



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

Appeal Number: EA/05922/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 31st of January 2020**

**Decision & Reasons
Promulgated
On 5th of February 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**TOLUWANIMOROTI MOSOPEFOLUWA OSOBA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Haseldine of Counsel, instructed by Augustine Clement Solicitors

For the Respondent: Mr P Deller, Senior Home Officer Presenting officer

DECISION AND REASONS

1. The Appellant appealed against the decision of First-tier Tribunal Judge Lawrence, promulgated on 20 March 2019, which included a finding that there was no valid appeal by the Appellant under Rule 22 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and therefore no decision made in respect of her. In a decision dated 9 December 2019, the Upper Tribunal found an error of law in that

decision and gave directions for the re-hearing of the appeal in the Upper Tribunal. The background to this appeal is set out in the error of law decision annexed not be repeated here in savers where necessary.

Relevant Immigration law

2. The Appellant's application for a derivative residence card was made under Regulation 16 of the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations"); which so far as material provides as follows:

- (1) *A person has a derivative right to reside during any period in which the person -*
 - (a) *is not an exempt person: and*
 - (b) *satisfies each of the criteria in one paragraph (2) to (6).*
- (2) *The criteria in this paragraph that -*
 - (a) *the person is the primary carer of an EEA national: and*
 - (b) *the EEA national -*
 - (i) *is under the age of 18:*
 - (ii) *reside in the United Kingdom as a self-sufficient person; and*
 - (iii) *would be unable to remain in the United Kingdom with the person left the United Kingdom for an indefinite period.*

...

- (6) *The criteria this paragraph are that -*
 - (a) *the person is under the age of 18;*
 - (b) *the person does not have leave to enter, a remaining, the United Kingdom under the 1971 Act (but see paragraph (7A));*
 - (c) *the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and*
 - (d) *the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.*

3. Regulation 20 of the 2016 the issue of a derivative residence as follows:

- (1) *The Secretary of State must issue a person with a derivative residence card on application and production of -*
 - (a) *a valid national identity card issued by an EEA State or a valid passport; and*
 - (b) *prove that the applicant has a derivative right to reside under regulation 16.*
- (2) ...

- (3) *A derivative residence card issued under paragraph (1) is valid until -*
 - (a) *the date five years from the date of issue;*
 - (b) *any earlier date specified by the Secretary of State when issuing a derivative residence card.*
- (4) *...*
- (5) *A derivative residence card is -*
 - (a) *proof of the holder's derivative right to reside on the day of issue;*
 - (b) *no longer valid if the holder ceases to have a derivative right to reside under regulation 16;*
 - (c) *invalid if the holder never had a derivative right to reside under regulation 16.*
- (6) *This regulation is subject to regulations 24 and 25.*

4. Pursuant to Regulation 24(3) of the 2016 Regulations, the Secretary of State may revoke a residence card if the holder has ceased to have, or has never had, a right to reside under the 2016 Regulations. By virtue of Regulation 28 of the same, the reference to residence card includes a derivative residence card.

The hearing

5. The Appellant's mother, Olayirika Abiola Osoba, attended the oral hearing, adopted her written statement dated 30 January 2020 and confirmed the truces contents set out therein. There was no further examination or cross-examination and I clarified the Appellant's current medical condition.
6. Mr Deller accepted on the Respondent that the Appellant met the requirements in Regulation 16(6)(a), (b) and (d) of the 2016 Regulations, in particular by reference to the Appellant's age, the evidence from her parents and the medical evidence. However, it was not accepted that she could meet the requirements of Regulation 16(6)(c) because her mother, her primary carer, is no longer a person entitled to a derivative right to reside in the United Kingdom because Regulation 16(2)(b)(i) of the 2016 Regulations was not met - the EEA national upon whom the Appellant's mother and in turn, the Appellant, was reliant upon, is no longer under the age of 18.
7. At the time of the appeal before the First-tier Tribunal, which was at that time a linked appeal for both the Appellant and her mother, the EEA citizen was under the age of 18 and it was accepted that his mother was his primary carer and that he would not be able to remain in the United Kingdom without her. The EEA national reach the age of 18 shortly after his mother's appeal was allowed by the First-tier Tribunal, although this does not appear to have been considered by the Respondent who

subsequently issued her with a derivative residence card. Mr Deller suggested that this is likely to be an administrative error which will need to be followed up separately by the Respondent, but which in fact does not impact on the determination of this appeal.

