Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/23721/2013
IA/23716/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5th June 2014	**On 2nd July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MR ANTONIO RUSSO LONDONO (FIRST APPELLANT)
MISS ISMENIA BASTIDAS LONDONO (SECOND APPELLANT)
(NO ANONYMITY DIERCTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Subramanian, Legal Representative
For the Respondent: Mr Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by Miss Ismenia Bastidas Londono and Mr Antonio Russo Londono, both citizens of Venezuela. They appeal against the

determination of First-tier Tribunal Judge Greasley issued on 14th March 2014 dismissing under the Immigration Rules and Article 8 ECHR their appeals against the decision of the Respondent made on 24th May 2013 to refuse residence cards based on retained rights of residence under Regulation 10 of the Immigration (EEA) Regulations 2006 on the basis of a relationship with a deceased family member, Antonio Russo Trupiano.

2. The Appellants were born on 23rd December 1994 and 4th January 1961 respectively. The second Appellant is the mother of the first.

3. On 29th April 2014 First-tier Tribunal Judge Hemingway granted permission to appeal. He admitted the application though late. He said:-

> "2. The grounds, which are not always wholly easy to follow, assert, in effect, that the Judge erred in failing to consider Home Office policy, in failing to adequately consider the evidence, and failing to consider legal submissions put to him and in failing to adequately consider Article 8 of the ECHR both within and outside the Rules.
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> …
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> 4. It is arguable that with respect to the male Appellant (a minor at the date of application though an adult now) the Judge did not adequately consider whether he meets the requirements of paragraph 276ADE. It is arguable that the Judge with respect to each Appellant failed to adequately explain an adverse credibility assessment.
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> 5. Permission to appeal is granted. All the grounds may be argued though, on the face of it, the Judge's reasoning with respect to the appeal under the EEA Regulations might be thought to be sound. Further, it is not obvious the Appellants could benefit from the policy argument referred to given the limited scope of that policy. Those representing the Appellants may care to consider whether those points are to be pursued further or not."

4. The Respondent submitted a response to the Grounds of Appeal under Rule 24. He simply said that they oppose the appeal. Their position is that the Judge directed himself appropriately. He did consider paragraph 276ADE in relation to the minor child and found that there was not enough evidence to show continuous residence for seven years.

5. The grounds are difficult to follow. One of the main submissions is that in the absence of evidence that the deceased had been exercising treaty rights in the UK the Respondent has a policy which would enable her to undertake any investigation of the deceased EEA person in order to establish whether or not he was exercising treaty rights. The relevant policy handout was submitted to the Immigration Judge who failed to mention it. No investigation has been undertaken by the Respondent. It is

submitted too that the Judge failed to consider the decision **OA (EEA – retained right of residence) Nigeria [2010] UKAIT 00003** which refers to the need to legally safeguard family members in the event of the death of the European Union citizen. It is submitted that the Judge also failed to consider Article 14 of the EEA Regulations and to properly consider paragraph 276ADE of the Immigration Rules and the case law appertaining thereto.

6. The basic facts of this case appear to be that the Appellants entered the UK for six months on 9th December 2002 and on 17th September 2012 their solicitors applied on their behalf for residence cards based upon their retained right of residence following the death of Mr Trupiano in Venezuala in 2011. The Judge set out Regulation 10 which defines "a family member who has retained the right of residence". It defines a person as satisfying the conditions of the category if:-

   (i) he was a family member of a qualified person when the qualified person died;

   (ii) he resided in the UK in accordance with these Regulations for at least a year immediately before the death of the qualified person; and

   (iii) he satisfies the condition in paragraph (6):-

   > is not an EEA national but would, if he were an EEA national be a worker, a self-employed person or a self-sufficient person under Regulation 6.

7. The Judge heard evidence from the first Appellant who said that he had lived in the UK for half of his life and spent a great deal of time with his father Mr Trupiano who had died in 2011. The Judge notes that the first Appellant accepted that there were no supporting documents regarding his father's business which he understood involved a tyre business. The Appellant said that he recalled visiting factory premises once in the UK. He said his father kept his work to himself.

