Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33694/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 July 2014	**On 25 July 2014**

Before

THE HONOURABLE MR JUSTICE HADDON-CAVE
UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VAFI KADI KAMARA

Respondent

Representation:

For the Appellant: Miss S Vidyadharan, Home Office Presenting Officer
For the Respondent: Mr H Cheng, Duncan Lewis & Co Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Eban promulgated on 28 March 2014. The claimant Vafi Kadi Kamara was refused a permanent residence card as the family member of an EEA national under the 2006 Regulations. The Reasons for Refusal are as set out in the Secretary of State's letter dated 27 August 2013.

2. The First-tier Tribunal Judge Eban found that the claimant had acquired a right to permanent residence under Regulation 15(1)(d) as the spouse of a worker who had ceased activity. Miss Vidyadharan, for the Secretary of State, has submitted that there is a fundamental error of law in the First-tier Tribunal's Determination and Reasons: namely, the First-tier Tribunal Judge failed to have regard to Regulation 5(3) which requires findings to be made that the EEA sponsor has to "terminate his activity in the United Kingdom as a worker or self-employed person .. as a result of a permanent incapacity to work". The judge made reference to Regulation 15(1)(d) but failed to make any reference to Regulation 5(3) or to refer to that provision.

3. The Judge then directed herself that the enquiries made by the Department of Work and Pensions (DWP) when deciding to give the claimant Employment Support Allowance (ESA) would have included determining whether he was permanently incapable of work:

> "The EEA spouse has been receiving ESA since September 2012. ESA is a benefit for people who available limited capability for work because of health condition or disability. DWP would have assured themselves that the EEA spouse was entitled to receive this benefit before paying it to him. As I understand it DWP would have checked whether the EEA spouse was an EEA national who was a worker or self employed person who had become permanently incapable of work within Regulation 5(3)."

Regulation 5(3)

4. It is for the claimant to show that the condition of 'permanent incapacity' is met: the letter from the Department of Word and Pensions did not in terms say that such a check had been made, nor was the letter itself evidence that the claimant's incapacity to work is 'permanent' as defined in Regulation 5(3) of the EEA Regulations. So far as relevant, that provision is as follows:

"Worker or self-employed person who has ceased activity"

5. (1) In these Regulations, "worker or self-employed person who has ceased activity" means

An EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

(3) A person satisfies the conditions in this paragraph if –

(a) he terminates his activity in the United Kingdom as a worker or self employed

Person as a result of permanent incapacity to work; and

(b) either –

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom"

5. In our judgment, it is clear that the judge failed to address her mind to the fundamental question of permanent incapacity. For these reasons, the judge's decision is plainly flawed and cannot stand.

6. Mr Chen, who appears for Mrs Kamara, seeks by way of cross-appeal to rely on a separate error of law, namely an assertion by the Tribunal Judge that she had no jurisdiction to deal with any of the the ECHR issues and would therefore not deal with those issues. We find that submission by Mr Cheng surprising given what the Tribunal judge records at paragraph 5 of her judgment:

> "At the outset of the hearing Mr Cheng and Mr Pos agreed that I should only hear the appellant's claim for an EEA residence document and not her claim under Article 8 as the decision to refuse to issue a permanent residence card did not give rise to any interference with Article 8 and should a decision be made at some point to remove the appellant from the UK, Article 8 could then be argued. It was accepted that the appellant's claim under Article 3 had not been made on the correct form."

7. Mr Cheng had prepared no statement of truth or copy of his notes to support his assertion that the Judge had herself refused to deal with Article 8. Nor had he sought a transcript of the First-tier Tribunal hearing to justify his submission, in effect, that the Tribunal Judge had misrecorded what had taken place. We would find it surprising that an experienced Tribunal Judge would make an assertion that she had no jurisdiction to deal with ECHR issues without recording it. We find it far more likely that the Judge's summary of Counsel's agreement at paragraph 5 is correct and we approach this appeal on the basis that Article 8 was lawfully excluded from the First-tier Tribunal's determination and that such exclusion cannot constitute an error of law because the claimant's representative agreed that the Tribunal was seised only of the EEA residence document point.

Adjournment

8. As an alternative, Mr Cheng seeks an adjournment of this matter to allow his client to garner further evidence to demonstrate that the sponsor is a qualified person. Regretably, Mr Cheng seems unaware of the practice direction which provides that parties should appear at these appeal hearings with any further evidence upon which they wish to rely in the event that the appeal Tribunal seeks to go on to remake the decision. We see no reason why we should not proceed now to dispose of this matter.

9. We reject his application for an adjournment. There is no further evidence before us.

Section 55 of the Borders Citizenship and Immigration Act 2009

10. No question under s.55 in relation to any relevant child was raised before this hearing. The issue was raised in Mr Cheng's skeleton argument served today without notice or supporting evidence. There is no application to vary to include Section 55 and if there were we would have refused it, since the question was not raised or relied upon before the First-tier Tribunal, nor did it form part of either the Secretary of State's grounds of challenge to that determination or a Rule 24 Reply thereto. There was no evidence before the First-tier Tribunal and there is no evidence before us in relation to the impact of the decision to refuse a permanent residence card on any relevant child.

11. To the extent that we are seized of Section 55 at all, we find that the claimant's assertion that the respondent erred in law in her original decision in relation to Section 55 is not made out and we also dismiss that.

12. In these circumstances we make the following orders. First, we allow the appeal of the Secretary of State. Second, we dismiss the appellant's appeal against the decision of 27 August 2013. If the appellant wishes to make any further applications in due course that is a matter for her on the advice of her advisors.

Signed Date

Mr Justice Haddon-Cave