



IAC-FH-CK-V1

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

Appeal Numbers: EA/01337/2019 (V)
EA/04625/2019 (V)
EA/04627/2019 (V)
EA/04632/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House
On 30 September 2020**

**Decision & Reasons Promulgated
On 12 October 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**MRS IJEOMA [N]
MR ALPHONSUS [O]
MISS [O I O]
MISS IFUNANYA [C]
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondents: Mr J Dhanji, Counsel instructed by Garth Coates Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

Introduction

1. The appellant in this appeal is the Entry Clearance Officer. However, for convenience, I will refer to the parties as they were in the First-tier Tribunal.
2. The appellants are citizens of Nigeria who applied for EEA family permits in order to accompany [OOI] (“OOI”), a Dutch national born on 10 July 2014, to the UK. The first appellant is OOI’s mother. The second appellant is the husband of the first appellant and OOI’s stepfather. The third appellant is the daughter of the first and second appellants. The fourth appellant is the sister of the first appellant.
3. On 19 February 2020 the respondent refused to grant any of the appellants an EEA family permit. A separate decision was made in respect of each of the appellants.
 - (a) The first appellant’s application was refused on the basis that:
 - (i) she had not provided sufficient evidence to establish that she was OOI’s primary carer and therefore did not meet the requirements of Regulation 16(2)(a) of the Immigration (EEA) Regulations 2016 (“the 2016 Regulations”); and
 - (ii) she is currently residing in Nigeria and therefore did not meet the requirements of Regulation 16(2)(b)(ii) and (iii).
 - (b) The second appellant’s application was refused on the basis that he is currently residing in Nigeria and therefore did not meet the requirements of Regulation 16(2)(b)(ii) and (iii).
 - (c) The third appellant’s application was refused on the basis that her parents’ applications had been refused.
 - (d) The fourth appellant’s application was refused as it was not accepted that she is related to either OOI or his primary carer; and because she is currently residing in Nigeria and therefore did not meet the requirements of Regulation 16(2)(b)(ii) and (iii).
4. The appellants appealed to the First-tier Tribunal, where their appeal was heard by Judge of the First-tier Tribunal Samimi (“the judge”). In a decision promulgated on 12 November 2019, the judge allowed the appeal. The respondent is now appealing against that decision.

Legislature Framework

5. Regulation 11(5)(b) provides that a person must be:

‘... accompanying an EEA national to, or joining an EEA national in, the United Kingdom and [the person] would be entitled to reside in the United Kingdom under regulation 16(2) were [the person] and the EEA national both in the United Kingdom.’

6. Regulation 12(2) of the 2016 Regulations provides:

'(2) An entry clearance officer must issue an EEA family permit to a person who applies and provides evidence demonstrating that, at the time at which the person first intends to use the EEA family permit, the person –

- (a) would be entitled to be admitted to the United Kingdom because that person would meet the criteria in regulation 11(5); and
- (b) will [] be accompanying to, or joining in, the United Kingdom any person from whom the right to be admitted to the United Kingdom under the criteria in regulation 11(5) is derived.'

7. Regulation 16 of the 2016 Regulations provides, in relevant part:

'(1) A person has a derivative right to reside during any period in which the person –

- (a) is not an exempt person; and
- (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(2) The criteria in this paragraph are that –

- (a) the person is the primary carer of an EEA national; and
- (b) the EEA national –
 - (i) is under the age of 18;
 - (ii) resides in the United Kingdom as a self-sufficient person; and
 - (iii) would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period.

...

(6) The criteria in this paragraph are that –

- (a) the person is under the age of 18;
- (b) the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act [(but see paragraph (7A))] ¹ ;
- (c) the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and
- (d) the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.'

Decision of the First-tier Tribunal

8. The judge found that the first and second appellants were joint primary carers of OOI and therefore satisfied Regulation 16(2)(a), on the basis that the first appellant is his biological mother and the second appellant has been named his legal guardian in Nigeria. Having made these finding about OOI's primary carers, the judge concluded that the first and second appellants met the requirements of Regulation 16(2) and therefore qualified for family permits under Regulations 12(2) and 11(5)(b).

