



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

Appeal Number: EA/04801/2019

THE IMMIGRATION ACTS

**Considered on the papers
On 29 October 2020**

**Decision & Reasons Promulgated
On 4 November 2020**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

EKG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge F Anthony, promulgated on 15 November 2019. Permission to appeal was granted by First-tier Tribunal Judge Bird on 1 April 2020.

Anonymity

2. Such a direction is now made owing to the appellant's medical conditions.

Background

3. The appellant entered the United Kingdom during 2013 and thereafter made a series of unsuccessful applications for a residence card as confirmation of a right of residence under European Community law as the sibling of an EEA national exercising Treaty rights in the United Kingdom. The last decision refusing the appellant a residence card was made on 20 August 2019 and is the subject of this appeal.
4. The basis of the appellant's claim to a residence card is that he is an extended family member of his sibling, with reference to regulation 8(3). Well-drafted submissions made on the appellant's behalf by a trainee solicitor and which were sent to the respondent by email on 29 May 2019 in the form of a pre-action protocol letter explained that the appellant was seriously ill and required his sister's care and support to function. Reference was made to a DNA report which proved the relationship as well as medical evidence that the appellant was suffering from cancer, was HIV+ and symptomatic. In her response dated 30 May 2019, the respondent withdrew an earlier decision letter dated 19 March 2019 and undertook to reconsider the application, *"taking into account the information already available."*
5. That reconsideration led to the decision of 20 August 2019 to refuse a residence card. The reasons for refusal were that the appellant had not provided adequate evidence that he was dependent upon or residing with his sponsor prior to entering the UK or that he had been dependent upon or resided with her since entering the UK. It suffices to say that the decision made no reference to regulation 8(3).

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the focus of the case was clearly on regulation 8(2) as is apparent from the appellant's skeleton argument, the judge's record of proceedings and the decision and reasons. The judge concluded that the appellant had no prior membership of his sister's household and no prior dependency. She concluded that the appellant could not succeed to be *"recognised as an extended family member pursuant to regulation 8."*

The grounds of appeal

7. The grounds of appeal identified that the relevant regulation in this case was 8(3) on account of the appellant's poor health and need for personal care, as set out in a report from his consultant physician. Criticism was made of the failure of the First-tier Tribunal to distinguish the alternative conditions available under Regulation 8. Secondly, it was argued that the judge relied upon an apparent inconsistency in the documentary evidence which had not been in dispute during the hearing. Lastly, it was said that there was evidence before the judge of the appellant and his sister living

in the same household and that there was a lack of clear credibility findings in relation to this.

8. Permission to appeal was granted on the basis that the judge arguably erred in focusing entirely on regulation 8(2).

The procedural history

9. On 13 July 2020, the parties were sent directions which expressed the provisional view that whether the First-tier Tribunal's decision involved an error of law and whether it should be set aside, could be determined without a hearing. The parties were invited to provide submissions and respond to the proposal to consider the matter without a hearing.
10. The respondent provided submissions under cover of an email dated 22 July 2020. It was not contended that a further hearing was necessary. The Upper Tribunal was invited to dismiss the appeal, taking into account the submissions of Mr Kotas.
11. There is no response from the appellant on file. Given the time that has elapsed since the grant of permission as well as the Upper Tribunal directions, I consider that it is in the interests of justice that this appeal be progressed. In the absence of any submissions from the appellant, objections from the respondent nor any other apparent reason to consider this matter at an oral hearing, I have resolved to decide the relevant issues on the papers.

Decision on error of law

12. While BWF Solicitors carefully prepared the appellant's bundle, ensuring that the basis of the case was apparent from the extensive medical evidence and witness statements, the appellant was poorly served by all at his appeal hearing. It is apparent from a cursory glance at the slight respondent's bundle, that his representatives clearly presented his application for a residence card as being one to be considered with reference to regulation 8(3). Despite this, the decision letter made no reference to this regulation nor to the detailed submissions provided in the pre-action protocol email. This is despite the Secretary of State undertaking to take those submissions into account upon reconsideration. Mr Kotas was correct to note that the skeleton argument of Adeel Malik made no mention of regulation 8(3) and this is regrettable. Furthermore, the focus of the appeal was wrongly on regulation 8(2) and all professionals at the hearing share the blame for this. In view of the documentary evidence, the oral evidence and the basis of the application to the respondent, it ought to have been obvious that regulation 8(3) was relevant. Indeed, the appellant's witness statement could not have made it clearer, at 5. *"Based on serious health grounds as I have stated above, I strictly require the personal care of my sister to function."*

13. The failure of the First-tier Tribunal to identify the basis of the case is a material error of law, without which a different outcome might have been achieved. Accordingly, I set aside the decision of the First-tier Tribunal in its entirety with no findings preserved.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is to be transferred to Taylor House for the convenience of the appellant and representatives, neither of whom are based in Birmingham.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge F Anthony.

Directions

The respondent is directed to reconsider the appellant's claim to be an extended family member with reference to Regulation 8(3), within 3 months of receipt of this decision.

Should the respondent wish to maintain the decision to refuse a residence card, a supplementary decision letter must be provided.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date 18 November 2020

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within

the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email