



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02538/2018
HU/03922/2018

THE IMMIGRATION ACTS

Heard at Field House
On 14th January 2019

Decision and Reasons Promulgated
On 08th February 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

P E
(anonymity direction made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Miszkiel, instructed by Jein Solicitors
For the Respondent: Mr P Deller on 5th November 2018 and Mr T Melvin on 14th
January 2019, Senior Home Office Presenting Officers

DETERMINATION AND REASONS

1. Mr E, a Nigerian Citizen born on 22nd November 1960, applied on 30th May 2017 for a derivative residence card as the primary carer of a British Citizen namely his wife, [I]. He also made a human rights claim on 19th April 2016. Both applications were refused by the respondent for reasons set out in a decision dated 8 January 2018. PE appealed both decisions and the appeal was heard by First-tier Tribunal Judge Daldry on 18th May 2018. She dismissed both appeals for reasons set out in her decision promulgated on 13th June 2018. Mr

[E] sought and was granted permission to appeal to the Upper Tribunal on three grounds:

- (i) It was arguable the First-tier Tribunal judge failed to conduct a full proportionality assessment when considering Article 8, including the factors set out in s117B Nationality Immigration and Asylum Act 2002, and in particular whether it was unduly harsh for him to return to Nigeria;
- (ii) It was arguable the judge had made an unreasonable finding when considering regulation 15A of the Immigration (European Economic Area) Regulations 2006 that it would be [I]'s choice whether she leave the EU by failing to consider [I]'s health;
- (iii) It was arguable the judge failed to consider all the issues with the most anxious scrutiny because there is no consideration of paragraph EX(1)(b) of the Immigration Rules.

2. This was quite an unusual appeal in that the appellant had two appeals running at the same time and the factual matrix was the same for each. Mr Deller accepted that the First-tier Tribunal judge had erred in law in her failure to consider the appeal in the context of paragraph EX(1)(b); there had been no assessment whether it was reasonable for the appellant to leave the UK and apply for entry clearance to return. Mr Deller confirmed that if the human rights appeal was successful then the EU appeal became academic – it was not the position that a derivative residence card was a route to settlement. Mr Deller also noted that the First-tier Tribunal judge did not appear to have given sufficient thought to [I]'s medical conditions, which were set out in the medical evidence relied upon.
3. I was satisfied on 5th November 2018 that the First-tier Tribunal judge had erred in law in her lack of full consideration under regulation 15(b) and her failure to adequately assess the evidence in the human rights claim including the failure to consider paragraph EX.1(b). I set aside the decision to be remade and adjourned the hearing on 5th November 2018. The findings of fact made by the First-tier Tribunal judge, in so far as findings were made, were retained and the parties given leave to file such further evidence as they sought to rely
4. The resumed hearing came before me on 14th January 2019. Unfortunately, and very sadly, [I] died on 27th November 2018 and her funeral took place on 12th January 2019. Mr E was obviously upset. It was agreed before me that there was no need for oral evidence, the findings made by the First-tier Tribunal judge stood as historical facts and the issue was the consideration of those facts and the current circumstances to the appeals before me.
5. Ms Miszkiewski acknowledged that the appeal under the EEA Regulations could not succeed and I formally dismissed that appeal. She however submitted that in determining the human rights claim the historical facts were of importance for the future claim. She submitted that the factual matrix was such that the human rights appeal, and the EU appeal would and should have been allowed by the First-tier Tribunal judge; the respondent should not have refused the applications and Mr E should be in the position now that he would have been in had his applications not been unlawfully refused. Mr Melvin submitted that there

was no historic injustice and the decision taken by the respondent on the basis of the evidence before him at the date of decision was lawful. He submitted that the decision has to be taken on the basis of the factual basis as it is on the day of the hearing; Mr [E] does not meet the requirements of the Rules and his circumstances are not such as could lead to him being granted leave on a broader approach to Article 8 – “outside the Rules”.

