Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/33980/2015
IA/33984/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th November 2018	**On 6th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

NIRMANI [K]
RAVI [G]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Anyene, Counsel
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Sri Lanka born respectively on 14th September 1986 and 30th September 1981. The Appellants had applied for residence cards to confirm a right of residence in the United Kingdom. That application had originally been refused on 20th April 2014 and the appeal was reconsidered. It was accepted that the parties married in 2005 in Sri Lanka and that they have a son born in 2009. Their contention was that they had dependency on an EEA national Sponsor in Italy and by

Notice of Refusal dated 30th October 2015 it was held that they had not provided any evidence that they were dependent upon an EEA national Sponsor immediately prior to entering the United Kingdom as required under Regulation 8(2)(a) and in addition the Secretary of State had not received any evidence that the Appellants had been dependent upon their EEA national Sponsor since entering the United Kingdom. It was noted that they contended that they had provided evidence of cohabitation with their Sponsor in Italy during 2007/2008 but no evidence of dependency had been produced.

2. The Appellants appealed. The appeal came before Judge of the First-tier Tribunal Wellesley-Cole on the papers at Taylor House in December 2016. In a decision and reasons promulgated in March 2017 the Appellants' appeal was dismissed for want of prosecution.

3. Judge of the First-tier Tribunal Alis granted permission to appeal noting that the grounds challenged the decisions to apply *Sala (EFMs: right of appeal) [2016] UKUT IAC* and raised Article ECHR issues. Judge Alis considered that there was no merit to the Article 8 Grounds of Appeal as case law had established that there was no set right of appeal arising in EEA appeals but that *Sala* had recently been overturned by the Court of Appeal and consequently there was an arguable error of law. The appeal then came before Deputy Upper Tribunal Judge Murray sitting at Field House on 10th January 2018. Judge Murray found there was no error of law in the First-tier Tribunal's decision but as *Sala* had been overturned the appeal was required to be reheard. He consequently sent the matters back to the First-tier Tribunal for rehearing taking into account all issues including the Article 10 issue raised by Counsel.

4. That rehearing then came before Judge of the First-tier Tribunal Burnett at Taylor House on 4th July 2018. It is important to note that that appeal was conducted on the papers at the specific request of the Appellant's instructing solicitors. The Appellants' appeal was dismissed under the EEA Regulations in a decision promulgated on 26th July 2018.

5. Thereafter on 7th August 2018 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended that the Appellants were family members of an EEA national and that the judge had erred in law in failing to recognise that the permanent residence cards issued in Italy were on the basis of the relationship and dependency on the EEA national and that this evidence established the relationship.

6. On 10th October 2018 First-tier Tribunal Judge Povey granted permission to appeal. Judge Povey noted that the primary issue under appeal was whether the Appellants were extended family members of their Italian aunt, as defined by Regulation 8(2). At the request of the Appellants, the appeal was determined without a hearing and that the judge clearly addressed the Italian residence cards and reached conclusions on their validity and relevance which were open to him. He provided detailed reasons of those findings. However, Judge Povey considered that it was

arguable that the judge had fallen into error in not providing sufficient reasons for why, after accepting that the Appellants had lived with their aunt in Italy between 2007 and 2008 and finding that they had continued to share the same household in the UK since 2011, that the Appellants could not meet the requirements of Regulation 8. Consequently, despite having reservation on the merits of all but one of the grounds, Judge Povey considered that all grounds were arguable.

7. It is on that basis that the appeal comes before me to determine whether or not there are material errors of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel, Mr Anyene. The Secretary of State appears by her Home Office Presenting Officer, Mr Whitwell.

Submissions/Discussions

8. Mr Anyene submits that this case turns on the issue of the residence cards to the Appellants, exactly what was issued and when they were issued. He takes me to paragraphs 20 to 30 of the First-tier Tribunal Judge's decision. He submits that the Appellants have provided a substantial volume of bundles of documents setting out their movements and the cards that were issued albeit that he concedes that it had not been made clear if the cards issued were an electronic version of a card issued in 2004 in Italy as family members of their aunt. He submits that the Appellants would not have been given cards without any limitation imposed upon them in Italy unless it had been accepted that they were family members and that the judge had erred in his assessment of the evidence (particularly that set out at paragraphs 26 and 31) with regard to purported gaps in the evidence as to whether or not the Appellants were dependent on a family member of the EEA national's household. He submits that the bundle has not been properly considered.

