Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number IA/05698/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 16 September 2014	**On 29 January 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Donald Scott Dubay
(Anonymity order not made)

Respondent

Representation
For the Appellant: Ms. J. Isherwood, Home Office Presenting Officer.
For the Respondent: Ms. S. Akinbolu of Counsel instructed by CK Solicitors.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Scobbie promulgated on 11 June 2014, allowing Mr Dubay's appeal against the Secretary of State's decision dated 11 January 2014 to refuse to issue a 'derivative residence card' under the Immigration (European Economic Area) Regulations 2006.

2. Although before me the Secretary of State is the appellant and Mr Dubay is the respondent, for the sake of consistency with the proceedings before the

First-tier Tribunal I shall hereafter refer to Mr Dubay as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of the United States of America born on 25 August 1968. He entered the UK as a visitor on 24 May 2011. On 24 November 2011 he made an application for a 'derivative residence card'. The application was refused on 28 February 2012.

4. The Appellant made a further application for a 'derivative residence card' on 5 April 2012. The application was based on his relationship with Ms Kimberley Davis, a British citizen, to whom he was married on 27 October 2011. The application was refused for reasons set out in a 'reasons for refusal' letter dated 11 January 2014, and a Notice of Immigration Decision was issued on the same date. Essentially the Respondent was not satisfied that Ms Davis needed such a level of care from the Appellant that she would be unable to reside in the UK or in another EEA state if the Appellant were required to leave the UK.

5. The Appellant appealed to the IAC.

6. The appeal was dismissed under the EEA Regulations (albeit the Judge mistakenly referred to the Respondent's decision having been made in accordance with the Immigration Rules in his concluding paragraph, paragraph 42), but allowed on human rights grounds, for the reasons set out the determination of the First-tier Tribunal.

7. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Kelly on 31 July 2014.

8. It is be noted that in granting permission to appeal Judge Kelly made the following observation: "*Although the respondent argued at the hearing that mere refusal of an EEA Residence Card could not lead to removal of the applicant, and thus to the potential engagement of the operation of Article 8 [see paragraph 35], this argument has not been renewed in the application for permission to appeal*". The scope or jurisdiction of the First-tier Tribunal to determine the appeal on human rights grounds accordingly was not a live issue before me, and Ms Isherwood did not seek to make it so.

Consideration

9. In considering the appeal under the EEA Regulations the First-tier Tribunal Judge made a number of favourable findings in respect of the relationship between the Appellant and Ms Davis, and the extent of the care which the Appellant provided to his wife: see in particular paragraphs 26–30. Nonetheless, the Judge did not consider that the circumstances reached the threshold – which he described as "*something almost extraordinary*" (paragraph 32) – such that Ms Davis would be unable to continue living in the UK if the Appellant were required to leave the UK (paragraph 32).

10. Having rejected the Appellant's appeal under the Regulations (paragraph 33), the Judge in an analysis consistent with the five **Razgar** questions, identified the key issue to be proportionality: (paragraph 37).

11. The Judge clearly took into account his positive findings as to the nature of the relationship between the Appellant and Ms Davis – including necessarily his understanding of Ms Davis's health and care needs and the extent to which the Appellant met these – when considering the appeal under Article 8 of the ECHR. The Respondent's representative "*made it absolutely clear in his submissions that he was not expecting the Sponsor to move to the United States of America*" (paragraph 27). This is particularly germane given the high level of medical input that Ms Davis receives in the UK, and it being unlikely that she would have the necessary health cover were she to relocate to the USA with a pre-existing condition.

12. The Judge had regard to the submissions advanced on behalf of the Respondent (paragraphs 38 and 39), before concluding in these terms at paragraphs 40 and 41:

> "*It is perfectly clear that the Appellant and the Sponsor enjoy a very strong family life together. It is also perfectly clear that the Appellant is committed to providing a level of care and support to the Sponsor which she is not going to get anywhere else. If the Appellant has to go back to the United State there can be difficulties in my view of them continuing their family life even by visit visas. There has to be some question as to whether or not the Sponsor is fit to go on a visit to the United States. Further, having overstayed his visa on this occasion it would seem to me quite likely that the Appellant would be refused permission to come back on a visit to the United Kingdom if he were to apply.*
>
> *The volume of evidence of a medical nature and from friends relative to what it means to the Sponsor to have the Appellant in her life on an everyday basis both from the point of view of the assistance he provides to a person who is seriously ill and also moral support, backed up by various pieces of evidence from other sources, leads me to the view that it would be disproportionate for the application under Article 8 to be refused.*"

13. The Respondent's grounds of challenge to the First-tier Tribunal's decision as set out in the application for permission to appeal ultimately come down to an assertion that "*the Judge has materially erred in his finding*" because "*[t]here are no exceptional circumstances in this case that would result in unjustifiably harsh consequences*" (grounds at paragraph 5). The remaining paragraphs of the grounds are essentially a rehearsal of the relevant facts and procedural history.

14. It seems to me that that is essentially an assertion of disagreement with the outcome and does not in and of itself identify an error of law.

15. Ms Isherwood, however, emphasised that the Judge had not overtly taken as a starting point the Immigration Rules, there being no analysis of Appendix FM and how it might apply to the Appellant. To that extent, it was submitted, the Judge had not adequately identified a justification for departing from the Rules.

16. The representatives debated the appropriate approach to the Rules in light of the decisions in **Edgehill [2014] EWCA Civ 402** and **Haleemudeen [2014] EWCA Civ 558**. In any event Ms Akinbolu identified that were regard to be had to the requirements of Appendix FM for a partner, the Appellant would meet sufficient requirements of E-LTRP such that the issue would ultimately be that of the applicability of EX.1, and that in context the Judge's findings were tantamount to an acceptance that EX.1 would be met. In the alternative, it was submitted, the Appellant would be able to meet the entry clearance requirements of E-ECP, – and therefore without needing to resort to EX.1 – and that in the circumstances of being a significant carer for his wife the principle in **Chikwamba** should apply to render it disproportionate for the Appellant to be expected to quit the UK simply to make an application to return. Accordingly, any failure by the Judge to have express regard to the Rules, if required so to do, made no material difference to the outcome of the appeal.

17. I accept Ms Akinbolu's submission. Further, it seems to me plain that the Judge identified very particular features of this case that were not found in most other cases by reference to the serious illness of the Appellant's wife, and came to a conclusion consistent with the notion that the removal of the Appellant in consequence of the Respondent's decision would result in unjustifiably harsh consequences for the Appellant's wife – necessarily whose Article 8 rights were also to be considered pursuant to the *ratio* in **Beoku-Betts**.

18. In such circumstances it is unnecessary for the purposes of the instant appeal for me to resolve any perceived tension between the decisions in **Edgehill** and **Haleemudeen**. Irrespective of whether the Judge was required to consider human rights with reference to the 'new rules' as a starting point, or by a wider ranging freestanding Article 8 analysis, he reached unchallenged conclusions as to primary facts that realistically and sustainably supported an obvious conclusion. In my judgement the Respondent's challenge is indeed fundamentally a disagreement with that outcome, and does not identify any material error of law.

19. For completeness I note that the First-tier Tribunal's decision pre-dated the introduction of Part 5A into the 2002 Act by reason of the Immigration Act 2014, and so there is, and can be, no challenge to the absence of reference to sections 117A-117D

Notice of Decision

20. The decision of the First-tier Tribunal Judge contained no material error of law and stands.

21. The Secretary of State's challenge is dismissed. Mr Dubay's appeal remains allowed on human rights grounds.

Deputy Judge of the Upper Tribunal I. A. Lewis **28 January 2015**