Background

6. The appellant arrived in the UK in July 2007 with entry clearance as a visitor. He did not leave on the expiry of his visit visa and on 7th August 2013 he was served with a removal decision. On 21st August 2013 he sought leave to remain as the unmarried partner of [I]. That application was refused on 22nd October 2013 with no right of appeal. He made a further application on 29th July 2014 for leave to remain as the spouse of [I]. That application was refused on 18th September 2014. A family and private life human rights claim made on 21st November 2014 was refused on 5th February 2015. A further application for leave to remain as a spouse made on 11th December 2015 was refused and the human rights claim certified on 2nd March 2016 thus enabling an out of country appeal only. On 19th April 2016 a further human rights claim was made, refused on 8th January 2018 and it is the appeal against that decision that is the subject of this appeal.
7. On 30th May 2017, the appellant made an application for a derivative residence card to confirm he was the primary carer of his wife. That application was refused on 8th January 2018 and the appeal against that decision is also the subject of this appeal.
8. Mr [E] was in a genuine and subsisting relationship with [I], who was a British Citizen. They were married on 17th October 2013. They had met in 2006 and had been together since then. [I] ran her own business – a restaurant. According to the medical records before the First-tier Tribunal judge and accepted by the judge, she started suffering from bilateral knee pain in August 2015, was in a lot of pain and was referred for knee replacement. She was also instructed to lose weight. In the autumn of 2015 she was able to travel to Nigeria, she had been attending weightwatchers when her business commitments permitted, and she was neither housebound nor dependent upon her husband for care.
9. In January 2016 she was referred to social services because of mobility difficulties. In April 2016, the appellant was described by the GP as [I]’s full time carer. In June 2016 [I] was referred to a pain clinic, was taking a strong opiate pain killers and needed help with toileting.
10. The First-tier Tribunal judge found that Mr E was the primary carer for [I]; Although she had a son in the UK he did not provide personal care for her.
11. [I] had rental income of £3000 per month and the couple therefore met the financial eligibility criteria in the Rules.

12. The First-tier Tribunal judge considered the availability of medication in Nigeria. There was adequate evidence before the judge to find that such medication as she required would be available even though there was some evidence of “fake” medication.

Discussion

13. Ms Miszkiel relied heavily upon the background to this appeal and that Mr E should be placed in the position he would have been in had his appeal been allowed before the First-tier Tribunal.
14. Although on its face an attractive submission, had Mr E been successful in his appeal against the refusal to grant a derivative residence card or had the appeal been allowed on human rights grounds, given that [I] has passed away, any grant of leave made by the respondent could have been curtailed because he no longer met the criteria in the Rules or under the EEA Regulations.
15. Although very sad that she has died, his appeal has to be determined on the basis of the evidence as it is now – he does not meet the criteria in the EEA Regulations for the grant of a derivative residence card and his acquired private life is not such as would justify the human rights appeal being allowed. Although he speaks English and, it seems, he would be financially self-supporting, he has not been lawfully in the UK save for an initial period of 6 months from July 2007. His first application to attempt to regularise his stay was not made until August 2013 and was after he had been served with an enforcement decision. Their relationship was entered into when his status in the UK was precarious and there is now, unfortunately, no current relationship. Mr E cannot meet the requirements of the Immigration Rules and the only issue that was raised before me that could be considered as taking the appeal outside the Rules for consideration as a wider Article 8 assessment was that he had been in a genuine and subsisting relationship with his wife for whom he was the full-time carer for the year before she died. That she needed him cannot be disputed but the fact remains that now he has no basis upon which he can remain in the UK. His ties to the UK, established through his residence since 2007 are insufficient to found a long residence claim, and he is not in a subsisting relationship.
16. If the appeal had been allowed under the Regulations, the derivative residence card would be declaratory of rights at that date only; he would not have achieved any long-term benefit from the grant of such a residence card because her death would legitimately lead to the cancellation of the residence card.
17. There was in any event insufficient evidence to support the contention that the appeal would have been allowed on human rights grounds. There was no significant evidence that it would have been unreasonable for Mr E to return to Nigeria to make an application for entry clearance. [I]’s son had been looking after her previously, she had previously travelled to Nigeria on holiday and although the evidence was that her health had deteriorated, there was no significant evidence that she would not be able to either travel with him to Nigeria whilst he awaited the result of an entry clearance application or that they would be separated for a long period of time. There was no formal assessment

of her care needs for the period he would be away or what could or could not be provided.

18. Taking all these matters into account, the appeals by Mr E against the SSHD's refusal of his derivative residence card and of his human rights claim must fail.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision is set aside to be remade.

I re-make the decision in both appeals by dismissing them

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I lift that order. There was no application for it to continue, the purpose for which the order was granted no longer exists and the necessity of open justice requires transparency.

Date 7th February 2019



Upper Tribunal Judge Coker