8. His mother gave evidence. She had lived with Mr Trupiano for more than twenty years. She said that her husband had been exercising treaty rights in the UK but there were no documents to prove this. Mr Trupiano had a car company in Venezuela. He spoke very little about it. There were no documents and no business activity was established in the UK. She said that her deceased husband had a separate family in Venezuela prior to her relationship with him and had four children from that relationship. There was also evidence from the second Appellant's mother who said that she was not aware that Mr Trupiano had any formal business interests in the United Kingdom but rather in Venezuela. Other family members gave evidence.

9. In his conclusions the Judge appears to have accepted that the Appellants had been in the UK for a year before the EEA national died but not that the EEA national was exercising treaty rights in the UK. He said that all the evidence before him suggested that the business activities were based in Venezuela.

10. The Judge then went on to consider paragraph 276ADE. He set out the requirements. He was not satisfied that the Appellants have lived in the UK for at least seven years. There was evidence that the first Appellant had attended school in the UK between 2008 and 2011 but said there is no evidence that the Appellant could establish either that he was under the age of 18 years and had lived continuously in the UK for seven years or, having been between 18 years and 25, had spent at least half his life continuously here. He found that the evidence given by the first Appellant about visiting his father's car factory in the UK was untrue as clearly no such business existed and given the evidence of the second Appellant that she had returned to Venezuela in 2005 and 2007 and had travelled with her son, continuous residence is not established. He noted that the second Appellant said in her witness statement that her husband had been exercising treaty rights in the UK then in oral evidence said that the car business was based in Venezuela. The EEA national had died in Venezuala. There was no evidence before the Judge to establish the residence claimed by the First Appellant and I do not accept that he failed to give adequate reasons for his findings on this point. So far as his credibility findings are concerned it seems to have been very clear that the First Appellant had said his father had a business in the UK when other family members said he did not. Again I find that sufficient reasons were given.

11. With regard to Article 8 the Judge said he was not satisfied that there are no family members to whom the Appellants could turn initially for support on return to Venezuela. He found that Article 8 was not engaged taking account of the principles set out in **Gulshan (Article 8 – new Rules – correct approach) [2013]**. Very little evidence was provided of the Appellants' private and family life in the UK. Judge Greasley considered the evidence before him and reached conclusions he was entitled to reach on the evidence before him.

12. With regard to the argument that the Home Office should have exercised their policy Mr Whitwell said that the policy is a domestic violence one which was issued on 4th August 2011 and it refers to seven years' residence in the UK. In the evidence that has been produced there is a gap in the evidence between April 2005 and 2008 and there is no evidence that the Appellants had lived in the UK continuously for seven years. Mr Subramanian responded that the policy says that in exceptional circumstances checks will be made. It is clear that the EEA Regulations intend that if an EEA national dies his family should be allowed to remain in the UK. He submitted that the Judge had ignored the policy. The family were here as EEA dependants. The first Appellant was a child at the date of application. The family must have had income from somewhere. Mr Subramanian did not challenge Mr Whitwell's submissions on this policy

and conceded that there was no evidence that the EEA national ever exercised treaty rights in the UK.

13. The fact of the matter is that there was not one jot of evidence before the Judge that the EEA national was exercising treaty rights in the UK and he was presented with contradictory evidence from the family about the locus of the EEA national's claimed business. In all the circumstances of this case including the absence of any documentation and the fact that there is nothing to suggest that there was any attempt by the Appellants to obtain documentation relative to Mr Trupiano from relevant bodies such as HMRC, it is difficult to take the view that even if the policy referred to did apply, which has not been established, there was any duty on the Secretary of State to make enquiries. The policy was not before me and it is not at all clear what submissions were made on it at the hearing before the First-tier Tribunal but the Judge was entitled to take account of the total lack of documentary evidence and the discrepant oral evidence and to place weight on the fact that the family were unable to produce anything and appeared to have no idea what Mr Trupiano did for a living or where he did it.

Decision

I find that there is no material error of law in the determination of Judge Greasley and his decision is upheld.

Signed Date: 30th June 2014.

N A Baird
Deputy Upper Tribunal Judge Baird