Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38244/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 December 2014	**On 7 January 2015**

Before

THE HON. MRS JUSTICE CARR DBE
UPPER TRIBUNAL JUDGE D CONWAY

Between

GEORGE ALEXANDER BOOTHE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Adophy, Solicitor instructed by Ranas & Co Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the appellant who appeals against the decision of First-tier Tribunal Judge Howard promulgated on 12 September 2014 whereby he refused the appellant's appeal against the Secretary of State's decision to issue a registration certificate as a dependent relative.

2. The appellant is a citizen of Jamaica with a date of birth of 8 June 1948. He left Jamaica in 2000 at the age of 52. He was educated there, he was married there and he brought up a family there. On entry to the United Kingdom in August 2001 he was issued with family leave to remain, such leave being valid until 24 September 2001. According to CID notes he was issued with indefinite leave to remain as of 16 October 2001. However this leave was issued on the back of a passport which was subsequently found to be counterfeit. We refer to the determination of Immigration Judge Bennett of 1 March 2012. On 12 June 2005 the appellant sought a no time limit ruling and again in October 2008 on each occasion unsuccessfully. On 3 May 2011 the appellant sought an EEA residence card as the unmarried partner of an EEA national. That application also was refused. He then turned his sights on the current application, namely the application made on 28 November 2012 when he applied for an EEA residence card as a dependent family member, in this case father of an EEA national, namely his daughter, who is of German nationality.

3. On 7 September 2013 the Secretary of State refused to issue a residence card as confirmation of a right of residence under European Community Law as the father of an EEA national exercising treaty rights in the United Kingdom. Her reasons were given on 21 September 2013. In essence the application was refused on the basis that the Secretary of State was not satisfied that the appellant was a dependent relative of his daughter by reference to Regulation 7 of the Immigration, (European Economic Area) Regulations 2006 ("the EEA Regulations"). The Secretary of State reasoned that the appellant had provided no evidence of dependency on his daughter. There was no evidence of financial dependency; indeed the evidence suggested that the appellant was working with an income. The Secretary of State also noted that in 2011 the appellant's application then had said that he was in a durable relationship with his partner. He had submitted evidence that he was living with his partner. It followed accordingly that at that time not part of his daughter's household.

4. The appellant lodged notice of appeal on 17 September 2013.

5. The legal framework can be summarised shortly. Under the EEA Regulations, Regulation 7 provides as follows:

> "7(1) Subject to subparagraph (2) for the purpose of these Regulations the following persons shall be treated as the family members of another person...
>
> (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner and
>
> (b) dependent 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"

6. By Regulation 17 of the EEA Regulations the Secretary of State must issue a residence card to a person who is not an EEA national but who is the family member of a qualified person or of an EEA national with a permanent right of residence on application and production of certain specified documents.

7. Regulation 8 of the EEA Regulations applies only to extended family members. Extended family members are defined as persons who are not a family member of an EEA national under Regulation 7 and who satisfies other certain conditions.

8. To succeed in his appeal before the First-tier Tribunal Judge the appellant had to prove in the context of the requirements set out in the EEA Regulations that he had a right of residence under regulation 7.

9. The first ground of appeal raised on behalf of the appellant is that the judge below applied the wrong Regulation and in that context considered the wrong authorities.

10. It is clear at paragraphs 14 to 16 of the judgment that the judge did so err in law. It is common ground before us that in those circumstances the judge's decision must be set aside. The judge wrongly considered the question of dependency by reference to Regulation 8 and extended family membership as opposed to Regulation 7, being the relevant one dealing with relation of father and son. The factual matrix here was as we have described the appellant as a non-EEA national was the allegedly dependent father of his daughter, an EEA national who is exercising treaty rights. Accordingly we set aside the decision. But whether or not when, having set aside the decision and remaking the decision as we are invited to do, that error would avail the appellant is a separate question. It raises head on the question of dependency.