9. The judge found that the third appellant satisfied the requirements of 16(6).
10. The judge found that fourth appellant did not meet the requirements of 16(6) because she was over the age of 18. However, the judge raised with the parties whether the fourth appellant met the criteria of being an extended family member of OOI pursuant to Regulation 8(2). The judge concluded that she did, on the basis that she is living, and will continue to live, in the same household as OOI.

Grounds of Appeal and Respondent's Submissions

11. The respondent's case is set out in the grounds of appeal, written submissions of Mr Whitwell dated 8 July 2020, further submissions made on 21 July 2020 and in Mr Whitwell's oral argument made at the error of law hearing.
12. Mr Whitwell accepted that, pursuant to Regulation 11(5)(b), the first and second appellants would be entitled to a family permit if they satisfied the requirements of Regulation 16(2) even though they are outside the UK. To the extent that the respondent's refusal letters expressed a contrary view, he accepted that they were wrong.
13. However, he submitted that the judge erred in the application of Regulation 16(2) in two ways. Firstly, he argued that the judge erred by not considering whether OOI was a self-sufficient person under Regulation 16(2)(b)(ii). Secondly, he argued that the judge did not give adequate reasons to explain why it was found that both the first and second appellants are primary carers of OOI.
14. With respect to the fourth appellant, Mr Whitwell argued that the judge was not entitled to determine the question of whether she was an extended family member under Regulation 8(2) without the respondent first carrying out the extensive examination required by Regulation 12(5). Regulation 12(5) provides that where an Entry Clearance Officer receives an application for an EEA family permit by an extended family member an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Entry Clearance Officer must give reasons justifying the refusal unless this is contrary to the interests of national security. Mr Whitwell argues that no such examination has been undertaken because an application as an extended family was not made - the issue having been raised for the first time at the First-tier Tribunal hearing by the judge. He also argued that the fourth appellant is dependent on the first appellant, not OOI, and therefore Regulation 8 is not in any event met.

Submissions of the Appellants

15. Mr Dhanji argued that the respondent cannot now raise the issue of self-sufficiency, as it had not previously been identified as an issue in dispute. He noted that it was not raised in the Refusal Decisions, Entry Clearance Manager Review, or in the First-tier Tribunal where (as recorded by the judge at paragraph 5 of the decision) the Presenting Officer explicitly stated that he was only relying on the refusal letter. He

also drew attention to the skeleton argument before the First-tier Tribunal where it is stated:

“The respondent also took no issue with the first and second appellants’ ability to meet the requirements of Regulations 16(2)(b)(ii) or 16(2)(b)(iii) that the sponsor child is a self-sufficient person and that he could not remain in the UK if the first and second appellants left for an indefinite period.”

16. He argued that the judge cannot have fallen into error for not addressing an issue that was not raised.
17. In respect of the respondent’s argument that the judge has not given adequate reasons for finding that the first and second appellants were joint primary carers for OOI, Mr Dhanji argued that at paragraph 9 of the decision the judge made clear findings of fact that are supported by the evidence: the first appellant is OOI’s biological mother and the second appellant has been granted joint legal guardianship with her.
18. With respect to the fourth appellant, Mr Dhanji’s argued that it was open to the judge to find that she is OOI’s aunt and therefore that she is a “relative of an EEA national” for the purposes of Regulation 8(2)(a). He argued that 8(2)(b) was clearly satisfied because she and OOI were living together, as part of the same family unit, and as such were members of the same household.

Analysis

The first and second appellants

19. In order to establish that the decision to refuse them a family permit breached Regulations 11(5)(b) and 12(2), the burden was on the first and second appellants to show, on the balance of probabilities, that the criteria specified in Regulation 16(2) would be met if they and OOI were in the UK. The criteria they needed to establish, therefore, were that, if they were in the UK, they would be:
 - (a) OOI’s primary carers (16(2)(a));
 - (b) OOI would be a self-sufficient person (16(2)(b)(ii)); and
 - (c) OOI would be unable to remain in the UK if they left the UK for an indefinite period (16(2)(b)(iii)).
20. The respondent, in the refusal decisions, only addressed the first of these issues (whether the first and second appellants were OOI’s primary carers under 16(2)(a)). No consideration was given to the question of OOI’s self-sufficiency (16(2)(b)(ii)) or to his ability to remain in the UK without his parents(16(2)(b)(iii)). These points were not conceded; rather, they were not addressed at all.
21. An appeal to the First-tier Tribunal under the 2016 Regulations is brought on the basis that a decision breaches an appellant’s rights under the EU Treaties in respect of entry to or residence in the United Kingdom, and is not limited to issues raised in

the refusal decision. See, by analogy, *RM (Kwok On Tong: HC395 para 320) India* [2006] UKAIT 00039. Accordingly, even though the refusal letters did not address whether OOI met the conditions specified in 16(2)(b)(ii) and (iii), it nonetheless remained incumbent on the appellants (the burden being on them) to establish before the First-tier Tribunal that these criteria were satisfied.

