



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/19875/2014**

APPEAL NUMBER:

THE IMMIGRATION ACTS

**Heard at: Field House
On 25 August 2015**

**Decision and Reasons
Promulgated
On 11 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MR IAN JOSEPH MCFARLANE
NO ANONYMITY DIRECTION MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms R Akhter, counsel (instructed by MetroLaw Solicitors)

For the Respondent: Ms E Savage, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Jamaica, born on 31 August 1980. He appeals with permission against the decision of First-tier Tribunal Judge T Jones, who dismissed his appeal against the decision of the respondent to refuse his application for a derivative residence card pursuant to the Immigration (EEA) Regulations 2006 - 'the 2006 Regulations'. The determination was promulgated on 16 March 2015.

2. In granting permission to appeal, First-tier Tribunal Judge Pooler found that the failure by the Judge to determine the appeal in respect of Article 8 was arguable. However, the first ground relied on, namely, that he was entitled to succeed, as the Judge had found that the appellant provided most of his mother's care as a primary carer, was less likely to succeed, in the light of the Judge's observations 'at paragraph 11' of the determination.
3. In paragraph 11 of the determination, Judge Jones stated that at no stage was it submitted that the appellant's mother would no longer be able to remain in the UK (or elsewhere in the EU) if her son was to be no longer able to care for her. The presentation of the appeal and the applications centred around his need to remain in order to care for his mother. That seemed to fail to address the regulations.
4. Ms Akhter, who also represented the appellant before the First-tier Tribunal, submitted in accordance with her grounds in support of the application for permission to appeal, that once the Judge accepted that the appellant was the main carer, he was entitled to succeed on this basis "and not on some hypothetical way that would completely change the help, love and support his mother is currently receiving."
5. She also contended in her grounds that the Judge's conclusion that other family members may have to do more to help does not negate the status quo. It is in fact the appellant who provides this care and as such, dependency not only arises but the appellant has shown that without him his mother would be unable to reside in the UK. That is supported by the fact that although he has two sisters, one is not interested in being the carer for her mother, whilst the other daughter is a single mother and is trying to find a job. She also relied on the report of Dr Rizak who stated that the appellant's removal would have a detrimental untoward effect on her general medical management. Any stress may seriously affect her diabetes, her eyesight or even cause a stroke.
6. Ms Akhter also submitted that even though no s.120 notice under the 2002 Act had been issued, the respondent sent a letter to the appellant's solicitors dated 12 November 2014 after a pre-action protocol for judicial review was served upon her. The respondent stated that as the appellant's appeal was scheduled for hearing on 15 December 2014, judicial review would be inappropriate in the circumstances as the Article 8 issues sought to be relied on may be raised and addressed in the course of his current appeal. That appeal hearing is an effective remedy for the appellant to raise any relevant and applicable Article 8 issues.
7. Ms Savage on behalf of the respondent referred to the Upper Tribunals' decision in the appeal of Amirteymour and Others (EEA Appeals; human rights) [2015] UKUT 00466 (IAC) that where no notice under s.120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations.

8. She accordingly contended that the respondent cannot create a jurisdiction in respect of a right of appeal where none exists under the statutory scheme.
9. Ms Savage submitted in any event that the appeal advanced under the 2006 Regulations was “misconceived.” Paragraph 15A of the Regulations provides that a person who satisfies the criteria in paragraph (2), (3), (4A) or (5) of the Regulations is entitled to a derivative right to reside in the UK for as long as he satisfies the relevant criteria.
10. Paragraph 4A sets out the potentially relevant criteria in respect of the appellant. He has to show that he is the primary carer of a British citizen who is residing in the UK and who would be unable to reside in the UK or in another EEA state if the appellant were required to leave.
11. Sub paragraph 7 provides that a person is to be regarded as a “primary carer” of another person if he is a direct relative of that person and is the person who has primary responsibility for that person's care.
12. She submitted that in these circumstances, the “finding” at paragraph 11 of the determination of Judge Jones was correct, having regard to the circumstances then prevailing. Adequate reasons for that conclusion have been given.
13. She referred to the decision of the Upper Tribunal in MA and SM (Zambrano: EU Children outside EU) Iran [2013] UKUT 0038 (IAC) at [41]. The Tribunal stated that it is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non EU national upon whom he is dependent.
14. Nothing less than such compulsion will engage Articles 20 and 21 of the TFEU. It further notes that EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non EU national upon whom she is dependent, is for example, removed or prevented from working.
15. That is subject to the proviso that the diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the relevant ascendant relative, and hence the EU dependent citizen, to leave, and such actions as removal or prevention of work may result in an interference with some other right including the right to respect for family life under Article 8 of the Human Rights Convention.
16. She submitted that it is clear on the Judge's finding that no such “compulsion” will result in this case. There are other family members who can provide care.

