



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29055/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 4 June 2014

Determination Promulgated
On: 18 July 2014

Before

UPPER TRIBUNAL JUDGE PITT

Between

RICHARD STEPHEN KALEB LLOYD

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

Respondent

Representation:

For the Appellants: Mr Jacobs, instructed by Joint Council for the Welfare of Immigrants

For the Respondent: Mr Saunders, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of New Zealand and was born on 8 January 1983.
2. This is his appeal against the decision promulgated on 8 April 2014 of First-tier Tribunal Judge R J N B Morris which refused the appellant's appeal against the refusal of an EEA family permit by the respondent on 7 August 2013.

3. The background to this matter is that the appellant is the civil partner of Mr Jason David Dela Cruz. Mr Dela Cruz is a citizen of the Philippines. He was issued with a residence card by the respondent on 20 July 2010 as the family member of an EEA national exercising Treaty rights. That EEA national is his step-father, Mr Martin Healy, an Irish citizen. It was common ground before me that Mr Healy was exercising Treaty rights.
4. The appellant maintains that he is entitled to a residence card as the family member of Mr Dela Cruz. He maintains that this right arises from Article 2 of Council Directive 2004/38/EC (the Citizens' Directive) as incorporated into domestic legislation by Regulation 7 of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations).
5. Judge Morris did not find that he was so entitled and he appeals that aspect of her decision as well as that declining to assess his Article 8 claim.

6. Article 2 of the Citizens' Directive states:

"Article 2

For the purposes of this Directive:

- 1) "Union citizen" means any person having the nationality of a Member State;
- 2) "Family member" means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership...
 - (c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
- 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence."

7. Regulation 7 of the EEA Regulations states:

"Family member

7. (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –
 - (a) his spouse or his civil partner;
 - (b) direct descendants of his, his spouse or his civil partner who are –
 - (i) under 21; or

- (ii) dependants of his, his spouse or his civil partner;
- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
- (d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless –

(a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or

(b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked... .”

6. On the face of it, neither Article 2 nor Regulation 7 affords the appellant the right to a residence card. That is because his relationship is that of a civil partner with Mr Dela Cruz who is a family member of an EEA national but not himself an EEA national exercising Treaty rights. Only a direct descendant of Mr Dela Cruz, as opposed to a partner, comes within the provisions of the Directive and the EEA Regulations.
7. As I understood it, at the heart of the appellant’s case is the proposition that the failure of the Directive and EEA Regulations to provide for the lawful residence the civil partner of a dependent of an EEA national is inconsistent with Article 8 of the ECHR. I could not see how that could be so. Article 8 is a qualified right. It does not provide for any form of relationship to be afforded lawful residence as of right, not even parent and minor child. It cannot be an automatic breach of Article 8 that EEA legislation does not provide for the lawful residence of a civil partner of a dependent of an EEA national. I could not see where the claimed inconsistency with Article 8 of the ECHR arose, therefore.
8. The arguments for the appellant also touched on the issue of whether the respondent’s decision impinged on the EEA rights exercised by Mr Dela Cruz and his step-father, Mr Healy. Again, it was not clear to me from the evidence why that would be so. The EEA rights engaged in this appeal are those of free movement under the Citizen’s Directive and Mr Healy does not assert that he will be forced to leave the UK because the appellant does not have a residence card and this may lead to his step-son and the appellant leaving the UK.
9. I accept, however, that the First-tier Tribunal erred in failing to consider the appellant’s Article 8 claim. In an appeal dealing with an issue of EEA law an appellant is entitled to rely on human rights grounds. Fundamental human rights form part of the general principles of Community Law, this being confirmed by the


Charter of Fundamental Rights of the European Union. The same principle is confirmed in the various cases relied upon by Mr Jacobs.

10. I found the failure to decide the Article 8 appeal to be an error on a point of law such that this part of the determination must be set aside and re-made. I proceed to do so now.
11. Nothing suggested that the first four of the questions set down in Razgar [2004] UKHL 27 fell to be answered other than in the appellant's favour. I proceeded to assess the proportionality of the decision to refuse a residence card, essentially refusing lawful residence and expecting the appellant to leave the UK.
12. There is no dispute as to the strength of the appellant's family life with Mr Dela Cruz or his private life with Mr Dela Cruz's family, through his wider social network and work he has undertaken. The evidence of all of the family members is that it will be distressing if the appellant has to leave the UK and Mr Dela Cruz goes with him. I accept that will be so and that it may be heightened for Mr Dela Cruz and his mother where a facet of Filipino culture is that adult children remain in the family home with their partners. I also have no doubt that the appellant and Mr Dela Cruz have offered support to Mr Healy when he has been unwell but did not find the evidence on this point and where support would be available from Mr Healy's wife this could be a factor determining the Article 8 claim in the appellant's favour.
13. The appellant has been in the UK only since 2010. There was nothing to suggest that he cannot return to New Zealand, where he has lived most of his life, with his civil partner. I did not have evidence as to how long Mr Dela Cruz has lived in the UK but although there will inevitably be upheaval and initial difficulty in moving to New Zealand with the appellant it did not appear to me that the difficulties involved in moving to a relatively similar culture using the same language could be so great as to reach the level disproportionality. Both the appellant and Mr Dela Cruz have qualifications, skills and work experience that will assist them in establishing themselves in New Zealand.
14. Even under a free-standing Article 8 proportionality assessment, untrammelled by the provisions of Appendix FM and paragraph 276ADE and test of exceptionality or compelling circumstances, it was not my view that the decision could be found to be disproportionate or the public interest in maintaining an effective immigration system outweighed. When the inability to meet the Immigration Rules is taken as a starting point in the proportionality assessment and the requirement for exceptional or compelling circumstances applied, the Article 8 claim here simply cannot succeed; Haleemudeen v SSHD [2014] EWCA Civ 558 applied.

Decision

15. The determination of the First-tier Tribunal does not disclose an error on a point of law as regards EEA law and shall stand.

16. The determination of the First-tier Tribunal discloses an error on a point of law as regards Article 8 of the ECHR. I re-make that part of the appeal as refused.

Signed 
Upper Tribunal Judge Pitt

Date 17 July 2014