



IAC-AH-DP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/50808/2013

THE IMMIGRATION ACTS

**Heard at Upper Tribunal Decision & Reasons Promulgated
Birmingham On 19 June 2015 On 15 July 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T G

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer

For the Respondent: In person, assisted by Mr Antwi-Boasiako (McKenzie Friend)

DECISION AND REASONS

1. The respondent, T G, is a citizen of Ghana who was born in 1981. She came to the United Kingdom as a working holidaymaker with a visa which was valid until 31 July 2015. She then made an invalid application (no valid fee) for leave to remain on the basis of human rights in December 2011 and a further application under the Immigration (European Economic Area) Regulations 2006 in July 2013. She has three children all of whom are British citizens (deriving their nationality from their father). That

application was refused by the appellant on 12 September 2013. The respondent appealed to the First-tier Tribunal (Judge Obhi) which, in a determination promulgated on 3 September 2014, dismissed the appeal under the EEA Regulations but allowed the appeal on human rights (Article 8). I shall hereafter refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal).

2. The grounds of appeal are short:

‘The First-tier Judge considered the facts of the case by reference to the Immigration Rules even though the SSHD [Secretary of State for the Home Department] did not make a decision in respect of the Rules. The First-tier Tribunal Judge has failed to state precisely which Immigration Rule was applicable at the relevant time particularly given the changes to the Rules on 28 July 2014. There is no consideration of the suitability requirement and eligibility requirement i.e. ELTRPT2.2 and 2.4 and in particular ELTRPT3.1-3.2.’

3. The appellant applied for a right of residence under Regulation 15A of the 2006 Regulations:

‘Permanent right of residence

15. — (1) The following persons shall acquire the right to reside in the United Kingdom permanently—

- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
- (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
- (c) a worker or self-employed person who has ceased activity;
- (d) the family member of a worker or self-employed person who has ceased activity;
- (e) a person who was the family member of a worker or self-employed person where —
 - (i) the worker or self-employed person has died;
 - (ii) the family member resided with him immediately before his death; and
 - (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;
- (f) a person who—
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) But this regulation is subject to regulation 19(3)(b).'

4. The judge had the opportunity of hearing evidence from the appellant. She made a number of findings of fact at [21] *et seq.* The judge found that the appellant's three children are British citizens. She found that the whereabouts of the children's father were known to the appellant and that he is in a position to care for them if the appellant has to return to Ghana. She found the appellant had not been frank about the position of the appellant's father. The judge found that the father

"... was quite clear that if he required to assume responsibility for the care of the children, he would. Therefore I am satisfied the appellant is not the sole carer for her children, she cannot therefore meet the requirements of Regulation 15A(7)(b)(2). Accordingly I am satisfied that the decision of the Secretary of State with regard to the application under the EEA Regulations was correct."

5. The judge went on to deal with Article 8 ECHR which had been pleaded by the appellant. As part of her analysis she said this:

"I considered the appellant's family life under Appendix FM. Paragraph ELTRP2.1 provides that the appellant must not be in the UK in breach of the immigration laws (disregarding any period of overstaying for a period of 28 days or less) unless paragraph EX1 applies.

EX1 applies to an individual who has a genuine and subsisting parental relationship with a child who is under the age of 18 years and is a British national who is in the UK and it would not be reasonable to expect the child to leave the UK. It is not reasonable to expect the children to leave the United Kingdom as they have a subsisting relationship with their father and a separation over a prolonged period will damage that relationship. Accordingly I am satisfied that the appellant meets the requirements of the Immigration Rules in relation to family life."

6. Mr Mills, for the respondent, drew my attention to Schedule 1 (Regulation 26(7)) of the 2006 Regulations:

'1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act(6) (right of appeal to the Tribunal) —

section 84(7) (grounds of appeal), as though the sole permitted ground of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

section 85(8) (matters to be considered), as though—

(i) the references to a statement under section 120(9) of the 2002 Act include, but are not limited to, a statement under

that section as applied by paragraph 4 of Schedule 2 to these Regulations; and

(ii) a “matter” in subsection (2) and a “new matter” in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;

section 86(10) (determination of appeal);

section 105 and any regulations made under that section; and

section 106 and any rules made under that section.

2. Tribunal Procedure Rules have effect in relation to appeals under these Regulations’

7. He submitted that the judge had erred by considering whether the appellant met the requirements of the Immigration Rules at all. She was precluded from doing so by Regulation 26(7). Her decision was, therefore, flawed.

8. I am not entirely clear why the judge has considered HC 395 at all. It could be argued that her observations as to the relationship between the children and their father and whether it was reasonable to expect the children to leave the United Kingdom and, in effect, sever that relationship, are matters relevant to the proper analysis of an appeal on Article 8 ECHR grounds. However, it is clear from the decision that the judge considered that the fact that, on her analysis, the appellant could satisfy the Immigration Rules (which were not relevant and to which she should have had no regard in this instance) directly led her to allow the appeal on Article 8 grounds. The judge made this absolutely clear at [27] where she went on to say that:

“I therefore dismiss the appeal under EEA Regulations but allow it under human rights.”

9. It is clear from reading [26] and [27] that the judge allowed the appeal *because* she believed that the appellant could satisfy the requirements of Appendix FM of HC 395. At the very least, the judge has referred to the Immigration Rules unnecessarily and has, in consequence, obscured the reasoning which led her to allow the appeal. It is not clear that she would have allowed the appeal on Article 8 grounds if she had considered that the Immigration Rules were of no relevance in this appeal.

10. Mr Mills raised the wider (and much discussed) question of whether Article 8 ECHR may operate as a ground in an appeal brought under the 2006 Regulations. It is my understanding that that is a matter upon which the Upper Tribunal will shortly adjudicate. However, I find that the issue does not arise in this appeal. I say that by reference to the refusal letter of 12 September 2013. This states as follows:

‘You have stated that you also wish to rely on family or private life established in the UK under Article 8 of the ECHR. Immigration Rules now include provisions for applicants wishing to remain in the United Kingdom on

the basis of their family or private life. These Rules are located at Appendix FM and paragraph 276ADE respectively. If you wish the Home Office to consider an application on this basis you must make a separate charged application using the appropriate specified application form ... since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR. Additionally it is pointed out that the decision not to issue a residence card/permanent residence card does not require you to leave the United Kingdom if you can otherwise demonstrate you have a right to reside under the Regulations.'

11. The appellant made an application under the 2006 Regulations and I have found that the Secretary of State was correct to refuse that application for the reasons stated in the refusal letter. I am not satisfied that the appellant is even remotely likely to be removed from the United Kingdom in consequence of the decision to refuse her a residence card; the refusal letter makes that plain. As a result, I am not satisfied that the appellant may legitimately rely upon Article 8 ECHR as a ground of appeal. I consider that she should make an application as is clearly stated in the refusal letter should she wish to remain in the United Kingdom for reasons connected with her family or private life. In the circumstances, I find that (i) the appellant cannot succeed under the 2006 Regulations; (ii) Article 8 ECHR does not arise as a valid ground in this appeal and (iii) even if it did arise, First-tier Tribunal Judge erred in law by allowing the human rights appeal by reference to HC 395. I therefore set aside the First-tier Tribunal Judge's decision and have remade the decision dismissing the appellant's appeal against the refusal of the Secretary of State to issue her with a residence card.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 3 September 2014 is set aside. I have remade the decision. The appellant's appeal against the decision of the respondent dated 12 September 2013 is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 10 July 2015

Upper Tribunal Judge Clive Lane