



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

Appeal Numbers: IA/00580/2016
HU/13181/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 28 November 2017**

**Decision & Reasons
Promulgated
On 02 February 2018**

Before

**THE HONOURABLE MR JUSTICE MORRIS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE RIMINGTON**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**[M M] (FIRST APPELLANT)
[L Y] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Mr A Kaihiva, Counsel instructed by PHIL Solicitors

DECISION AND REASONS

1. This is an appeal, brought with permission, by the Secretary of State for the Home Department (“the Secretary of State”) against the decision of First-tier Tribunal Judge Herbert promulgated on 24 February 2017 (“the FtT decision”). By the FtT decision the judge allowed the appeal of [MM] (the first appellant) and her daughter [LY] (the second appellant) against

two decisions of the Secretary of State dated respectively, 16 January 2016 revoking the first appellant's EEA residence card, and dated 24 November 2015 refusing the second appellant leave to remain. The FtT Judge refused the first appellant's case under the EEA Regulations but allowed the second appellant's appeal (and, as a result, the first appellant's appeal as her carer) under the Immigration Rules as a dependent child of the first appellant, and in any event outside the Rules, under Article 8 ECHR.

2. The Secretary of State appeals on two grounds: first, that the FtT Judge erred in his refusal to entertain the EEA appeal in relation to the first appellant, and secondly because the second appellant's appeal was dealt with without proper consideration, and further it was not open to the judge to consider the first appellant's appeal on the basis of the second appellant's position.

The Factual Background

3. The first appellant is a Ghanaian national and is aged 31. The second appellant is her daughter who is now aged 8 and has lived here all her life. The first appellant had previously been issued with EEA residence cards, and further on 27 October 2011 she was issued with an EEA residence card. On its face that card stated that she was "a family member of an EEA national". On 24 July 2015 the second appellant applied for indefinite leave to remain. On 24 November 2015 the second appellant's application for leave to remain was refused.
4. The Secretary of State in the "reasons for decision" refused the application on the following grounds.
5. First, the first appellant, the mother, although previously issued with a residence permit as a family member was no longer residing with or financially dependent upon her own mother and as a result no longer qualified for a right of residence under the EEA Regulations. It followed that, as the second appellant's mother did not have leave to enter or remain in the United Kingdom, or was British or had a right of abode in the United Kingdom, the second appellant did not meet the requirements of paragraph 305(i) of the Immigration Rules because she was not the child of a parent given leave to enter or remain in the United Kingdom.
6. Secondly, as regards the second appellant's family life, under the relevant provisions of the Immigration Rules, as the second appellant was at that time aged only 6 she did not qualify on the basis of family life. Thirdly, in relation to the second appellant's private life, the second appellant did not qualify under paragraph 276ADE of the Immigration Rules, most particularly because at the time of the application, although the second appellant was under the age of 18 years, she had only lived continuously in the United Kingdom for six years (not the requisite seven years), and further it was concluded that it would be reasonable to expect her and her mother to continue her family life in Ghana. Fourthly, having considered

the position under Section 55 of the Immigration Citizenship and Borders Act 2009, in the particular circumstances of her case:-

“It had been concluded that the need to maintain the integrity of the immigration laws outweighs the possible effect on you that might result from you and your mother having to re-establish your family life outside the UK”.

7. On 8 December 2015 the second appellant gave notice of appeal against that refusal of leave to remain. Whilst referring to the fact that the first appellant’s EEA residence right was still in place, the appeal was firmly based on Article 8 family life. On 16 January 2016 the Secretary of State issued her decision revoking the first appellant’s residence card purportedly under Regulation 8(2) and Regulation 20(2) of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). In the Reasons for the Revocation Letter accompanying that decision the Secretary of State set out Regulation 8(2) of the Regulations and concluded as follows:-

“You provided evidence to show that you now reside in your own rented accommodation and are in receipt of public funding, notably housing, council and tax benefits. As such this department does not consider you to be dependent on your EEA sponsor and as a result you cease to be entitled to a residence card under Regulation 8(2) of the Immigration (EEA) Regulations 2006”.

