Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50916/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 30th July 2015	**On 14th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MISS NALVATHANI MUTHUKRISHAN
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Jeearajahic
For the Respondent: Mr Bramble

DECISION AND REASONS

Introduction

1. The Appellant born on 5th March 1982 is a citizen of Sri Lanka. The Appellant was represented by Miss Jeearajahic. The Respondent was represented by Mr Bramble, a Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application for a derivative residence card under the 2006 Regulations. The Respondent had refused that application on 12th November 2013.

3. The Appellant had appealed that decision and the appeal was heard by First-tier Tribunal Judge Lal sitting at Hatton Cross on 1st July 2014. The judge had allowed the appeal under both the Immigration Rules and the Human Rights Act.

4. The Appellant had made application for permission to appeal on 14th July 2014 and permission was granted by First-tier Tribunal Judge P J M Hollingworth on 1st September 2014. It was said that arguable errors of law had arisen in terms of the matters raised within the Respondent's grounds. Directions were issued directing that the Upper Tribunal should firstly decide whether an error of law had been made and the matter comes before me in accordance with those directions.

Submissions on behalf of the Respondent

5. Mr Bramble referred me to the Grounds of Appeal. It was submitted that the judge had failed to give any or any adequate reasons for the decision that the appeal should be allowed under the Immigration Rules having neither considered in any detail the Rules nor identifying the specific Rule under which it was said that the appeal succeeded.

6. It was further submitted that in terms of Article 8 the judge had failed to give public interest considerations within the proportionality evaluation exercise and in any event had erred in law in not deciding firstly whether there were compelling circumstances that would allow an examination of Article 8 outside of the Rules.

Submissions on behalf of the Appellant

7. Miss Jeearajahic submitted that paragraph 13 of the judge's decision was clear in that the judge had noted within that paragraph that whilst the Appellant may not necessarily have fulfilled the requirements of Regulation 15 of the 2006 Regulations at the date of application the judge had found that at the hearing date the Appellant had so satisfied the Regulations and therefore the matter had been allowed under the European Regulations. It was said therefore that the points raised by the Respondent were of no relevance.

8. I reserved my decision to consider the submissions and documents and I now provide that decision with my reasons.

Decision and Reasons

9. The decision of the First-tier Tribunal is a very short decision but I have done my best to draw any proper inferences from the limited available material.

10. The Appellant's application was for a derivative residence card under Regulation 18 of the 2006 Regulations. The Appellant had claimed to be the primary carer of her

two children and referred specifically within her application form to the fact that she was breastfeeding her younger 8 month old daughter. However the Appellant had within that same application form also noted that her husband, with whom she lived, was also a primary carer (7.1 to 7.16).

11. Not surprisingly, in those circumstances the Respondent found the Appellant did not meet the requirements of Regulation 15A(7)(i) or (ii) of the 2006 Regulations. The Respondent also found separately that the children would be able to reside in the UK if the Appellant was required to leave and found therefore the Appellant did not satisfy Regulation 15A(4A).

12. In consideration of Regulation 15A of the 2006 Regulations the decision of the First-tier Tribunal is confined to paragraph 13 of that decision alone. Miss Jeearajahic relies upon this paragraph for the proposition that the judge accepted that at the date of application the judge agreed that the Appellant could not meet Regulation 15A but at the date of hearing she could. Even seeking to infer any proper inference within paragraph 13 of the judge's decision there is no basis for inferring that the judge necessarily meant that or even if the judge had meant that had dealt with the matter properly.

13. It is true that a proper reading of paragraph 13 indicates that the Appellant's Counsel at the appeal hearing conceded that the Appellant at the time of application could not meet the requirements of Regulation 15A(7) given that within her own application form the Appellant had accepted that she shared responsibility with her husband who was not an exempt person. The judge referring to him or herself in the abstract term "the Tribunal" may well have accepted that concession made by Counsel as being accurate. However the judge seems to suggest that the evidence as it emerged at the hearing changed that position. That is the inference it is submitted that I should make from paragraph 13. The judge at paragraph 13 does not distinguish in the concession made by Counsel and accepted by the judge himself the distinction between Regulation 15A(7) and Regulation 15A(4A). The concession is simply put as openly as "Regulation 15". It is difficult to properly infer that the judge had in mind the separate features that needed to be examined. Further to say or infer from paragraph 13 that circumstances had changed between application and hearing bears little relation to the evidence.

14. At the time of application the Appellant had noted as a central feature that she was breastfeeding the younger child. She also referred to both children being very young. The first feature may not necessarily have applied at the date of hearing, it is unclear. Certainly the children were older at the date of hearing. It could therefore be said that the Appellant's argument if anything had weakened between date of application and hearing. The only evidence referred to by the judge in paragraph 13 was that in cross-examination the Appellant had said "she could not live without her children". The judge refers to no other evidence. The judge does not analyse or comment upon whether that phrase should be taken literally or merely as an expression of unhappiness if there was a separation. The judge does not analyse or comment upon whether that position adopted by the Appellant at the date of hearing

did or did not exist at the date of application. If the Appellant would have described matters in similar vein at the date of application then nothing had changed. There is no indication whether the judge had in mind Regulation 15A(4A) within paragraph 13 simply because there is a reference to Regulation 15 only. Further even if it could be inferred that the judge had in mind specifically Regulation 15A(4A) the question appropriate under that sub-paragraph is whether the children would be unable to reside in the UK if the Appellant was removed rather than the state of mind either literally or figuratively of the Appellant. Even the concluding phrase "she is their main carer and they are extremely young" is not based on any assessment of the evidence or adequacy of explanation nor does it appear to be any different at date of hearing as the date of application where it was conceded that the Appellant could not succeed in this case.

