



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

Appeal Number: IA/35049/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 13th February 2015**

**Decision & Reasons
Promulgated
On 18th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MR MALIK SHAHZAD AHMAD AWAN
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Logan Counsel instruct M-R Solicitors

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, Mr Malik Shahzad Ahmad Awan, date of birth 19 August 1979 is a citizen of the Pakistan.
2. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking all the circumstances into account including the impact that these proceedings have upon the interests and rights of two children, I do not consider it necessary to make an anonymity direction.

3. This is an appeal by the Appellant against the Decision of First-tier Tribunal Judge G Bruce promulgated on 13th November 2014. The judge dismissed the appeal of the Appellant against the decision of the Respondent dated 29th April 2014 to refuse the Appellant a Residence Card as evidence that he was entitled to reside in the United Kingdom as a extended family member [or other family member] of an EEA national under Regulations 8 and 12 of the Immigration [EEA] Regulations 2006.
4. On 7th January 2015 First-tier Tribunal Judge Cox granted permission to appeal to the Upper Tribunal. In granting permission to appeal Judge Cox ruled that the Judge Bruce's findings and decision on the rights under the EEA Treaties and Regulations was fully justified and could not be challenged.
5. Judge Cox only gave permission on Article 8 grounds in that Judge Bruce had not assessed the Appellant's position under Article 8 of the ECHR. The Appellant was applying for a Residence card under the EEA Regulations. Where the Regulations require a specific relationship to enable an individual to claim EEA dependent's rights, Article 8 cannot replace that requirement.
6. Judge Bruce found that the Appellant had not been a member of the EEA national household nor been financially dependent upon the EEA national in Pakistan prior to coming to the UK. The EEA national in question was Mr Un Nabi a cousin of the Appellant. The findings of fact have been fully justified by the judge and there is no ground for reviewing the findings made. The judge was entitled to conclude that the Appellant and his family were not extended family members under Regulation 8. Leave was not granted on any ground relating to the EEA Regulations. That did not stop the Appellant's representative from seeking to re-open the arguments.
7. The Appellant first came to the United Kingdom on 26 July 2010. The Appellant was given leave to enter as a partner of his wife, who was in the UK as a Tier 4 Migrant under the points based system. That leave was valid until 22 March 2011.
8. After his leave expired the Appellant made application for further leave on 18 May 2011 as the partner of a Tier 4 Migrant. That application was refused. The Appellant made a further application as the partner of a Tier 4 Migrant on 30 October 2012. That application was also refused on 30 May 2013. Therefore the Appellant has not had leave to remain in the United Kingdom since the 22nd March 2011.
9. Having been refused leave under the Immigration Rules, on 10 February 2014 the Appellant made application for a residence card as a dependent extended family member of an EEA national exercising treaty rights. That application was refused by the Respondent on 29 April 2014. The Notice of Decision refusing leave contains the following:-

As you appear to have no alternative basis of stay in the United Kingdom you should now make arrangements to leave. If you fail to make a

voluntary departure a separate decision may be made at a later date to enforce your removal from the United Kingdom. Any such decision and associated appeal rights will be notified separately.

10. The Appellant appealed against the decision to refuse him a Residence Card. His appeal was dismissed by Judge Bruce.
11. The Appellant is married. His wife and two children, both of whom were born in the UK, are dependents on this application, as appears in paragraph 2 of Judge Bruce's decision. The whole family are in the UK. The Appellant's wife appears originally to have been a Tier 4 Student Migrant. It does not appear that she currently has leave under the Immigration Rules.
12. The Appellant and his wife are both nationals of Pakistan. Neither the Appellant nor his wife has or at any stage had settled status in the UK. The Appellant's wife being a Tier 4 Migrant may have had leave but at no stage was she settled or a citizen of the UK.
13. During the course of the hearing before me Counsel on behalf of the Appellant claimed that the two children were English, because they were born in England and were attending schools in England. Whilst I would not necessarily accept that the children are English, much more material the children are not British or citizens of the UK nor are they settled in the United Kingdom. The children do not appear to have any leave under the Immigration Rules or the law. The children are nationals of Pakistan.
14. Further Counsel on behalf of the Appellant took issue with the reference in paragraph 3 of the Decision of Judge Bruce to the Appellant having made to previous applications as a "*dependent*" of his wife as a Tier 4 Migrant. It was being suggested that that was a finding by Judge Bruce which infected the whole of the Decision.
15. If one looks carefully at paragraphs 2 and 3 of the Decision, it is clear that the judge is merely summarising the respective cases, for the Appellant in paragraph 2 and for the Respondent in paragraph 3. Thereafter the judge has properly concentrated upon the issue that was before her of whether or not the Appellant had proved dependency in terms of that Regulation 8 on the EEA national applying the cases of Moneke (EEA OFM) Nigeria [2011] UKUT 00341 (IAC) and Dauhoo [2012] UKUT 79.
16. In assessing whether or not an individual is entitled to rights under the EEA Treaties and Regulations, specifically Regulations 8 and 12, in the first instance it has to be shown that an individual is an extended family member in that he or she was a member of the household or financially dependent upon of the EEA national prior to coming to the UK and that he or she is a family member or financially dependent on the EEA national in the UK.
17. Once it has been shown that he or she is an extended family member, there is a discretion to exercise under Regulations 8 and 12 (2) as to

