IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/36505/2013
IA/36522/2013

THE IMMIGRATION ACTS

Heard at RCJ Belfast	**Decision & Reasons Promulgated**
On 30 November 2015	**On 22 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

RT
&
CT

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: In person
For the Respondent: Mr Diwnyez, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are mother and son and are citizens of Canada. They were born on 20 August 1982 and 18 October 2003, respectively.

2. On 12 October 2012 they applied for residence cards as the family members of an EEA national exercising Treaty rights. The applications were refused in decisions dated 21 August 2013.

3. Their appeals against those decisions came before First-tier Tribunal Judge S. T. Fox on 23 January 2015 whereby he dismissed the appeals. Permission to appeal having been granted by a judge of the Upper Tribunal, the appeals came before me.

4. Prior to the hearing there had been an application for an adjournment which had been refused by an Upper Tribunal Judge. Grounds of Appeal to the Upper Tribunal had been drafted by legal representatives, although the appellants were not represented before me. The first appellant said that they were still seeking an adjournment. She said that new information had come to light and that they needed some time to consider their options.

5. Mr Myles Wolfe, the first appellant's husband, told me that they had been given more options by their legal representative. He had dual citizenship and he had been told that if he renounced his citizenship, an application could be made on the basis that he is an EEA national.

6. The first appellant added that the First-tier Judge had said that he would not look at the documents they had brought with them because they had not been provided prior to the hearing. He did however, take copies of the birth certificates of their children, O and J, born on 6 October 2014 and 24 July 2013, respectively. She referred to other documents that were produced at the hearing before the First-tier Judge, also identified at [21] of the grounds of appeal to the Upper Tribunal.

7. The first appellant also said that they did not ask for an adjournment at the hearing before the First-tier Tribunal, although the judge said that there would be no point in adjourning the hearing.

8. Mr Diwnyez informed me that he did not have a complete copy of the determination of the First-tier judge. I arranged for one to be provided to him.

9. I explained to the first appellant and her husband the issue in relation to the case of *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC), and its relevance to the appeal in terms of Article 8 of the ECHR. I indicated that the President of the Upper Tribunal had considered it appropriate for cases which raised the question of Article 8 rights within an appeal against the refusal of a residence card to be adjourned pending the outcome of an appeal to the Court of Appeal against the Upper Tribunal's decision in that case.

10. However, I also explained to the first appellant and her husband what appeared to me to be the difficulties with their case in relation to grant of a residence card given Mr Wolfe's dual British and Irish nationality in the light of the decision in *McCarthy* [2011] EUECJ C-434/09. I was told by the first appellant that her husband had never worked in Southern Ireland, although he had sometimes travelled there for work.

11. I decided to reserve my decision on the matters raised in the grounds but indicated that in any event the matter would have to be adjourned insofar as a decision was required in relation to Article 8 of the ECHR, pending the

outcome of the decision of the Court of Appeal in *Amirteymour*. In other words, I decided that I may proceed to determine the error of law issue and any re-making on the EEA grounds, but that I would not make a decision in relation to Article 8 for the reasons already explained.

12. It follows from the foregoing, that I did not consider it necessary in the interests of justice to adjourn the hearing, particularly bearing in mind that I had before me written grounds of appeal against the decision of the First-tier Tribunal.

The decision of the First-tier Tribunal

13. At [7] of the determination Judge Fox noted that standard directions had been served on the parties, and although the appellants have taken advice from the Law Centre in Belfast, as he understood it it would appear that they did not receive advice on complying with the standard directions and therefore they had failed to adduce any statements or supporting evidence before him. At [9] he stated that he had given full and careful consideration to all the documents, including the respondent's decision, and had considered the grounds of appeal. He said that save what may be attached to the grounds of appeal there are no new documents before him.

14. At [11] he recorded that the first appellant and her husband attended the hearing before him (although at [7] he said that the appellants had not sought an oral hearing). Mr Wolfe said in evidence that he was a UK national and was born in Northern Ireland. He stated that he worked in Northern Ireland but the judge said that he had been unable to demonstrate that he had worked there by producing wage slips, HMRC documents or similar, proving his employment history. He then stated that there were no additional documents produced to show that the couple were living together in the United Kingdom, "as is normally required in these courts". He recorded that the first appellant and her husband accepted that the proofs required had not been provided. They also accepted that they had not made any application under the Article 8 Immigration Rules.

15. At [12] he noted that there were no removal directions in place. He said that he considered whether an adjournment would be "beneficial" to the appellants but was satisfied on the balance of probabilities that it would be better for the appellants to consider making a fresh application with the appropriate documentation in support. He also noted that the first appellant and her husband indicated that they were keen to start afresh and to engage legal representation. He considered that an adjournment was not appropriate in the circumstances.

16. He decided that the appellants were not entitled to residence cards and that the decision in terms of Article 8 was proportionate.

The Grounds of Appeal

17. The Grounds contend that the judge's conclusion that the appellants are not entitled to residence cards is inadequately reasoned, and that there

was no assessment of the evidence before him. It is also argued that there is no indication from the determination what legislative provisions in terms of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") were considered.

18. Similarly, it is argued that the judge's findings in relation to Article 8 are flawed, for example because no consideration at all was given to the best interests of the first appellant and her husband's children.

19. There is also criticism of the judge's conclusion that the appellant and her husband had failed to produce evidence that they were living together in the UK, the argument being that the law does not require spouses to be living together in order to be considered as a family unit.