Assessment

17. Judge Jones had regard to the evidence of both the appellant and his mother, Ms Julien. In summary, they both confirmed that she suffers from a number of largely age related health conditions, including diabetes, which causes her ongoing health concerns. Ms Julien receives primary and secondary care from the NHS. She also said she has had a heart attack. In January 2014, she had bypass surgery and is now taking more medication and has periodic reviews. She has further appointments to attend concerning her diabetes and she told the Tribunal that her sight is an ongoing health concern as well [6].
18. She has contact with social services which provide about an hour's care a day, five days a week; this provides her with some personal care and hygiene which she might find difficult to have her son provide for her. [6]
19. Ms Julien also said that her two daughters were nearby but one is engaged fully with her own family needs and has little time to visit, let alone offer care for her mother. The other is "disinterested" in caring for her mother suggesting that the State would or should look after her if needs be [6].
20. Ms Julien confirmed that she gets Employment and Support Allowance and is exempt from the need to undertake work related activities. She receives disability living allowance following a medical assessment for her care needs. She has few interests now, watches television, reads and prefers to stay indoors. She keeps essential appointments and is accompanied by the appellant [6].
21. Judge Jones accepted that the appellant provides her with most of her care, as a primary carer [10].
22. After applying the appropriate standard, he found that even though he has sympathy for the appellant's mother given her ongoing chronic health conditions, she does receive care from the NHS in that respect and also care from social services, albeit for one hour a day.
23. It is in that context that the Judge went on to state at [11] that at no stage was it submitted that the appellant's mother would no longer be able to remain in the UK or elsewhere in the EU if her son were no longer able to care for her.
24. At [12] Judge Jones stated that it may be the case that regrettably in such circumstances, her other family members may need to consider helping more, and if they refuse to do so, social services and the NHS will provide her, as is her right, with more help with her reasonable care needs.
25. She has the receipt of state benefits to assist her to make provision for carers who might also assist her. This the Judge found '... will be hard for the appellant and his mother to accept that the regulations in this matter have been properly cited and considered by the respondent, insofar as the

requirements of the EEA Regulations are concerned ... and upon which the claim is based' [12].

26. I do not accept the contention by Ms Akhter at paragraph 7 of the grounds that once the Judge has accepted that the appellant is the main carer, he is entitled to succeed on that basis.
27. I have set out the relevant regulations where it is clear that there is a requirement not only that the appellant be the primary carer of an EU citizen who is residing in the UK but that she would be unable to reside here or in another EEA state if he were required to leave.
28. Having regard to the findings of Judge Jones at [10-12], the appellant's mother is not compelled to leave the UK.
29. Insofar as the Article 8 claim is concerned, I accept Ms Savage's submission that in the absence of a s.120 notice and in the absence of any decision to remove, the appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations. None of the preconditions apply in this case.
30. In any event, I do not accept that the respondent's reply to the appellant's pre-action protocol assists the appellant in this respect. It was contended by the respondent in the letter that the appellant had a current appeal listed where the Article 8 issues he seeks to rely upon may be raised and addressed in the course of his appeal. Accordingly it was asserted that the appeal hearing is the effective remedy to raise any Article 8 issues.
31. I do not construe that as coming anywhere near granting the appellant some form of legitimate expectation that Article 8 issues could be raised at his appeal. Moreover, the respondent's assertion was made on the basis that such jurisdiction existed. However, as a matter of law, the appellant was not entitled to advance an Article 8 appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. It shall accordingly stand.

No anonymity direction is made.

Signed

Dated 10/9/2015

Judge C R Mailer
Deputy Upper Tribunal Judge