do so. He argued that the Judge had failed to take account of this evidence in reaching his conclusions. He argued that the bank statements clearly again showed that payments in respect of the parents' mortgage were made in January, February, April and June 2015 and that the record bank statement entry on the 25th January 2015, for example, referred specifically to a £650 payment for "parents mortgage". It was argued that this had not been taken into account by the Judge and that the Judge had thereby failed to consider relevant evidence.

8. It was further argued by Mr Bazini, although the First-tier Tribunal Judge properly quoted the correct Regulations, the errors in this case stemmed from the fact that

within the original Refusal Letter, the wrong Regulations had been quoted, such that he asked me to find that if there was a material error of law, the decision should be remade, setting out that the original decision was not in accordance with the Law, and remitting the case back to the Secretary of State for a new decision to be made. Alternatively, he sought to argue that there should be a hearing de novo before the First-tier Tribunal.

9. In her submissions on behalf of the Respondent, Miss Fijiwala sought to argue that there was no material error of law and that the Judge was entitled to consider the questions of transfer of the Centre of Life and dependency based upon the evidence that had been given by the Appellant, Mr Oni. She argued that the suggestion that Tobi paid the mortgage based upon what is said in the documents was not what was said by Mr Oni when giving oral evidence and that the Judge found that "Michael especially" had paid the mortgage since 2009. She argued that the case had been dealt with fairly by the Judge and that the Appellants representatives could have sought to apply for an adjournment but had not. She conceded that there is no evidence to show that the Judge had in fact considered the bank statements, written statements regarding Centre of Life or dependency, but the Judge she argued was entitled to base his findings upon the oral evidence given and she therefore argued that any error in that regard was not material.

10. Miss Fijiwala conceded that the wrong Regulations had originally been considered within the Respondents refusal notice, but argued that the Judge had set out the correct Regulation. She sought to rely upon the case of Osoro (Surinder Singh) [2015] UKUT 593 (IAC) in respect of how the case should be considered if the Regulations were not met. She argued there was no material error of law.

11. I reserve my decision on the question of error of law and materiality.

My Findings on Error of Law and Materiality

12. Within the reasons for Refusal Letter produced by the Respondent dated the 10th January 2015, which decision was the subject of the appeal to the First-tier Tribunal, the only ground for refusal set out was that "the Secretary of State has been unable to determine that you and the British citizen were residing together in an EEA country before returning to the United Kingdom. It was therefore concluded that you have not provided evidence you Mr Adetokunbo Dada Oni Oni and Mrs Olunbunfumi Olufunke Oni resided in Belgium with the British Citizen while she was exercising her Treaty Rights in another EEA state. It is also apparent that you both have resided in the United Kingdom previously due to your immigration histories, this would indicate that neither of you had resided in Belgium with the British citizen".

13. The only issue raised in the Refusal Letter was therefore whether or not the Appellants had resided with their sponsor, their daughter-in-law Olubunmi, in Belgium. Questions regarding the sponsor's "Centre of Life" and questions of "dependency" were not raised within the original Refusal Notice.

14. Having effectively found in the Appellant's favour in respect of the question as to

whether or not the Appellants' needed to live with their sponsor in Belgium between [14] and [16] of the decision, First-tier Tribunal Judge Gillespie then went on to make findings regarding the sponsor's "Centre of Life" between [17] and [19] and also "dependency" between [20] and [21]. However, it is clear from the record of proceedings, that although questions were asked in this regard during cross-examination, no application was made by the Respondent to change the reasons for refusal set out within the Refusal Notice, at any stage, whether at the start of the appeal or after the evidence or even during closing submissions. Submissions were made in respect of these issues during closing submissions, but without seeking to change the reasons for Refusal Notice.

15. Clearly, the First-tier Tribunal Judge is entitled to consider any evidence presented before him which does tend to indicate that other criteria not referred to within the Refusal Notice has not in fact been met, and further, it is also clear that the Secretary of State is entitled to seek to change the grounds for reasons given for refusal. However, if this is to be done, it has to be done fairly.

16. Clearly, Appellants to the First-tier Tribunal, will only submit evidence to the Tribunal in respect of the issues said to be in dispute within the Reasons for Refusal notice. If other criteria exist under the Regulations, but are not referred to within the Refusal Notice as a reason for refusal, the Appellants cannot be expected to produce evidence in respect of every single criteria, when the other criteria have not been challenged within the Refusal Notice. The Refusal Notice is there to set out the grounds on which the Respondent says that the requisite requirements of the Regulations are not met.

