Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/32056/2014**
IA/32067/2014
IA/32069/2014

THE IMMIGRATION ACTS

Heard at Field House
On 1st October 2015

Decision Promulgated
On 7th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr KENNEDY AMPOMAH DONKOR
Mr KWAKU AMPOMAH DONKOR
Mr STEPHEN AMPOMAH DONKOR

Respondents

Representation:
For the Appellant: Ms A Brocklesby-Weller, Senior Home Officer Presenting Officer
For the Respondent: Mr P Opoku- Boateng (solicitor) of JF Law, solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

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2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Majid, promulgated on 31st March 2015 which allowed the Appellant's appeal.

Background

3. The First Appellant was born on 29 September 1987. The second appellant was born on 22nd of December 1989 the third appellant was born at 30 March 1991. All three appellants are Ghanaian nationals.

4. On 8 March 2012 the respondent refused each of the appellants' applications for a residence card.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Majid ("the Judge") allowed the appeals against the Respondent's decision.

6. Grounds of appeal were lodged and on 15 June 2015 Judge Cruthers gave permission to appeal stating *inter alia*

> "The judges determinative paragraphs (paragraphs 10 to 11) do not include any findings of the issue which had been agreed at the hearing on 27 March 2015 to be the central issue -i.e. the question of whether or not the appellants are dependent on the German national mother as claimed (as per paragraph 2 of the respondent's grounds)
>
> "And arguable that the judge has not addressed his mind to the main principles that are relevant in this sort of appeal (see, for example Dauhoo (EEA Regulations – reg 8(2)) [2012 UKUT 79 (IAC)
>
> "And arguable that the judge has not explained why he considered that the appeal succeeded by reference to the ECHR or the regulations...."

The Hearing

7. (a) Ms Brocklesby-Weller, for the respondent, told me that the decision is tainted by material errors of law. She told me that there are two material points for consideration this appeal. The first was whether or not the EEA national is a qualified person. The second is that because each of the appellant's is over 21 years of age the question of dependency must be determined because of the operation of regulation 71B of the 2006 regulations.

(b) Ms Brocklesby-Weller conceded that at [10] and [11] the judge makes reference to a "qualified person", but argued that it was incumbent on the judge to consider the question of dependency, and told me that decision does not contain any reference to either regulation 7(1) or to dependency; and that the decision is devoid of findings in fact in relation to the degree of any dependency three adult appellants might have on their EEA national mother.

(c) Ms Brocklesby-Weller told me that, insofar as the judge considered whether or not article 8 ECHR is engaged, an inadequate balancing exercise has been carried out. The only reference to ECHR is contained within the one sentence which forms [13] of the decision. In any event, the case of Amirteymour & others (EEA appeals; Human Rights) [2015] UKUT 00466 indicates that the judge should not have considered article 8 ECHR.

8. Mr P Opoku-Boateng, for the appellants, told me that the decision does not contain any material errors of law and should be allowed to stand. He argued that the question of dependency was entirely irrelevant because the evidence indicated that, four years ago, each of the appellants had been granted a family permit. He told me that the decision contains sufficient detail to support the conclusions reached by the judge and that the conclusions reached by the judge were conclusions which was reasonably open to him. He urged me to dismiss the appeal, but that if I were to find a material error of law to remit the case to the first-tier with the direction that the question of dependency should not be considered.

The Law

9. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal’s decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

Analysis

11. All three applications were made on the basis that each of the appellants was the adult family member of their EEA national mother. Regulation 7 sets out the definition of a "*Family member*”:

> *“(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).”*

12. It is beyond dispute that each of the appellant's is aged over 21 years. The question of dependency is therefore central to these appeals. The judge's determination is entirely silent on the question of dependency; the judge's determination makes no reference to regulation 7 of the 2006 regulations; the judges determination is practically devoid of relevant findings in fact.

13. At [13] the judge appears to take a cursory glance at the article 8 ECHR rights of the appellants. There are no findings of fact in relation to whether family or private life exist. Quite correctly, the judge comes to no conclusion in relation to article 8 ECHR, nor does the judge make a decision in relation to article 8 ECHR.

14. In Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 it was held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.

Finding on Material Error

15. I therefore find that the decision promulgated on 31st of March 2015 is tainted by material errors of law. The inadequate consideration of the Immigration (EEA) Regulations 2006 together with the inadequacy of findings in fact, constitutes a material error of law. I consider those errors to be material because had the tribunal conducted a proper fact finding exercise and then considering the Immigration (EEA) Regulations 2006, the outcome could have been difference. That, in my view, is the correct test to apply.

16. Material errors of law have been established and the Judge's determination cannot stand and must be set aside in its entirety. All matters must be determined afresh.

REMITTAL TO FtT

17. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

> *(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*
>
> *(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal*.

18. In this case none of the findings of fact are to stand and the matter requires a complete re hearing.

19. I consequently remit the matter back to the First-tier Tribunal sitting at Taylor House, before any First-tier Immigration judge other than Judge Majid.

Decision

20. The decision of the First-tier tribunal is tainted by material errors of law.

21. I set aside the decision. The appeal is remitted to the First Tier Tribunal to be determined of new.

Signed Date 6th October 2015

Deputy Upper Tribunal Judge Doyle