11. For the appellant Mr Adophy helpfully took us to the written evidence before the judge below. The witness statement of the appellant and his daughter in particular are relied on. In the witness statement of the appellant at paragraphs 3 and onwards the appellant confirmed he resides with his daughter. He says he does not have the right to work and his daughter provides for his daily needs. He says he resides in the property rent-free. He sets out his employment history, stating that he ceased to work in circumstances which are not particularised in any way in 2010. His daughter's witness statement again in general terms asserts that she provides for her father. She states that she has been supporting him since he stopped working in 2010. She confirms that he resides rent-free and all of his other needs are met by her.

12. Whilst the appellant and his daughter gave evidence before the First-tier Tribunal, no material findings of fact were made by the Judge in relation to such evidence. The appellant has chosen not to give oral evidence before

us. This is of course his right, but the position remains that we have been asked to rely for the appellant simply on the written witness statements and associated documentation.

13. We have considered carefully whether or not the appellant has discharged the burden that lies on him in satisfying us on the balance of probabilities that he meets the dependency test. That test is a factual one – see **Reyes [2013] UKUT 314** : has the appellant established on a balance of probabilities the factual situation is one characterised by material support in terms of meeting the appellant's essential needs and an inability to support himself.

14. Having carefully considered the material put before us, including a tenancy agreement, bank statements and payslips relating to the daughter, we have come to the conclusion that the appellant has not discharged the relevant burden of proof. In particular his evidence and the material upon which he relies amounts to no more than simple assertion. There is a total lack of particularisation in the witness statements to which we have referred of, for example, how much the daughter provides to her father, when and for what purpose. Nor is there any documentary evidence to support the assertions there made. The fact that the appellant and his daughter have chosen not to give evidence means that the evidence has also not been capable of testing by cross-examination. In those circumstances the weight to be attached to the broad assertions made can only be limited. We are also influenced by the fact that the daughter's documentation in the form of her bank statements suggest that she is not in a position independently to support her father, let alone in a way that meets all his essential needs. She appears to be a student herself and her bank statements suggest that she is at least on occasion overdrawn. She is certainly not in receipt of significant wages.

15. For all these reasons the appeal under the Regulations fails upon the original decision being set aside.

16. We turn in those circumstances to the second ground of appeal which relates to the application of Article 8. Article 8 of course provides materially that everyone has the right to respect for his private and family life, his home and his correspondence and the appellant asserts that there was no proper proportionality assessment for Article 8 purposes in this case.

17. We comment at the outset that, as appears to have been ignored by the parties, there is a very substantial question mark as to whether or not Article 8 is engaged at all in relation to this type of decision under the EEA Regulations. The interplay between the EEA Regulations and Article 8 has been identified as a potentially problematic issue for a number of years with recent conflicting decisions. There is a substantial body of relevant case law to which we have not been taken.

18. However it does not appear to us necessary for us to determine whether or not Article 8 is engaged or can be engaged in principle. We assume for present purposes only in the appellant's favour that Article 8 is engaged in principle.

19. We are however wholly unpersuaded that there is any viable basis for alleging any disproportionate interference with the appellant's private or family life.

20. So far as the existence of family life is concerned we see on the evidence before us no more than normal emotional ties in circumstances where more is needed – see for example **Ghising v Secretary of State for the Home Department [2012] UKUT 00160 (IAC).** Nor has there been put before us any evidence sufficient of private life such as to engage Article 8. There is no evidence before us of wider engagement within the community or of any longstanding. Even if we are wrong about that it cannot be said on the evidence before us that any interference would be disproportionate. As we have already noted the appellant has only been in this country since about 2001 having spent the vast majority of his life in Jamaica, having married there and also brought up a family there. We note for the majority of his time in the United Kingdom (as recorded by the Judge in his judgment at paragraphs 22 and 23), the appellant was not even in regular or significant contact with his daughter and there is no other evidence before us of any other relevant family in this country. It is true that the appellant was apparently treated by the NHS for certain medical conditions here, but there is no evidence that such treatment would for example not be available in Jamaica.

Decision

21. The decision of the First Tier Tribunal showed material error of law and is set aside. We re-make the decision by dismissing the appeal under the EEA Regulations and under Article 8.

22. Finally, the First-tier Tribunal Judge did not make an anonymity direction. We have not been asked to do so and in the absence of any explanation as to what good reasons there might be we do not make such a direction.

Signed Date

Mrs Justice Carr