22. However, if a point is not put to a judge, it will not generally be an error of law for a judge to not consider it. See *GS (India) v SSHD* [2015] EWCA Civ 40 at [89] and *BM (Iran) v SSHD* [2015] EWCA Civ 491 at [17]. It is clear from reading the decision as a whole that the Presenting Officer, taking an approach that was consistent with the refusal letters, did not put to the judge, and did not contend in any way, that the conditions of Regulations 16(2)(b)(ii) and 16(2)(b)(iii) were not met. Indeed, although the judge did not explicitly refer to a concession, at paragraph 5 of the decision it is stated that the Presenting Officer “relied on the refusal letter only”, which indicates that the Presenting Officer accepted that Regulations 16(2)(b)(ii) and 16(2)(b)(iii) were not at issue. The appellants’ position, as set out in their skeleton argument before the First-tier Tribunal, was that the respondent did not take issue with Regulations 16(2)(b)(ii) and 16(2)(b)(iii). In these circumstances, where both parties proceeded before the First-tier Tribunal on the basis that the issues under Regulations 16(2)(b)(ii) and 16(2)(b)(iii) were not in dispute, and the Presenting Officer effectively conceded the point by stating that he was only relying on the refusal letter, the judge cannot be expected to have considered – and did not fall into error by not considering – Regulations 16(2)(b)(ii) and 16(2)(b)(iii). Accordingly, although it was necessary for the first and second appellants to establish OOI’s self-sufficiency, because of the approach adopted by the respondent before the First-tier Tribunal, failure to consider the issue was not an error of law.
23. The judge gave clear reasons for finding that the first and second appellants are joint primary carers of OOI. The reasons, which are set out in paragraph 9 of the decision, are that the first appellant is OOI’s mother, and that the second appellant (her husband) has been appointed his Guardian (by a Nigerian court). These are valid and sustainable reasons: there is therefore no merit to this challenge to the decision.
24. For the foregoing reasons, I am satisfied that the grounds of appeal do not identify an error of law in respect of the decision concerning the first and second appellants.

The third appellant

25. It was common ground that the third appellant’s appeal fell to be decided in line with that of the first and second appellants.

The fourth appellant

26. In order for the fourth appellant to be an extended family member under Regulation 8(2) she would have to either be dependent on OOI or a member of his household.

27. The judge found that Regulation 8(2) was satisfied because the fourth appellant has been (and would continue) living as part of the same family unit and household as OOI.
28. However, being part of the same family unit and household as OOI is not the same as being a member of his household. See *AA (Algeria) v The Secretary of State for the Home Department* [2014] EWCA Civ 1741, where it was made clear that living under the same roof as an EEA national did not equate to being a member of that person's household.
29. Whilst the fourth appellant may be a member of the first or second appellant's (or their combined) household, plainly she is not a member of OOI's household, as OOI is a young child. The judge therefore materially erred in law by finding that the fourth appellant is an extended family member of OOI. As the evidence cannot, on any legitimate view, support the conclusion that the fourth appellant is either dependent on OOI or a member of his household, I remake the decision in respect of the fourth appellant and dismiss her appeal against the decision of the Entry Clearance Officer.

Notice of Decision

30. In respect of the first three appellants:
 - (a) The decision of the First-tier Tribunal did not involve the making of an error of law.
 - (b) The Entry Clearance Officer's appeal is dismissed.
31. In respect of the fourth appellant:
 - (a) The decision of the First-tier Tribunal involved the making of an error of law.
 - (b) I set aside the decision and remake the decision. My remade decision is to dismiss the fourth appellant's appeal against the decision of the Entry Clearance Officer.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Date: 7 October 2020