Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/01803/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 8 October 2014	**On 9 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

ENTRY CLEARANCE OFFICER PARIS

Appellant

and

PDA
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Shilliday, Home Office Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

1. This determination refers to the parties as they were in the First-tier Tribunal

2. The appellant, a national of Congo, appealed to the First-tier Tribunal against a decision made by the Entry Clearance Officer (ECO) to refuse his application for an EEA Family Permit to join his French national spouse and their five children in the UK. Judge of the First-tier Tribunal Harmes dismissed the appeal under the Immigration (European Economic Area)

Regulations 2006 (the EEA Regulations) and allowed the appeal under Article 8 of the European Convention on Human Rights. The respondent now appeals with permission to this Tribunal.

3. At the hearing there was no appearance by or on behalf of the appellant. I was satisfied that notice of the hearing had been sent to the appellant at the address given on the notice of appeal to the First-tier Tribunal and that no other address had been notified to the Tribunal. In the absence of communication from the appellant and in considering the matter as a whole I was satisfied that the appellant had been notified of the hearing and that it was in the interests of justice to proceed with the hearing. I heard submissions from Mr Shilliday.

Background

4. According to his application form the appellant and his wife married on 8 January 2002. They have five children together and his wife has been in the UK since 7 March 2006. In the application the appellant said that his wife had been a student in the UK studying at a College since September 2013 and that the course was due to finish on 4 July 2014. The ECO refused the application on the grounds that he was not satisfied that the appellant met the requirements of regulation 12 of the EEA Regulations in that he had not provided evidence that his wife held fully comprehensive sickness insurance cover in the United Kingdom as required by regulation 4 (1) (d) of the EEA Regulations.

5. The appellant submitted a European Health Insurance Card (EHIC) in his wife's name with the notice of appeal but the Entry Clearance Manager noted that this is not evidence of private medical insurance and maintained the decision to refuse.

6. The First-tier Tribunal Judge considered the appeal on the papers as requested. The appellant still had not provided evidence of comprehensive sickness insurance so the Judge dismissed the appeal under the EEA Regulations on this basis. Incidentally the Judge erred at paragraph 16 when he said that section 85 (5) of the Nationality, Immigration and Asylum Act 2002 required him to consider only the circumstances appertaining at the time of the decision under appeal as that section does not apply to decisions made under the EEA Regulations. However the error is not material because the appellant did not produce evidence showing that he met the requirements of the EEA Regulations by the time of the hearing. In any event that part of the decision is not challenged.

Error of law

7. The Judge went on to consider the appeal under Article 8 of the European Convention on Human Rights. The Judge failed to consider the provisions of the Immigration Rules before considering whether there were arguably good

grounds for considering the appeal outwith the Rules as set out in the case of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) where the Tribunal examined the case law and concluded [24]; "*after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them*". This was further considered by the Upper Tribunal in the recent case of Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). The Tribunal's conclusions are summarised in the head note as follows;

> "(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
>
> (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
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> (v) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

8. In any event Schedule 1, paragraph 1 of the EEA Regulations provides that certain provisions of the Nationality, Immigration and Asylum Act 2002 have effect in relation to an appeal under the EEA Regulations as if it were an appeal against an immigration decision under section 82(1) of that Act except for section 84(1) (a) and (f). Section 84(1) (a) is the ground that the decision is not in accordance with Immigration Rules. The appellant appealed under regulation 26 of the EEA Regulations against an EEA decision and Schedule 1, paragraph 1 of those Regulations therefore prohibits consideration as to whether the refusal decision is in accordance with the Immigration Rules. Whilst there was before the Judge a valid appeal on the grounds that the decision breaches Article 8 he could not therefore consider whether the decision was in accordance with the Immigration Rules. However the case law referred to above has established that the Immigration Rules, in particular Appendix FM and paragraph 276ADE, are the starting point for an assessment of Article 8 because the respondent has now codified the provisions in relation to applications to remain in the United Kingdom on the basis of their family or private life and those rules are set out at Appendix FM and paragraph 276ADE.

9. In these circumstances the Judge should have given taken account of the law set out above and given reasons for going on to consider Article 8 in this case.

10. Even had he done so I am satisfied that he materially erred in his consideration of Article 8. The Judge had evidence from the appellant's wife's GP saying that she was suffering from stress and exhaustion as a result of caring for her five children and that her health and that of the children would be greatly improved by the presence of her husband in the UK. There was also a letter from a Child Protection and Family Services officer from the children's school expressing concern for the long term effects on the children if their father is not admitted to the UK to support his wife. The Judge found that a consideration of the best interests of the children meant that it was *'imperative that immigration control is circumvented in this case for the appellant to be allowed to enter'* [27].