8. On 27 January 2016 the first appellant appealed against the decision of 16 January contending, inter alia, that the Secretary of State had applied too restrictive an interpretation of the meaning to be placed on the concept of dependency for the purposes of Regulation 8. The first appellant further contended that the Secretary of State wrongly failed to have any adequate regard to Article 8 ECHR and wrongly failed to have regard to the exceptional circumstances surrounding her case, as well as the disproportionate effect that the decision would have upon her private and family life.

9. The relevant legislation in the EEA Regulations are those to be found at Regulation 7(1)(b) which provides that:-

“... the following persons shall be treated as the family members of another person—

...

(b) direct descendants of his, his spouse or his civil partner who are —

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner”.

10. Regulation 8 of the EEA Regulations provides, as far as relevant:-

“(1) In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5)”.

In this case we are concerned with paragraph 2 which provides:-

“A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household”.

11. As regards private and family life the relevant provisions of the Immigration Rules are set out at paragraphs A27-C Appendix FM and paragraph 276ADE of the Immigration Rules and the further paragraphs there referred to. We refer in particular to provisions set out in the Secretary of State’s decision of 24 November 2015.

The FtT Judgment

12. First, whilst it appears that in fact that it was only the first appellant’s appeal which had been notified for hearing, the FtT Judge decided to hear both appeals at the same hearing, despite objection being taken by the first appellant. It is not clear that the Secretary of State actually objected at that hearing to the hearing of the second appellant’s appeal.
13. The FtT Judge recorded the Secretary of State’s case as follows. As regards the first appellant she was considered no longer to be dependent on her EEA sponsor and as a result ceased to be entitled to a residence card under the EEA Regulations. As regards the second appellant, she did not qualify because her mother no longer had an entitlement to an EEA residence card, and further, at the time of the letter of decision the second appellant did not meet the requirements under the Immigration Rules.
14. The FtT Judge found, at paragraph 7, that although the first appellant had lived separately from her father and stepmother, she continued to rely upon them both financially and in terms of emotional and physical support for herself and her daughter. The judge went on also to find that the second appellant was by then over 7 years of age and had built a significant private and family life in the UK. He then cited a case, apparently under Regulation 7 of the EEA Regulations, supporting the proposition that dependency is not the same as mere receipt of financial assistance, and that whether there was dependency involved a holistic examination of a number of factors including financial, physical and social conditions. Importantly, at paragraph 8 of the FtT judgment the judge concluded that there was ample evidence that there was a significant level of dependency, notwithstanding the fact that the first appellant and her daughter live separately from her stepmother who was an EEA national

and her father, and that there is a significant emotional, financial and physical matrix supporting both the first and second appellants.

15. The judge then appeared to consider the “parent” route in relation to a claim based on family life under R-LTRP.1.1. and then seemed to go on to consider separate provisions relating to family life. At paragraph 11 of his judgment the FtT Judge recognised that, at the date of her application for leave to remain, the second appellant had not reached 7 years of age and therefore did not benefit from the provisions of the Immigration Rules. Nevertheless, he considered that given that by the time of his decision she was 7 years old, and “the evidence before me that the removal of her mother and her to Ghana would be unreasonable and would cause her significant hardship if she was forced to leave the United Kingdom”. In our judgment this is an important finding.
16. At paragraph 13, dealing first with the first appellant’s case under the EEA Regulations, the judge concluded that, given his finding of dependency on her EEA national father and stepmother, he “would have” allowed the appeal save for the decision of **Sala** which held that there is no right of appeal against a decision to refuse a residence card to a person claiming to be an extended family member. (Of course we now know that as a result of the recent decision of the Court of Appeal in **Khan** (which we believe was on 9 November 2017) the decision of **Sala** has been overruled and there is indeed such a right of appeal.)
17. Finally, at paragraph 14 the judge continued that in any event the first appellant was allowed to remain as the primary carer of the second appellant. He continued:-

“This is a case that following SS (Congo) would be allowed outside of the Immigration Rules under Article 8 ECHR in any event. There is a presumption in favour of not removing children who have been in the UK for more than seven years and developed. I have found that it would not be reasonable to expect her to leave the UK after the significant integration she has developed here. This is the only country she knows. I apply the rational in ZH (Tanzania), the ruling by Lady Justice Hale, s 55 of the Borders, Citizenship and Immigration Act 2009, the provisions of the Children Act 1989 and rule 117 in so far as it is relevant to this child.” (emphasis added)
18. The final decision in the Notice of Decision in the FtT judgment was as follows:-

“I refuse this the First Appellant’s application under the EEA (Regulations).

I allow second appellant’s appeal (and therefore the first appellant as her carer), under the immigration rules as a dependent child of the first appellant, and in any event outside of the Immigration Rules under Article 8 ECHR”.
19. Whilst not entirely easy to decipher, it appears that in substance the decision of the FtT Judge was as follows:-

- (i) The first appellant's appeal in relation to the revocation of the residence card was refused because there was no right of appeal under the principle stated in **Sala**.
- (ii) However, the second appellant's appeal was allowed first under the Immigration Rules because she was a dependent child of the first appellant and secondly, in any event, outside the Immigration Rules under Article 8.
- (iii) The first appellant's appeal against the revocation of the residence card appears to have been allowed on the grounds that she, the first appellant, was the carer of the second appellant who was entitled to leave to remain.

The Grounds of Appeal

20. The Secretary of State appeals against the FtT decision. Her first ground of appeal was that the second appellant's appeal should not have been heard together with the first appellant's appeal without adequate notice. However, permission to appeal on that ground was refused. The second two grounds, grounds 2 and 3, for which permission was granted, were as follows. By ground 2 the Secretary of State contends that the FtT Judge was wrong in law to refuse to entertain the EEA appeal. This was because in substance this was not a case covered by the decision of **Sala, Sala** only covered cases of residence cards granted under Regulation 8(2) of the EEA Regulations, namely on the basis of being an extended family member of an EEA national. However, the Secretary of State now accepts and contends that the first appellant's entitlement to an EEA residence card was, and always had been, that she was a dependent descending relative aged over 21 of an EEA qualified person and thus covered by Regulation 7(1)(b)(ii) of the EEA Regulations. The slight oddity about this ground is that previously the Secretary of State's own case, both in the decision of 16 January 2016 and before the FtT Judge was that the first appellant's residence card had in fact been issued under Regulation 8. Nevertheless, the Secretary of State says that as a matter of jurisdiction the FtT Judge was wrong to decline to hear the appeal because there was a right of appeal from the substance of the decision.
21. By ground 3 the Secretary of State submits that the FtT Judge had concluded that because the second appellant was born in 2009 it could not be considered reasonable to expect her to leave the UK under the provisions of paragraph 276ADE(iv) of the Immigration Rules. However, the FtT Judge had no regard to the relevant case law or statutory framework. The second appellant's appeal was considered without proper notice and without proper consideration.
22. Further, in relation to the first appellant's appeal and the decision that it succeeded on the basis that she was the second appellant's "primary carer", this was erroneous because, first, the first appellant could not pursue her own appeal by reference to Article 8 considerations because that appeal was an appeal against an EEA decision. Secondly, in any

event, even if the FtT Judge was able to consider the first appellant's appeal by reference to Article 8 there was no proper consideration given to her position against the relevant statutory framework.

23. In argument today as regards the first appellant, Mr Tarlow for the Secretary of State accepts that based on the findings by the FtT Judge at paragraph 8 of the FtT judgment, the first appellant was entitled to an EEA residence card as a family member under Regulation 7(1)(b)(ii). He says to that extent the FtT judgment should be set aside and then should be remitted to the FtT. As regards the second appellant, when pressed, the Secretary of State's submission on the appeal was that the FtT Judge had set out no valid reasoning as to why the second appellant could not reasonably be expected to leave the country. Further, as regards the first appellant in her capacity as carer Mr Tarlow maintained his submission that given that her appeal was in respect of an EEA residence card, that ground was not available.

The Appellants' Contentions

24. Mr Kaihiva for the appellants contended that as regards the residence card the matter should not be remitted but the FtT decision should be remade by us, and as regards the second appellant the FtT Judge's findings outside the Immigration Rules were correct and the FtT decision should be maintained.

Conclusions

The First Appellant and the EEA Residence

25. In our judgment, on the basis of the clear finding of fact in paragraph 8 of the FtT judgment which is not contested by the Secretary of State, the first appellant had a right to an EEA residence card as a direct dependent descendant of an EEA national under Regulation 7(1)(b)(ii) of the EEA Regulations. The decision of **Sala** (which in any event has since been over-ruled by the Court of Appeal in **Khan**) had no application to a claim to a residence card under Regulation 7 as opposed to Regulation 8. It therefore follows that the FtT Judge's decision at paragraph 13 that there was no right of appeal against the Secretary of State's decision of 16 January 2016 was wrong in law. The FtT Judge did have jurisdiction to entertain the first appellant's appeal against the revocation of her residence card. To that extent we therefore set aside the FtT decision in relation to the first appellant, namely the first sentence of the Notice of Decision.
26. Further, we have decided to remake the decision ourselves under Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. In doing so we preserve the finding of fact made in paragraph 8 of the FtT judgment. On the basis of that finding of fact we conclude that the first appellant was a direct descendant of, and dependent on, an EEA national under Regulation 7(1)(b)(ii). It therefore further follows that the Secretary of

State's decision dated 16 January 2016 to revoke the first appellant's residence card on grounds based on Regulation 8 was wrong as a matter of law since the first appellant had a right of residence under Regulation 7.

27. Accordingly, we allow the first appellant's appeal against the Secretary of State's decision and that decision revoking the residence card issued on 27 October 2011 is set aside.
28. In the light of this conclusion we say no more about the first appellant's position as carer of the second appellant and do not enter upon issues as discussed in the case of *Amirteymour v SSHD* **[2017] EWCA Civ 353**

The Second Appellant

29. As regards the second appellant we do not accept the Secretary of State's ultimate argument that the FtT Judge set out no valid reasoning as to why she could not reasonably be expected to leave the country. In our judgment, at paragraph 14 of the FtT judgment the FtT Judge made a clear finding that the second appellant was entitled to leave to remain under Article 8 outside the Immigration Rules. What is more, he set out clear reasons why he concluded that it would not be reasonable to expect a 7 year old girl who had lived all her life in the UK and had been schooled in the UK to leave the United Kingdom. We have already set out paragraph 14 in full. When faced with this reasoning Mr Tarlow fairly accepted that he had no answer.
30. It follows that in our judgement the FtT Judge was correct to conclude that the second appellant is entitled to leave to remain outside the Immigration Rules and to that extent, and on that specific basis, the Secretary of State's appeal fails.
31. However, we make clear that the second paragraph of the Notice of Decision in the FtT decision does not wholly accurately reflect the correct position in law. Contrary to what is there stated, the second appellant does not have a right to remain under the Immigration Rules, as indeed the FtT Judge found in the first part of paragraph 11 of his substantive decision (and there is no right of appeal under the Immigration Rules); and secondly, in the events which happened the first appellant's right to remain does not arise in her capacity as carer for the second appellant.
32. We conclude that although in relation to the second appellant the FtT Judge to this extent had erred in law, those errors were not material and so we do not set aside the substance of that part of the decision. However, for the record we would suggest that the second paragraph be amended to reflect the substance of his findings to read "I allow the second appellant's appeal outside of the Immigration Rules under Article 8 ECHR". Those are our reasons for our decision.
33. No anonymity direction was made nor is one required.

Notice of Decision

The appeal of the First Appellant is allowed under the EEA Regulations

The second paragraph of the Notice of Decision of the First-tier Tribunal Judge be amended to reflect the substance of the findings of the First-tier Tribunal Judge and should read "I allow the second appellant's appeal outside of the Immigration Rules under Article 8 ECHR".

Signed



Mr Justice Morris

Dated

23 January 2018