



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

Appeal Number: IA/40510/2013

THE IMMIGRATION ACTS

Heard at Field House

On 19th January 2015

Determination

Promulgated

On 28th January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR ADEGOKE STEPHEN AYOOLA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Sheizon (LR)

For the Respondent: Ms L Kenny (HOPO)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Thanki, promulgated on 23rd October 2014 following a hearing at Hatton Cross on 22nd September 2014. In the determination, the judge dismissed the appeal of Mr Adegoke Stephen Ayoola. The Appellant subsequently

applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 22nd July 1975. He appealed against the decision of the Respondent to revoke his residence card under Regulation 20(2) of the Immigration (EEA) Regulations 2006, made in a decision letter dated 23rd September 2013.

The Appellant's Claim

3. The Appellant's claim is that he had been issued with a residence card on 19th February 2010 as an unmarried partner of a Ms AK, who was a Polish national, exercising treaty rights in the UK. On 13th May 2013, however, Ms AK wrote to the Respondent Secretary of State informing her that her relationship with the Appellant had permanently broken down. The Respondent took the view that the Appellant was no longer entitled to a residence card. A refusal letter was issued. The Appellant now appealed under Section 82 of the NIAA 2002 and under Regulation 26. The Appellant argued that the Respondent's decision was unlawful under Section 6 of the Human Rights Act 1998, and it was specifically with the Appellant's rights to family and private life, under Article 8 of the ECHR. The Appellant and Ms AK had a son. That son is a British citizen. The Appellant's relationship with the British citizen child would be interrupted if the Appellant were forced to leave the UK.

The Judge's Findings

4. At the hearing before Judge Thanki, there was evidence that the Appellant had failed to inform the Respondent Secretary of State that his relationship had broken down with Mr AK in May 2013 and that he had moved out of joint residence. However, there were court approved contact arrangements with their child, whom the Appellant last saw on 20th September 2009, and another supervised visit on 23rd September 2009. There was also a court hearing on 10th October 2009 to determine whether he could have increased contact with the child (see paragraph 12).
5. The representative for the Respondent Secretary of State argued that if Article 8 family life rights were being asserted then a separate application was required because the Respondent had not issued removal directions yet. However, the Appellant asserted that the right to family life was not a "additional" right but a primary right and the Appellant was entitled to raise it under Section 84(1)(b) of the NIAA 2002. Moreover, the Respondent had not considered the child's rights under Section 55. The decision was not in accordance with EU law. Given that under Regulation 20 the Respondent was required to apply discretion before revoking the residence card, these considerations were relevant.

6. In what is a very brief determination, the judge simply proceeded to say that because the power existed under Regulation 20 to revoke a residence card from a holder when he no longer satisfies the 2006 Regulations, this revocation was made, and it was made after the Respondent received letters from Ms AK, that she was no longer in a relationship with the Appellant (see paragraph 30). The judge also held that the Appellant was not entitled to appeal the Respondent's decision under Section 84(1)(3) because he was no longer a member of the family of an EEA national. Also, given that the Respondent had not made removal directions, Article 8 issues could not be raised (paragraph 32). The Respondent's decision was made lawfully because it was based on information available to her and the presence of the child it was not known to the Respondent because the Appellant failed to inform the Respondent that he was no longer a family member of an EEA national (paragraph 33). The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge erred in finding that the Appellant had no right to rely on Section 84(1)(ii) of the 2002 Act; that the judge erred in failing to address the Appellant's argument that the principle of proportionality applied in all decisions giving effect to community rights; (3) that the judge erred in law in refusing to consider the interests of the child; (4) that the judge erred in law in failing to address the Appellant's argument that the decision amounted to discrimination contrary to Article 21 of the Charter of Fundamental Rights; (5) the judge erred in law in failing to address the Appellant's argument that the revocation decision was incompatible with the right of the child to have contact with both parents; (6) that the judge erred in law in failing to give reasons as to why the Appellant's application for his request for disclosure of proceedings in the Family Court was refused.
8. On 9th December 2014, permission to appeal was granted.
9. A Rule 24 response was entered on 12th December 2014 by the Respondent Secretary of State.