whether the individual should be granted a residence card. Article 8 of the ECHR and factors associated with it may be relevant in considering whether or not the discretion should be exercised.

18. The EEA Regulations and Treaties in order to be able to rely upon EEA rights require that an individual was a member of the household or financially dependent prior to coming to the UK. Judge Bruce found that the Appellant was not a member of the household or financially dependent of the EEA national prior to coming to the UK. Accordingly there were no Article 8 rights arising prior to the Appellant coming to the UK. Any Article 8 rights have to have arisen after the Appellant came to the UK.
19. It having been decided that the Appellant was not a member of the household or financially dependent prior to coming to the United Kingdom, the Appellant cannot succeed under the EEA regulations. The Appellant is not entitled to a Residence Card.
20. One cannot substitute the assessment of present rights in the United Kingdom under Article 8 for the requirements under the regulations of prior membership of the household or dependency in the country of origin. Whilst the Article 8 assessment may assist in determining whether an individual is a family member or dependent, it can wholly replace the requirements of the regulations.
21. Counsel on behalf of the appellant sought to argue that the consequences of failing to consider the Appellant's Article 8 rights would render the Appellant as unlawfully in the United Kingdom and liable to criminal consequences. The Appellant is in no worse position than he was before he made the application. He had no leave prior to the EEA application and still has no leave. It is the Appellant's failure to leave after his leave expired or his failure to make a valid application under the Rules or the Law that has resulted in his being unlawfully in the UK not the present decision.
22. It may be that issues under Article 8 may assist in looking at whether the discretion under Regulations 8 and 12(2) should be exercised in favour of an Appellant, once it has been established that they are a family member. However in the first instance it has to be established that an individual is an extended family member. Where on the facts there is the finding that an individual is not an extended family member no right to an EEA Residence Card arises and Article 8 cannot alter that decision.
23. It is for the Appellant to make a valid application under the Rules and his and his family's Article 8 Rights can be considered at that stage. Whether that gives an in-country right of appeal will depend upon the application and decision, but it is for the Appellant to make the application. It cannot be a breach of a person's Article 8 rights that they make a lawful application for leave to remain.
24. Further it has to be noted that there is no decision to remove the Appellant. The decision refusing to issue a residence card specifically

states that the Appellant is required to make arrangements to leave the United Kingdom failing which a separate decision may be made to enforce removal at a later date. Until such time as there is a decision to remove, there will be no interference in Article 8 rights.

25. Accordingly whilst Article 8 may assist in assessing whether an individual is a family member, where a judge has found and justified a conclusion that an applicant is or was not a family member at a material time, that is whilst in Pakistan, and was not dependent at that time, that is sufficient to deal with the rights under EEA law. That was the application made by the Appellant. If the Appellant was his Article 8 rights further considered, he should make an application for leave.
26. For the reasons set out any Article 8 assessment cannot alter the decision that the Appellant is not entitled to a residence card. Accordingly I find that there is no arguable material error of law within the determination. I uphold the decision to dismiss this appeal.

Notice of Decision

27. There is no material error of law in the original determination and I uphold the decision to dismiss this appeal.
28. No anonymity direction is made.

Signed

Date **16th February 2015**

Deputy Upper Tribunal Judge McClure