17. Further, had the Respondent wanted to then ask questions of the Appellant upon Centre of Life and dependency within cross examination, these not being formal matters upon which the refusal and consequent appeal were based originally, the First-tier Tribunal Judge should have sought to establish if the Respondent was seeking to make a formal application to amend the reasons for refusal by the Respondent, before allowing extensive cross examination on those issues. It is not for the Respondent simply to go on a "fishing expedition" on issues not raised within the Refusal Notice, simply to see what answers the Appellants might then give. However, even if the Judge was correct in allowing questions in this regard before clarifying the Respondent's position, given that the questions regarding dependency and Centre of Life had not formed any basis of the original decision, the Judge should have, after cross examination, pointed out that these were not issues which had been raised within the Refusal Notice, and should have at that stage clarified with the Respondent to whether they wished to seek permission to vary the refusal grounds to encapsulate those issues, and if so, the Judge should have ascertained whether or not the Appellants required an adjournment, in the interests of justice and fairness, to be able to deal with those issues.

18. Even if the Judge himself, in light of the evidence given, had considered that these matters were of concern to him, in the interest of justice and fairness, he should have sought to establish whether or not the Appellants were actually in a position to deal

with those issues on the day, or whether or not an adjournment would be required. Simply moving directly on from cross examination to closing submissions, without affording the opportunity for an adjournment to deal with the new issues, I consider to be procedurally unfair. It was not simply a question of the representative for the Appellants needing to ask for an adjournment, it is for the Judge to ensure a fair hearing and he should have offered that as an option.

19. Further, I consider that the Judge's findings and analysis of the evidence in respect of Centre of Life, and his findings that there was no proof of Olubunmi having worked in Belgium from September 2013, the only evidence being that on the application form completed by Tobi that Olubunmi had only worked between January and April 2014, but that there was no documentary evidence of earnings or their circumstances in Belgium, when this had not been an issue previously, such that the Appellants could not have been expected to produce evidence in that regard, to be wholly unfair. If the Judge was concerned with the lack of evidence in this regard, he should have afforded the Appellants the opportunity of adducing such evidence.

20. Further, the Judge has failed to take into account the relevant evidence that Tobi had been granted a residence card, which would not have occurred had the Respondent previously not accepted that Olubunmi had transferred her Centre of Life to Belgium.

21. Further, I find that in circumstances where the question of dependency had not previously been issued, the Judge's findings at [21] regarding there been a lack of documentary evidence of the means of the sponsor in Belgium or of the remittance monies from Belgium to the United Kingdom and a lack of documentary evidence of the provision of financial support by Tobi or Olubunmi to the Appellants in the UK, again, to be procedurally unfair, given that the Judge does not appear to have actually addressed this issue specifically with the Appellants and given them the opportunity to seek an adjournment if necessary, in order to obtain further evidence on the point, given that this issue had not been contained within the original Refusal Notice.

22. In any event, the Judge has failed to take into account the evidence that was contained within the bundle in terms of the statements setting out the support which is said to have been provided by Tobi, together with the household bills paid for by Tobi. The Judge had therefore failed to take account of material evidence in this regard.

23. I therefore consider that the decision in this case has been vitiated as a result of procedural errors in the Judge allowing fresh issues to be raised without any formal application to amend the Refusal Notice, and without affording the opportunity to the Appellants of an adjournment to deal with the new issues and to provide further evidence in respect of issues that had not previously been in issue within the appeal. Further, there are clearly also material errors in this regard in failing to take account of the evidence that there was on those issues, in any event.

24. I therefore do find that the decision of First-tier Tribunal Judge Gillespie is vitiated by material errors of law and the decision is set aside. I therefore move on to remaking the decision. Given that it was agreed between the legal representatives, that the original decisions made were based upon the old wording of Regulation 9, that was in effect before the 1st January 2014, rather than the amended Regulation, such that the original refusal decisions made in respect of the Appellants were made on the basis of the wrong Regulation, by the Secretary of State originally, and given the concession made by Ms Fijiwala that if there was a material error of law in the original decision of First-tier Tribunal Judge Gillespie, that the matter should be remitted back to the Secretary of State for lawful decisions to be made, I do find that as a result of the decision having been based upon the old wording of Regulation 9 of the Immigration (EEA) Regulations 2006 rather than the amended wording, I find that the original decisions made in respect of both Appellants were not in accordance with the Law, such that the Appellants' appeals are allowed no that basis and lawful decisions do need to be made in respect of both of the Appellants by the Secretary of State.

Notice of Decision

The decision of First-tier Tribunal Judge M.J Gillespie, does contain material errors of law and is set aside;

I remake the decision allowing the Appellants appeal on the grounds that the decisions made in respect of the Appellants were not in accordance with the Law.

Signed Dated 6th February 2015

RF McGinty

Deputy Judge of the Upper Tribunal McGinty