8. The issue of an EEA derivative residence card is only recognition of entitlement in accordance with the regulations when it is issued and is not of itself confer a right of residence in the United Kingdom. Further, pursuant to Regulation 20(5)(b) the 2016 Regulations, the derivative residence card is no longer valid because the Appellant's mother has ceased to have a derivative right of residence under Regulation 16. Ultimately, the Respondent also has the power to revoke the derivative residence card issued to the Appellant's mother.
9. Mr Deller submitted that the regulation has a clear and exact age requirement for the EEA national which is not satisfied in the present case. He submitted that there was nothing in the treaties or case law to allow anything other than a literal reading of this requirement, even if it could be shown that there was a continuing need for the primary carer, for example for a vulnerable adult. There is nothing in this case to suggest that the EEA national could not continue to meet the 2016 Regulations in his own right, nor that he would be required to leave if his mother left the United Kingdom. This is a submitted that there is a good reason for the age requirement as it is and however desirable it may be for the Appellant's mother to remain the United Kingdom, the evidence does not show it is needed.
10. This point in relation to age is substantively different to the age point suggested on behalf of the Respondent at the error of law hearing and made without notice prior to the day of the hearing (with neither party having complied with directions given in the previous decision for the filing of evidence and skeleton arguments). Mr Haseldine did however confirm that he was able to deal with the point at the oral hearing without the need for an adjournment.
11. On behalf of the Appellant, Mr Haseldine submitted that the only argument in response is that there must be some give to the literal meaning of the Regulations containing the age requirement. The evidence shows, and was accepted by the First-tier Tribunal, that the Appellant's mother is the primary carer for both children, the Appellant and the EEA national and it is accepted by the Respondent now that the requirements in Regulation 16(6)(d) of the 2016 Regulations is met this Appellant.
12. Mr Haseldine suggested that the age of 18 was chosen in the regulations because before that age, children are not able to, nor expected to look after themselves and therefore may be unable to remain in the United Kingdom to exercise their treaty rights without the presence of their primary carer. In the present case it was submitted that exactly the same reason is made out on the evidence, that the EEA national is only just over the age of 18 but has not yet position to look after himself and exercises

treaty rights independently in the United Kingdom without the presence of his mother. The Appellant's mother's evidence is that the EEA national would have to return to Nigeria with her if she had to leave with the Appellant and he would be unable to remain here without a primary carer. Mr Haseldine accepted that this evidence was subjective rather than object of, but presented this as the reality of the family situation.

13. Finally, it was suggested that it was necessary for the Tribunal to consider the best interests of the Appellant as a child pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 and in particular to consider her health needs. However, Haseldine could not identify where, within Regulation 16 of the 2016 Regulations this could be appropriately factored in, in the context of an EEA rather than a human rights appeal. In these circumstances the point was not pursued further.

Findings and reasons

14. On a literal reading of Regulation 16(2)(b)(i) and 16(6)(c) of the 2016 Regulations, there is no dispute between the parties that the Appellant is not entitled to a derivative right of residence as the EEA national upon which her mother's derivative right to reside and therefore her own is placed, is now over the age of 18. On that basis her appeal falls to be dismissed unless there is some basis upon which the Appellant can show that the requirement in Regulation 16(2)(b)(i) of the 2016 Regulations should not be read literally. Mr Haseldine could not identify anything in the EU treaties or case law which supported anything other than a literal interpretation of the age requirement and I am not aware of anything either.
15. Mr Haseldine did make submissions as to why the age of 18 may have been included as a requirement which focused broadly on a child's inability to look after themselves. However, this is not solely for emotional or guidance reasons but must also be for legal reasons as to the lack of legal capacity of a child to enter into certain formal relationships required for independent living. There is a broad range of reasons as to why a person is treated as an adult at the age of 18 and likely to be able to live independently at that age, which go far wider than those suggested by Mr Haseldine by reference to the evidence in this appeal.
16. In any event, even if there was some principle or reason not to read the age requirement literally, the evidence in this appeal simply does not support the extension of the provisions to include the primary carer of this EEA national, or by extension, to the Appellant. There is nothing to suggest the EEA national is anything other than a typical 18 year old who has started university. There is no evidence of any medical conditions, any particular vulnerability or dependency on his mother and he no longer lives at home on a full-time basis. Whilst there is no dispute that the continuing support from his mother would be desirable, not least for the reasons she gives in her own written statement, they fall far short of establishing that he would be unable to remain in the United Kingdom if

she left. Therefore, even if the express age requirement is disregarded or applied more flexibly, the requirement in Regulation 16(2)(b)(iii) of the 2016 Regulations could no longer be met as at the hearing before the Upper Tribunal (notwithstanding the findings of the First-tier Tribunal, which were made at a time when the EEA national was under the age of 18 with the obvious consequences on his ability to live independently). For these reasons, the Appellant can not meet the requirements for a derivate residence card and her appeal is therefore dismissed.