Submissions

10. At the hearing before me on 9th January 2015, Ms Sheizon made the following submissions. First, that even if the Appellant's relationship had broken down with his unmarried partner who was an EEA national, the Appellant still had a right of access to a child of this relationship, this was confirmed by a contact order from the Romford County Court (at pages 32 to 34 of the Appellant's bundle). The Appellant was having weekly direct contact with the child every Saturday. This was in addition to scheduled contact over the telephone.
11. Second, the Appellant did not lose protection of the EEA rights by reason of the deterioration of his relationship with his ex-partner because he had

a continuing parental relationship with the child. Any decision to revoke the residence card was in breach of the Appellant's retained right of residence under EU law derived from the combined operation of the Charter of Fundamental Rights of the European Union and the provisions of Directive 2004/38. The exercise of discretion under Regulation 20(2) of the EEA Regulations was therefore not in accordance with the law.

12. Third, the judge made a material error in recording that the Appellant's evidence was that he last saw his son on 20th September 2009 and had another supervised visit on 23rd September 2009, because the Appellant's evidence was that he saw his child weekly, and the last time he saw his child was two days before the hearing on 20th September 2014.
13. For her part, Ms Sheizon submitted that Article 8 was rightly rejected by the judge because it was not relied upon at the hearing. There was no application for a consideration of Article 8. The appeal process cannot be used to circumvent an application process. If the Appellant wanted to rely upon Article 8 a separate application had to be made.
14. Second, the judge produced a copy of the case of **Mohammad (Family Court proceedings - outcome) [2014] UKUT 00419**. This confirms that the mere possibility of an application for contact being made in the case of an immigration appeal is not a relevant consideration in adjourning an appeal or directing the grant of discretionary leave in order for such proceedings to be pursued. In this case the Appellant had only instigated Family Court proceedings after the refusal and there was no evidence before the court except a letter from SJ Solicitors dated 16th September 2014 that a contact order is in place.
15. Furthermore, as the judge makes clear, "there was no evidence before the Respondent as to the existence of the child of the family" (paragraph 30). The proper course for the Appellant now was to make a fresh application where his Article 8 rights could be considered.
16. In reply, Ms Sheizon submitted that Section 84(2) gives protection to the right of appeal under Regulation 26. Section 84D is with human rights applications and this includes Article 8. It was wrong for the judge to say that this was not relevant. The Family Court proceedings are there to show that there is a family life between the Appellant and this child. The child is entitled to contact with both parents. The decision was not in accordance with the community law.

Error of Law

17. It is an error for the judge to say that there is no right to raise Article 8 issues given Section 84(1)(ii) of the 2002 Act. However, I am not satisfied that this is a case where the decision should be set aside. This is for the following reasons.

18. First, as the judge made clear, “there was no evidence before the Respondent as to the existence of the child of the family” (paragraph 30).
19. Second, and in point of fact, the Appellant only instigated Family Court proceedings after the refusal. Accordingly, it is not correct to say that the judge failed to have regard to the best interests of the child, or to have made a decision which was incompatible with the rights of the child to have contact with both parents.
20. It may very well be, as the Appellant now claims that he had contact with his child two days before the hearing on 20th September 2014, or that he has contact on a weekly basis.
21. These matters, however, were not before the Respondent decision maker. The appropriate course of action is indeed for the Appellant to now make a separate application and to raise these matters specifically in relation to his Article 8 rights.
22. Accordingly, such error as there is in this determination is not capable of affecting the outcome of the appeal, and I consequently do not set aside the decision. I am guided by Section 12(2)(a) which is to the effect that the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal.

Notice of Decision

There is no material error of law in the original judge’s decision. The determination shall stand.

No anonymity order is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

28th January 2015