Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26601/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 17th November 2015	**On 20th November 2015**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FAISAL MAQSOOD
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr M Biggs, counsel instructed by M-R Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 28th December 1986. On 6th August 2013, whilst present in the UK as a Tier 4 (general) student migrant, he applied for an EEA residence card as the family member of Tauseef Ahmed (his maternal uncle who is a Portuguese national born on 11th March 1969) as he says he is and has been dependent upon him and

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currently lives as part of his household. The application was refused on 12th June 2014. He appealed on 24th June 2014. His appeal against the decision was allowed by First-tier Tribunal Judge David C Clapham in a determination promulgated on the 11th December 2014.

2. Permission to appeal was granted by Judge of the First-tier Tribunal V A Osborne on the basis that it was arguable that the First-tier judge had erred in law. The grant of permission is confusing but it appears that the concern that Judge Osborne had was it was arguable that insufficient regard was had to the Immigration Service interview in determining whether the appellant was dependent on his uncle/ formed part of his household.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law

Submissions

4. The grounds of appeal raised four issues but Mr Duffy did not rely upon any save for the fourth one. This set out that it was an error of law for the First-tier Tribuanl to have allowed the appeal outright. If the appeal was to be allowed in accordance with Regulation 17(4) of the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations) it could only be allowed as not in accordance with the law as discretion to issue a residence permit had not yet been exercised by the Secretary of State. He submitted that in fact that all the Secretary of State would do was to carry out a criminal record check with the Police National Computer, and if this was clear that a residence permit would be granted.

5. Mr Biggs argued that the appeal could not succeed as the grant of permission to appeal should be seen as one solely based on the second ground which Mr Duffy had conceded was not an error of law as it went to the weight given to evidence which was properly a matter for the judge. He argued that the grant had been properly limited in accordance with Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304. It was very clear that Judge Osborne granting permission had refused to make a grant on the fourth ground concerning Regulation 17(4) of the EEA Regulations.

6. In the alternative, if the grant of permission was not limited as set out above, the appeal could not succeed as the Home Office Presenting Officer had not argued that discretion was in issue before the First-tier Tribunal. The submissions of the Presenting Officer were set out at paragraph 31 of the decision, and (like the reasons for refusal letter) did not include a submission that if there was dependency the Secretary of State put discretion in issue so the appeal should only be allowed to the extent that discretion to issue a residence permit on the found dependency remained extant before the Secretary of State. The lack of this prior submission meant that the Secretary of State could not rely upon the argument at the appeal stage.

7. Mr Duffy raised the possibility that the decision of Judge Clapham was limited in allowing the appeal to a decision that there was dependency under Regulation 8 (2) of the EEA Regulations, and thus that there was no error as the decision had the meaning he argued for in any case.

Conclusions – Error of Law

8. The grant of permission to appeal was most unfortunately expressed, and did not meet the proper standards of judicial clarity. In relation to the second ground Judge VA Osborne both said “any arguable error of law is not material” and in his concluding paragraph that there was an arguable “error of law with regard to the weight” that should have been attached to the interview with the appellant which meant that permission to appeal should be granted. Mr Duffy rightly accepted that questions of weight to be given to evidence were ones for the judge, and that this ground could not be pursued as an error of law.

9. It is clear that in order to grant permission on limited grounds this must be made “abundantly plain” in the decision on permission to appeal, and that the Tribunal staff must send out the proper notices informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on the grounds on which he or she has been unsuccessful in the application to the First-tier Tribunal (see conclusion (2) of head note in Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304.) It was quite clear that Judge V A Osborne had discounted giving permission to appeal on grounds one, three and four (the one which Mr Duffy wished to pursue relating to Regulation 17(4) of the EEA Regulations and to the extent to which the appeal could be allowed), but it is also quite clear that the relevant notices regarding options to appeal to the Upper Tribunal for permission on these grounds were not provided to the Secretary of State.

10. Ultimately I find that the grant of permission to appeal was not limited, taking all matters into consideration. However I do not find that the First-tier Tribunal has erred in law.

11. I find that the decision of the First-tier Tribunal was limited to allowing the appeal under Regulation 8(2) of the EEA Regulations. The decision does not do anything further than find that the claimant was and is dependent on his uncle, a Portuguese citizen, and is also currently part of his household. There is no statement in the decision that the claimant is thereby automatically entitled to a residence permit. I am entitled to assume that the First-tier Tribunal understood that in accordance with Regulation 17(4) of the EEA Regulations and YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 that it remained for the Secretary of State to exercise discretion as to whether to issue a residence permit in the context of the finding of the claimant being able to meet Regulation 8(2) of the EEA Regulations.

12. I would however urge that in the future First-tier Tribunal judges appreciate that it is clearer and definitely preferable to allow appeals that

find the appellant qualifies as an “extended family member”, on the basis that the decision is not in accordance with the law so that it is absolutely clear that the matter returns to the Secretary of State to consider the exercise of discretion to issue a residence permit in accordance with Regulation 17(4) of the EEA Regulations. If discretion is not exercised in his or her favour such an appellant will of course be entitled to a further appeal against that decision.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. The decision of the First-tier Tribunal allowing the appeal is upheld but is clarified in its affect above.

Signed: Fiona Lindsley Date: 17th November 2015

Upper Tribunal Judge Lindsley