Notice of Decision

The reasons set out in the attached error of law decision, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

The decision is remade as follows.

The appeal is dismissed under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed



Date

3rd February 2020

Upper Tribunal Judge Jackson



IAC-AH-SC-V1

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

Appeal Numbers: EA/05920/2018
EA/05922/2018

THE IMMIGRATION ACTS

Heard at Field House

On 28th November 2019

**Decision & Reasons
Promulgated**

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Before

**HIS HONOUR JUDGE BIRD
(SITTING AS JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE JACKSON**

Between

**OLAYINKA ABIOLA OSOBA (FIRST APPELLANT)
TOLUWANIMOROTI MOSOPEFOLUWA OSOBA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B Haseldine of Counsel, instructed by Augustine
Clement Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The second appellant appeals with permission against the decision of First-tier Tribunal Judge Lawrence, which included a finding that there was no valid appeal by the second appellant under Rule 22 of the Tribunal

Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and therefore no decision made in respect of her.

2. The appeal came before the First-tier Tribunal against the respondent's refusal of a derivative residence card firstly for Mrs Osoba, the first appellant, as the primary carer of an EEA national child under Regulation 16 of the Immigration (European Economic Area) Regulations 2016 and secondly, in respect of the second appellant, as the dependent of the first appellant (her daughter).
3. Before the First-tier Tribunal, the first appellant's appeal, was allowed on the basis that she satisfied the requirements of Regulation 16 of the Immigration (European Economic Area) Regulations 2016. The First-tier Tribunal found in paragraphs 16 to 18 of the decision that there was no valid appeal from the second appellant because the First-tier Tribunal had not been provided with a decision in her case, noting only a covering letter from the respondent which referred to both appellants.
4. However, as accepted today on behalf of the respondent, the Reasons for Refusal Letter clearly deals with both appellants, the mother and the daughter. The final paragraph of the substantive part of the decision states:

"You have also applied for a derivative residence card on behalf of Toluwanimoroti Mosopefoluwa Osoba as your dependant. As you have failed to demonstrate that you meet the requirements of Regulation 16(2) of the Immigration (EEA) Regulations 2016 (as amended) Toluwanimoroti Mosopefoluwa Osoba is therefore, unable to derive a right on the basis that you are the primary carer of a self-sufficient EEA national child and is refused in line."

5. Although the decision is only formally addressed to the first appellant, the covering letter clearly identifies both appellants and it is beyond doubt that the decision letter is in respect of both and contains a substantive decision in relation to them both.
6. The First-tier Tribunal therefore erred in law in finding that there was no valid appeal in relation to the second appellant and erred in failing to make any decision under the Immigration (European Economic Area) Regulations 2016 on that basis. It would further, although not strictly necessary to add, be a procedural error for this point not to have been raised with the parties before the decision was reached on that basis in circumstances where neither party had raised the issue.
7. The decision in paragraphs 16 to 18 of the First-tier Tribunal's decision is a material error of law and it is necessary to set aside that part of the decision. The second appellant's appeal in consequence remains outstanding.

8. There are two points of dispute between the parties as to whether Regulation 16(6) of the Immigration (European Economic Area) Regulations 2016 is met. One relates to the age of the person, or more specifically, which person has to be under the age of 18; and in subparagraph (d) whether the primary carer would be prevented from residing in the United Kingdom if the person (the second appellant) left the United Kingdom for an indefinite period.
9. These matters require only limited further findings of fact and potentially further limited evidence such that the remaking of this appeal is retained in the Upper Tribunal and will be listed for further hearing on the first available date before UTJ Jackson.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision in respect of the second appellant.

I set aside the decision of the First-tier Tribunal in respect of the second appellant.

Directions

- (i) The appeal to be re-listed before UTJ Jackson on the first available date.
- (ii) Any further evidence the Appellant wishes to rely upon is to be filed and served no later than 14 days before the re-listed hearing.
- (iii) The parties are at liberty to, but are not required to, file a skeleton argument no later than 7 days before the re-listed hearing.

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

Unless and until a Tribunal or court directs otherwise, the second 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
2019



Date

9th December

Upper Tribunal Judge Jackson