15. As indicated above if anything the features relied upon by the Appellant would have weakened by the date of hearing. Further, as indicated above paragraph 13 also seems to be essentially looking, very briefly, through the eyes of the Appellant rather than the approach required under paragraph 15A(4A). It is a confusing and wholly inadequate analysis of this case under Regulation 15A of the 2006 Regulations.

16. Under the final heading "decision" the judge allows this appeal under the Immigration Rules and Article 8 of the ECHR. There is no reference to the EEA Regulations. I have tried to infer that the judge in error said "under the Immigration Rules" rather than correctly "under the 2006 Regulations". However the concession recorded by her and adopted within paragraph 13 that the Appellant could not meet the requirements of Regulation 15 and the absence of any cohesive evaluation thereafter means it is difficult to make that proper inference. Further if the judge had meant to allow it under the EEA Regulations there was no need to consider Article 8 of the ECHR. Accordingly, whilst unclear the fact the judge purports to allow this case under the Immigration Rules without conducting any analysis of the evidence within the terms of the Immigration Rules or seeking to identify which Rule the judge had in mind is a further material error of law.

17. Finally there is the consideration of this case under Article 8 of the ECHR which further discloses serious errors of law. I accept the question of whether judges are entitled to look at Article 8 of the ECHR in circumstances such as these is a vexed question. Mr Bramble suggested this aspect should perhaps be adjourned as he understood the issue was being considered by the Upper Tribunal. I disagree with that suggestion. This jurisdiction is beset with vexed and conflicting views and cases in many areas. There are always fresh cases emerging from the Superior Courts that seek to give assistance or definitive answers. They do not necessarily achieve that purpose. If cases were adjourned to await such pronouncements little or no work would be done within this jurisdiction. I have therefore within the context of this hearing looked at whether the judge was entitled to consider Article 8 of the ECHR having conceded it is a conflicting and confusing area. However I take the view the judge was not entitled to look at Article 8 of the ECHR for a number of reasons:

(a) An examination of Article 8 of the ECHR is only relevant if there is evidence that there may be a proposed interference with family and/or private life. The Home Office refusal letter in no less than four separate places invited the Appellant to make application under the Immigration Rules (including Article 8 of the ECHR) if the Appellant so wished; and further made clear that there was no intention to remove until at least the Appellant had had the opportunity to make such application and for the Home Office to consider it. It is plain therefore that this refusal by the Home Office did not propose any imminent removal and therefore interference with family or private life and further made it plain that if such position arrived the Respondent would be considering that matter further.

(b) The First-tier Tribunal is an Appellate jurisdiction. The Home Office for reasons explained above had not even looked at this case under Article 8 of the ECHR and for the judge to so do meant that the judge was effectively placing himself in the role of decision maker of first instance which is not the role of a judge in the First-tier Tribunal.

(c) Article 8 of the ECHR now, is looked at through the Immigration Rules as the refusal letter makes clear. There is also case law (**Singh**) to suggest that considering Article 8 of the ECHR without first looking at the Immigration Rules is unlawful.

(d) Finally if the Appellant makes no further application or did make an application as invited by the Home Office then further removal directions and/or decisions would be made by the Respondent which of course may be favourable to the Appellant but even if unfavourable would generate a right of appeal including an appeal under Article 8 rendering this decision both academic and outdated and therefore pointless.

18. For the above reasons there was in my view no basis in the judge considering Article 8 of the ECHR in this case. In any event the consideration under Article 8 of the ECHR disclosed in itself material errors of law in that:

(a) It had not been examined within the ambit of the Immigration Rules.

(b) If as the judge had declared within the decision paragraph that the appeal was allowed under the Immigration Rules it was unnecessary to consider it in any event under Article 8 of the ECHR outside of the Rules.

(c) There were no reasons given as to why the judge should be considering the case outside of the Rules.

(d) There was no consideration of Section 117B of the 2002 Act a statutory consideration necessary (**Dube [2015]**).

(e) Too much reliance was placed on **ZH (Tanzania)** and although "best interests of children" is a primary consideration it is certainly not the only factor

whenever an examination of proportionality between the public good and private wishes is under consideration. The judge does not appear to have noted that point.

Notice of Decision

19. There were a number of material errors of law made in this decision such that the decision of the First-tier Tribunal needs to be set aside and remade.

20. Anonymity not retained.

Signed Date

Deputy Upper Tribunal Judge Lever