11. The Judge found that the welfare of the five children was sufficiently important to find on these facts that the Article 8 rights of the family are more important than immigration control and that *'the burden on the school and health services is likely to be less as a result of the admission of the appellant'* and that the family would *'prosper if reunited'*. However there was no evidence before the Judge to support the assertion that the burden on the school and the health service would be less if the appellant were to be admitted to the UK. In fact the burden on the health service would be less if the appellant's wife obtained the sickness insurance required under the EEA regulations.

12. The Judge went on to say; *'It was said in the case of Rudolph v ECO, Columbo [1984] Imm AR 84 that the underlying purpose of the immigration rules is to unite families'* and that the purpose of the EEA regulations is to allow free movement of EEA nationals. However both of these purposes are subject to limitations. In the case of the Immigration Rules the limitations are set out in Appendix FM. The EEA Regulations set out the requirements and limitations on the right of free movement. These include the legitimate requirement that a student has comprehensive sickness insurance. These requirements must be part of the balancing exercise when considering the respondent's legitimate aim of the maintenance of an effective system of immigration control.

13. Whilst the Judge referred to immigration control he failed to give any detailed consideration to the requirements of immigration control in this case. Here in order to obtain an EEA Family Permit the appellant is required to show that his wife has comprehensive sickness insurance cover in the United Kingdom. The appellant has given no reason why his wife does not have the sickness insurance. This ought to be reasonably easily obtained and a fresh application could be made. In fact the lack of the required sickness insurance undermines the appellant's wife's status in the UK and that of the children. A further relevant consideration is that the application form states that the appellant's wife's course was due to end on 4 July 2014, just a day after the Judge's decision was promulgated. These matters were not considered by the Judge who appeared to assume that the appellant's wife and children were legitimately in the UK for the long term. In failing to weigh all of these factors in considering proportionality under Article 8 the Judge fell into material

error. In light of the failure to undertake a proper assessment under Article 8 I set aside the part of the decision dealing with Article 8 leaving the part dealing with the EEA Regulations.

Remaking the decision

14. I remake the decision under Article 8. As set out above I am satisfied on the basis of this case law that the correct approach to the assessment as to whether the decision in this case is in breach of Article 8 is to firstly consider the appeal under Appendix FM and paragraph 276ADE of the Immigration Rules. The grounds of appeal do not address how the appellant could meet requirements of Appendix FM or paragraph 276ADE. In any event the 2006 Regulations do not permit an appeal under the Immigration Rules and I cannot therefore make findings as to whether the appeal should succeed under the Immigration Rules.

15. Despite this issue I have considered the appellant's appeal under Article 8 as the appellant does have a right of appeal on this basis. In undertaking an assessment under Article 8 I follow the five stage approach set out by Lord Bingham in R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27.

16. The appellant does not enjoy family life in the UK with his wife. It appears that since his wife came to the UK in March 2006 the relationship has been conducted through visits. Although I note that the appellant previously obtained an EEA Family Permit in August 2010 valid until 18 February 2011 and that he appears not to have applied for a Residence Card at that time. However, given that the relationship appears to be subsisting and that there are five children, I accept that there is a family life between all of the members of the family. Although there is limited evidence of any interference given that the family life has been conducted in this way since 2006 in light of the low threshold I am prepared to accept that the decision to refuse an EEA Family Permit may interfere with the family life in the UK. Any interference is in accordance with the law.

17. In considering steps 4 and 5, I weigh in the appellant's favour that he is currently separated from his wife and five children and that his wife is suffering from stress and exhaustion as a result of caring for the children. I also weigh in his favour the positive effect his presence would have for the children as detailed in the letter from the Child Protection and Family Services Officer.

18. On the other side of the scale I weigh the fact that the appellant's wife has by now finished her studies, her course was due to end in July 2014 and there is no evidence of further studies before me. Further, in the absence of a comprehensive sickness cover, the appellant's wife is not residing in the UK

in accordance with the EEA Regulations, nor are her children. There is therefore no expectation that they will continue to reside in the UK in the long term.

19. Further, it is open to the appellant's wife, if she is still a student, to obtain the relevant sickness cover and for the appellant to reapply for an EEA Family Permit. No reason has been given as to why this has not been or cannot be obtained. A requirement to obtain the appropriate medical cover, in compliance with the EEA Regulations, is a lawful requirement under European law.

20. I am satisfied that a temporary interference with the appellant's family life whilst sickness insurance is obtained and a fresh application is made, in circumstances where the family have chosen to live apart since 2006, is proportionate to the respondent's legitimate aim of the maintenance of an effective system of immigration control for the prevention of disorder or crime or to secure the economic well-being of the country.

Conclusions:

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

I set aside the part of that decision dealing with the Article 8 appeal and remake it by dismissing it.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed Date: 8 October 2014

A Grimes

Deputy Judge of the Upper Tribunal

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