20. The failure to adjourn the hearing is also criticised in the light of the fact that the appellants wished to obtain legal representation.

21. Although the judge had said that there were no new documents before him, the appellants did in fact bring with them a number of documents which the judge refused to accept, these being birth certificates of O and J, a letter of employment in relation to Mr Wolfe, school letters and personal references.

22. It is also suggested that the determination betrays a lack of care, for example in that the judge had said that the appellants had not sought an oral hearing, whereas in fact they plainly had.

My assessment

23. Although the First-tier Judge said that he had given "full and careful consideration to all the documents attached to this Appeal", there is no identification of what documents were before him.

24. It is asserted by and on behalf of the appellants that they did in fact produce documents at the hearing but that the judge refused to accept them. The respondent was not represented before the First-tier Judge and accordingly no assistance can be derived from any contemporaneous notes from any representative of the respondent at the hearing. The judge's manuscript record of proceedings does not illuminate the matter.

25. Nevertheless, although the judge said that no "additional" or "new" documents were before him, as already indicated the determination does not identify what documents were in fact before the judge. In addition, there is nothing on the face of the determination to reveal whether or not the judge asked the appellants whether they had any documents with them.

26. Although the judge gave a summary of the respondent's reasons for refusing the residence cards, including with reference to the EEA Regulations, there is no reference in the determination to the relevant provisions of the EEA Regulations governing the issuing of residence cards, nor any explanation of what is meant at [11] of the appellants having failed to produce "additional documents" to show that they were living together in the UK. It does not appear that there has been any issue taken

by the respondent in terms of their living together. If that is a reference to reg. 9 of the EEA Regulations it is not explained.

27. I do not consider it necessary to resolve the issue of whether or not the appellants were prevented from producing documents at the hearing. If they were, in my view the judge erred in law in refusing to accept documentary evidence produced at the hearing by unrepresented appellants. In any event, I am satisfied that the judge erred in law in failing to identify what documents he had before him and failing to explain the basis upon which the decision was reached with reference to the applicable legislative framework within the EEA Regulations.

28. So far as Article 8 of the ECHR is concerned, I am also satisfied that the judge erred in law in his consideration of that ground of appeal. Although at [10] he said that he had had regard to ss.117A, B and D of the Nationality, Immigration and Asylum Act 2002, and at [14] he referred to the need for fair and firm immigration control, the conclusion that the respondent had acted proportionately by refusing to issue the residence cards is not reasoned. It is particularly important that there be a reasoned analysis of the proportionality of the decision where children are concerned, as here.

29. I do not however, consider that the judge's refusal to adjourn the hearing reveals any error of law. It does not appear that the appellants applied for an adjournment and the grounds do not explain why legal representation had not been sought in advance of the hearing.

30. Having identified errors of law in the decision of the First-tier Judge, the question then arises as to whether the decision should be set aside. The mere finding of an error of law, of course, does not necessarily lead to that outcome. Furthermore, it must be said that I have doubts about the extent to which the appellants are able to succeed in their applications for a residence card bearing in mind the decision in *McCarthy* and the question of whether Mr Wolfe is exercising Treaty rights. There does not appear to be any basis upon which to conclude that a residence card should be issued with reference to reg. 9. For reasons explained below, the prospects for success in relation to Article 8 do not seem to me to be high.

31. It is however, perfectly permissible for the Upper Tribunal to set aside a decision for error of law and immediately to re-make the decision but concluding that the result should be the same. Alternatively, an error of law could be found but the conclusion reached that the error could not have affected the outcome of the appeal.

32. In this case, I have decided that the decision of the First-tier Tribunal should be set aside given the fact that the appellants were unrepresented, the lack of identification of what documentary evidence was before the First-tier Tribunal and the lack of detailed engagement with the relevant legislative framework governing the issue of residence cards.

33. As indicated above, I have reservations about the extent to which the appellants are entitled to residence cards. The grounds before the Upper Tribunal do not in fact explain the basis on which the appellants are entitled to residence cards. It is not suggested either, that reg. 9 has any part to play in terms of Mr Wolfe having worked in another EEA state before coming back to Northern Ireland and having lived in that EEA state with the appellants.

34. Furthermore, in relation to Article 8, although as at the date of hearing before me the position was that *Amirteymour* was awaiting a hearing in the Court of Appeal, on 1 December 2015 the Court of Appeal gave judgement in the case of *TY (Sri Lanka) v Secretary of State for the Home Department* [2015] EWCA Civ 1233 in which, in summary, the Court of Appeal endorsed the decision in *Amirteymour*. It does not appear from that decision therefore, that the appellants have recourse to Article 8 within this appeal.

35. Nevertheless, given that the appellants were unrepresented before me, and given that the '*Amirteymour*' point has only just been decided by the Court of Appeal, I conclude that the fair and appropriate course of action is to adjourn this case for further hearing before the Upper Tribunal. This incidentally, gives the appellants further time to consider the other options that were referred to at the hearing before me. However, the appellants and their now legal representatives must have regard to the directions set out below.

DIRECTIONS

1. No later than 14 days after this decision is sent, the appellants are to notify the Tribunal as to whether the appeal against the refusal of residence cards is to be pursued. If not, the appellants are to confirm that they wish their case to be withdrawn pursuant to rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. If the appeals are to be pursued, the appellants must file and serve a comprehensive bundle of documents no later than 14 days before the resumed hearing, together with a skeleton argument setting out the basis of the appellants' case, including with reference to Article 8 of the ECHR.

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity in order to protect the identity of the minor appellant. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 23/12/15