9. Mr Whitwell reminds me that this was a paper appeal and he does not know what exactly was in the bundle and indeed that the judge has made no reference to an earlier residence card within it. He asked me to look at paragraph 26 of the decision and to note that it is possible that the Appellants may have returned to Italy between 2008 and 2011 but there is nothing to suggest that the case that is now being put is the case that was put to the Tribunal. He refers me to the authority of *Oboh and Others v Secretary of State for the Home Department [2013] EWCA Civ 1525* and the paragraphs that follow in the discussion at paragraph 45 thereafter, in particular emphasising that there is a requirement in pursuing a case of this nature to show an element of continuance in the residence. He asked me to find that there are no material errors of law in the decision of the First-tier Tribunal Judge.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by

taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. This matter has a long history and in some respects the submissions made by Counsel for the Appellants amounts to little more than disagreement. However, I am persuaded that in the interests of justice this matter should be reheard and that there are errors within the decision that are material. The actual point that needs to be decided is a very clear and specific one as to whether or not the Appellants meet the requirements of having a valid residence card issued in Italy which is still valid on the basis upon which they can make their application. It was found by the First-tier Tribunal Judge that there was a gap between 2008 and 2011 when he considered that neither of the Appellants were dependent on nor a member of the EEA national's household and that although the Respondent accepted that the Appellants had lived with the EEA national in Italy between 2007 and 2008, there was no evidence of dependency.

13. It is the contention of Mr Anyene that this is in direct contradiction to the documents that were available before the Tribunal and he seeks to explain them to me.

14. The difficulty with which both I and Mr Whitwell are placed is that the only documents we have before us are those attached to a letter from Chancery Solicitors received at Taylor House on 28th June 2018 in readiness for the hearing on 4th July in which they submit an additional bundle which they contend is in addition to the previously submitted bundle running to 230 pages dated 14th December 2016. That bundle is not before me. Neither is that bundle before Mr Whitwell. What unfortunately is not clear is whether it was before the First-tier Tribunal

Judge. This case has a long history. It is possible that the bundle has gone astray.

15. The situation of course would not have risen had the Appellants not chosen for the appeal to be dealt with on the papers albeit that that was their prerogative. However, it is possible that having looked at the papers that were before him the judge came to the wrong conclusion based merely on the fact that she should have been in a position to have considered the previous papers, to make a paper trail of the full history and to give due consideration to Counsel skeleton arguments. Had she done so it is the submission of Mr Anyene that she must have come to a different conclusion.

16. I do not know if that is the case but if it is clear that it is likely – as seems to be the case here – that all the relevant bundles were not before the judge hearing this matter then as a matter of fairness it is only appropriate that the decision be set aside and the matter be reheard. I emphasise that that is in no way a criticism of the First-tier Tribunal Judge.

Decision and Reasons

17. On the basis that the First-tier Tribunal Judge did not have before her all the relevant papers upon which to make the appropriate consideration and bearing in mind that the letter from Chancery Solicitors received at Taylor House on 28th June 2018 makes it specifically clear that a previous bundle had been submitted and made available, the decision of the First-tier Tribunal Judge contains a material error of law and is set aside. The following directions are given.

    (1) That the matter be remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an ELH of two hours.

    (2) That the appeal is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Burnett, Immigration Judge Wellesley-Cole, or Immigration Judge Murray.

    (3) That the restored hearing be an oral hearing and the Appellants do personally attend that hearing for the purpose of cross-examination.

    (4) That there be leave to either party to file an up-to-date bundle of objective and/or subjective evidence upon which they seek to rely at least seven days prior to the restored hearing. It is emphasised that it is the requirement of the Appellants' instructed solicitors to ensure that a complete and full bundle of all documentary evidence upon which they seek to rely is made available both to the Tribunal on the rehearing and to the Secretary of State.

    (5) That any skeleton arguments/authorities upon which the parties intend to rely be served and filed at the Tribunal at least seven days prior to the restored hearing.

(6) That in the event of the Appellants requiring an interpreter then the Appellants' instructed solicitors must notify the Tribunal of this fact and of the language requirements of the interpreter within seven days of receipt of these directions.

No anonymity direction is made.

Signed Date 2 December 2018

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris