



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

Appeal Number: OA/09345/2013
OA/09349/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 17 July 2014**

**Determination
Promulgated
On 22nd July 2014**

Before

**THE HON. MR JUSTICE LEWIS
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MOULDEN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS TEMIDELE IRENE KAREEM
MASTER VICTOR OLUWASEGUN KAREEM**

Respondents

Representation:

For the Appellant: Mr Adebayo Kareem
For the Respondent: Mr P Duffy

DETERMINATION AND REASONS

INTRODUCTION

1. This is an appeal against a determination by the First-tier Tribunal promulgated on 17 April 2014. By that determination, the Tribunal allowed an appeal by Miss Temidele Irene Kareem and Master Victor Ouwasegun Kareem against the refusal of an Entry Clearance

Officer in Lagos on 7 March 2013 to grant them leave to enter as extended family members of a European Economic Area (“EEA”) national exercising rights conferred by the Treaty on the Functioning of the European Union (“the Treaty”).

2. In essence, the respondents contend that their uncle, who is a national of Malta, lives in the UK. The respondents wish to be admitted to the UK to join him. They contend that they are extended family members within the Regulations and seek to obtain an EEA family permit to facilitate their admission to the UK. The issue before the tribunal was whether the entry clearance officer was correct in concluding that they were not extended family members within the meaning of the Regulations. The tribunal determined that the respondents were extended family members and allowed the appeal. The Secretary of State now appeals against that determination.

THE LEGAL FRAMEWORK

3. Regulation 11(1) and (2) of the Regulations deal with the right of admission to the UK and provide that:

“11. – Right of admission to the United Kingdom

(1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State.”

“(2) A person who is not an EEA national must be admitted to the United Kingdom if he is—

(a) a family member of an EEA national and produces on arrival a valid passport and a qualifying EEA State residence card, provided the conditions in regulation 19(2)(a) (non-EEA family member to be accompanying or joining EEA national in the United Kingdom) and (b) (EEA national must have a right to reside in the United Kingdom under these Regulations) are met; or

(b) a family member of an EEA national, a family member who has retained the right of residence, a person who meets the criteria in paragraph (5) or a person with a permanent right of residence under regulation 15 and produces on arrival—

(i) a valid passport; and

(ii) an EEA family permit, a residence card, a derivative residence card or a permanent residence card.”

4. Family members are defined in Regulation 7 of the Regulations, so far as material, provide as follows.

“7.— Family member

(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

- (a) his spouse or his civil partner;
- (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;
- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
- (d) a person who is to be treated as the family member of that other person under paragraph (3).”

.....

“(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.”

5. “Extended family members” are defined in Regulation 8 of the Regulations in the following terms

“8.— “Extended family member”

“(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).”

“(2) 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 [a country other than the United Kingdom] and is dependent upon the EEA national or is a member of his household;
- (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
- (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.”

“(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.”

“(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.”

“(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.”

“(6) In these Regulations “*relevant EEA national*” means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).”

6. Regulation 12 of the Regulations deals with the issuing of an EEA family permit.

Regulation 12(1) deals with family members. Regulation 12(2) and (3) deal specifically with extended family members and provide that:

“(2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.”

THE FACTUAL BACKGROUND

The Applications

7. The respondents to this appeal, Irene and Victor Kareem, are nationals of Nigeria born on 25 July 1996 and 10 October 1997 respectively. They live with their father in Nigeria and attend a boarding school in Nigeria. Sadly, their mother died in 2012
8. They have an uncle, Mr Adebayo Kareem, who is a national of Malta. He is currently working and living with his wife in the United Kingdom. He is an EEA national for the purposes of the Regulations. On 14 January 2013 both respondents applied for admission to

the United Kingdom. The basis for that application was, in essence, that they wished to join their uncle in the United Kingdom on the basis that they were extended family members within the meaning of the Regulations. The applications did not identify the particular sub-regulation or sub-regulations in Regulation 8 of the Regulations on which the respondents relied.

9. In their application forms, the respondents gave details of their father and stated that his work or occupation was business/insurance practitioner. The form recorded that they had visited London in 2012 and had visited the United Arab Emirates in 2011 and the United States of America in 2012 for holidays. There was also a visit to India in 2011. The application forms explained that the respondents lived at home with their father. The application forms gave details of their uncle's address, employment, and income. The application also states that the respondents (or their uncle) would receive income from their father.
10. The uncle, Mr Adebayo Kareem, also sent two letters each dated 20 February 2013 to the entry clearance officer. One is headed "Invitation Letter" inviting the respondent to live with him and his wife in the United Kingdom as their mother had died and their father was not coping well with his bereavement. The second letter is headed sponsorship letter and says that the uncle paid the fees for the respondents' boarding school, food and upkeep. It explained that he sent money to his brother (the respondents' father) or left money with him when he visited Nigeria. The respondents' father also sent a letter dated 21 February 2013 to the entry clearance officer indicating that he consented to his brother taking the two respondents to the United Kingdom.

The Decision of the Entry Clearance Office

11. By notices dated 7 March 2013, the entry clearance officer refused each application. In relation to Mrs Irene Kareem, the notice of refusal is in the following terms:

“Your Application

You have applied for admission to the United Kingdom by virtue of European Community Law as the family member of a European Economic Area national who is exercising, or wishes to exercise, rights of free movement under the Treaty of Rome in the United Kingdom.

The Decision

You state that you wish to go and join your uncle in the UK. He is a Maltese citizen exercising his treaty rights in the UK. He has stated that he has been supporting you as your father was unable to do so as he was caring for your mother. He has stated your mother has now died. However; I note that you were issued a visa last year to visit the UK with your parents. In that application your father submitted documents to show that he was self employed and that he was paying for the trip for the whole family. You also made a recent application to join your uncle in January of this year and in that application your father stated that he would continue to support you. Given this and the fact that you have submitted no evidence of your claimed dependency on your uncle I am not satisfied that you are dependent on the EEA national or a member of his/her household. I am therefore not satisfied that you are an extended family member in accordance with Regulation 8 of the Immigration (European Economic Area) Regulations 2006. I therefore refuse your EEA family permit application because I am not satisfied that you meet all of the requirements of Regulation 8 of the Immigration (European Economic Area) Regulations 2006.”

12. A notice in the same terms was sent to Victor Kareem. The notices do not specifically identify which sub-regulation of Regulation 8 of the Regulations the entry clearance officer was considering. The wording of the notice, and in particular the reference to the officer not being satisfied that the respondents were dependent on the EEA national or a member of his household, reflects the provisions of Regulation 8(2) of the Regulations.

13. There was an internal review of the decisions by an entry clearance manager. The respondents provided further information including copies of bank statements said to show payments from the respondents’ uncle to their father. The entry clearance manager reviewed the matter and decided to maintain the decision of the entry clearance officer on this basis:

“The appellant has stated in the Grounds of Appeal that he provided documents with the application demonstrating that his sponsor has been sending money through the appellant’s

father and other individuals. I note that a letter was provided with the application from the appellant's father stating that the sponsor has been the sole provider for some years now. The appellant has provided bank statements with the appeal in which some transactions are highlighted. Whilst I note that he states in the Grounds of Appeal that these demonstrate payments through other people when the sponsor cannot travel, no supporting evidence of this has been provided. This information contradicts that provided in the appellant's previous applications, in which he stated that his father would fund his travel to the UK (ABV/789648) and had part financial responsibility for him (LAG/5380655). I am therefore not satisfied that the appellant has demonstrated that he is dependant on his uncle as claimed."

The Appeals

14. The Respondents then appealed the refusals to the First-tier Tribunal. The grounds of appeal were expressed in the following term:

Proof

I disagree with the E.C.O Decision simply because in my recent application, we submitted with the applications a supporting documents explaining how our uncle [Mr Adebayo Kareem] has been sending money to me and my brother through our father [MrGani Bamidele Kareem] and also the reasons why the money cannot be given to us directly, we submitted also with the applications two different bank statements [Barclays & HSBC] showing the list of the people he's been sending the money through when he [Mr Adebayo Kareem] cannot visit himself due to his work.

Holiday

It was our mother's wish for all of us to go on family holidays, unfortunately only half of us could go due to the deteriorating condition of our mother and in fact she died halfway through the holidays.

I'm sure there was some arrangement between our father [Mr Gani Bamidele Kareem] and our unclce [Mr Adebayo Kareem] as our father always consult our uncle anything concerning myself and my brother [Master Victor Oluwasegun Kareem].

Mistakes

Long before the demise of our mother, our father has not been himself, the whole situations has been taken its toll on him. He has been making a lot of mistakes, lot of wrong decisions, It seems he cannot cope most especially after the death of mother, he's been going to the hospital himself for treatments. I believe that is reasons why he's been making a lots of mistakes and wrong decisions so also I believe that is the one of the many reasons why our uncle has been frequently visiting and phoning us in other to ensure things are ok with us."

The First-Tier Tribunal Determination

15. The First-tier Tribunal dealt with the background and the proceedings before it. In identifying the relevant law, the First-tier Tribunal considered the appeal on the basis of Regulation 8(4) of the Regulations, that is on the basis that the respondents would be extended family members if they were a relative of the EEA national and would meet the requirements of the Immigration Rules (other than those relating to entry clearance) for

indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

The tribunal considered that the relevant provisions of the Immigration Rules were those set out in Immigration Rule 298 or, possibly, 317.

16. In relation to that issue, the tribunal found that the respondents could satisfy the requirements of Immigration Rule 298 and its reasoning is contained in the two following paragraphs:

“23. I find that both these Appellants do satisfy the requirements set out in paragraph 298 of the Immigration Rules, in that they:-

- (i) Are seeking to remain with a relative in one of the following circumstances:-
 - (d) one parent or a relative is present and settled in the United Kingdom, and there are serious and compelling family or other considerations which make exclusion of the child undesirable, and suitable arrangements have been made for the child’s care, and
- (ii) The children are “under the age of 18”;
- (iii) Are not leading independent lives, are unmarried (and are not civil partners), and have not formed any independent family unit; and
- (iv) Can, and will, be accommodated adequately by the parent, parents or relative the child was admitted to join without recourse to public funds, in accommodation which the parent, parents or relative the child was admitted to join owned or occupied exclusively; and
- (v) Can, and will, be maintained adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds; and
- (vi) Does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974.

24. I find that both these Appellants satisfy all of those requirements set out in paragraph 298 of the Immigration Rules, on the basis that they are children of a relative who is effectively ‘present and settled in the United Kingdom’.”

17. In relation to Immigration Rule 317, the First-Tier Tribunal’s conclusion was as follows:

“25. If I am wrong about that, and the correct provision to look at in the circumstances is paragraph 317 of the Immigration Rules, I nevertheless find that both these Appellants comply with the provisions of that Rule also. That Rule sets out the requirements for Indefinite Leave to Enter or Remain in the United Kingdom as the ‘parent, grandparent or other dependent relative of a person present and settled in the United Kingdom’.

26. Having said that, sub-paragraph (i) of paragraph 317 makes it clear that a person applying under that Rule must be related to the person present and settled in the United Kingdom in one of a number of defined ways. These Appellants, who are still under the age of 18, don’t seem to fall within any of the categories outlined in sub-paragraphs (a) – (f) of sub-paragraph (i) of paragraph 317 of the Immigration Rules.”

THE APPEAL

18. The Secretary of State appealed, with permission, on two grounds. The first was that the tribunal had erred in considering this appeal under the provisions of the Immigration Rules not the Regulations. Mr Duffy, appearing on behalf of the Secretary of State, withdrew that ground of appeal at the hearing. We consider that he was correct to do so. The tribunal applied Regulation 8(4) of the Regulations. That, in turn, directed attention to whether or not the respondents satisfied certain requirements of the Immigration Rules. Consequently, the tribunal did not err by considering the provisions of the Immigration Rules; it was directed to do so by Regulation 8(4) of the Regulations.
19. The second ground of appeal alleges that the tribunal failed to give adequate reasons for allowing the appeal and did not make relevant findings.

ANALYSIS

20. In our judgment, properly analysed, there were two routes by which the respondents were claiming to be extended family members for the purposes of regulation 12 of the Regulations. First, they were claiming that they were dependants of their uncle who was an EEA national exercising Treaty rights in the UK and therefore they fell within regulation 8(2) of the Regulations. Secondly, they were contending that they were persons who would meet the requirements in the Immigration Rules (other than those relating to entry clearance) for leave to remain or enter the UK if their uncle were present and settled in the UK (as opposed to exercising Treaty rights) and so fell within Regulation 8(4) of the Regulations. That would involve consideration of Immigration Rules 297 and 298 (which are in materially similar terms) and 317. Those Rules deal with leave to enter and remain as, amongst other things, a relative of a person present and settled in the UK.

21. The First-tier Tribunal has, in our judgment, however, erred in law in the way in which it dealt with these appeals. First, the tribunal erred in its approach to Immigration Rule 298.

The material provisions of that rule in the present case provide that

“298. The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:-

(i) is seeking to remain with a parent, parents or a relative in one of the following circumstances:
`.....

(d) one parent or relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangement have been made for the child’s care

22. The basis for the tribunal’s conclusion that the requirements were met is set out in paragraph 24 of its determination, namely that the respondents “are children of a relative who is effectively ‘present and settled in the United Kingdom’”. First, that, in our judgment, is a misstatement or misunderstanding of the relevant requirements of Immigration Rule 298. It is not sufficient that the respondents are children of a relative who is effectively present and settled. There must be “serious and compelling family or other considerations” which make the exclusion of the respondents from the United Kingdom “undesirable”.

23. Secondly, the tribunal fails to identify what were the “serious and compelling circumstances” in the present case. The background is that the respondents were aged 17 and 16 at the relevant time. They had spent their entire life in Nigeria. They attended boarding school there. They lived otherwise with their father. Their father had recently been bereaved and was said to be suffering from depression. The tribunal do not identify which factors it identified as giving rise to “serious and compelling “ considerations making it undesirable for the respondents to be excluded from the United Kingdom. For those reasons, we are satisfied that the tribunal erred in law in relation to this aspect of the matter.

24. Thirdly, the tribunal erred in law in its interpretation of Immigration Rule 317. The material provisions of that rule provide as follows:

“317.. The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the parent, grandparent or other dependent a relative present and settled in the United Kingdom are that he:-

(i) is related to a person present and settled in the United Kingdom in one of the following ways:

(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances.”

25. The tribunal found that the respondents satisfied the provisions of Immigration Rule 317.

That decision is wrong as a matter of law. The two respondents were under 18. They were not related to their uncle in one of the ways prescribed by Immigration Rule 317. For each of those two separate reasons, the respondents did not satisfy the requirements of Immigration Rule 317. Further, it may be doubted that they were living alone as they were living with their father when not at boarding school. In any event, it is clear that the tribunal erred in law and misinterpreted or misapplied Immigration Rule 317.

26. For those reasons, the tribunal erred in law and we set aside the determination allowing the appeal. We remit the case to the First-tier Tribunal pursuant section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007. We also make the following observations. First, the tribunal will need to consider both regulation 8(2) and (4) of the Regulations. The basis of the entry clearance officer’s decision was regulation 8(2) of the Regulations and the conclusion that the respondents were not dependants of the EEA national (their uncle) or members of his household. The tribunal did not address this issue and did not consider the adequacy of the reasons given by the entry clearance officer for the refusals. The respondents appeal against that finding. The tribunal will need to consider and address this issue. Secondly, the tribunal will need to consider regulation 8(4) of the Regulations and the relevant Immigration Rules to determine whether or not these respondents fall within the regulation 8(4) and so may claim to be extended family members of the EEA national.

ANCILLARY MATTERS

27. For completeness, we note that at the hearing before this Tribunal, permission was granted to the Appellant, the Secretary of State to add an additional ground of appeal, namely that if the First-tier Tribunal was correct to have allowed the appeal under Regulation 8 of the Regulations, then it should have remitted the matter back to the Secretary of State for the Home Department rather than simply allowing the appeal. The point that the Secretary of State wished to make was that Regulation 12(2) of the Regulations conferred a discretion on her to grant an EEA family permit if the requirements of Regulation 8 were satisfied. Even if the tribunal had been correct to hold that the respondents were extended family members for the purposes of Regulations 8 and 12(2) of the Regulations, the result would be that the Secretary of State then had a discretion to grant an EEA family permit and the exercise of that discretion ultimately, was a matter for her. In the event, we have found that the tribunal erred in law and the determination allowing the appeal must be aside. In those circumstances, this ground does not therefore need to be addressed.

CONCLUSION

28. The First-tier Tribunal made an error of law and the determination is set aside. The matter is remitted to a differently constituted First-Tier Tribunal.

Signed:

Date: 21/07/2014

Mr Justice Lewis