Upper Tribunal
(Immigration and Asylum Chamber) EA/00563/2018 & EA/00249/2018

THE IMMIGRATION ACTS

Heard at Glasgow	Decision and Reasons Promulgated
On 4 January 2019	On 16 January 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JUNO [F] & JASON [W]
(anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr K Forrest, Advocate, instructed by Pryde Immigration Lawyers
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination is to be read with:

   (i) The respondent's decisions dated 7 December 2017, declining to issue the appellants with derivative rights of residence cards as the primary carers of a self-sufficient EEA national child.

(ii) The appellants' grounds of appeal to the First-tier Tribunal.

(iii) The decision of FtT Judge J C Grant-Hutchison, promulgated on 8 August 2018.

(iv) The appellants' grounds of appeal to the UT, stated in the application for permission to appeal dated 20 March 2018.

(v) The grant of permission by the FtT, dated 13 September 2018.

(vi) The respondent's rule 24 response, dated 22 October 2018, to the grant of permission.

2. The grant of permission observed that if the appellants had provided evidence at the FtT which the respondent conceded to be satisfactory, then arguably the judge erred by not admitting it and allowing the appeals. It was suggested that the appellants' representatives might re-send the documents to the respondent and invite withdrawal of the respondent's decision, rather than wasting resources on a further hearing.

3. During the hearing on 4 January the appellant's representatives produced a copy of their letter to the respondent dated 1 October 2018, written along the lines suggested above.

4. Mr Govan explained that the rule 24 response was framed to deal with that matter. It was accepted that the FtT should have considered the evidence and resolved the appeal accordingly, and so the decision fell to be set aside. However, the concession made in the FtT was *not* that the evidence served to substantiate the appeals; it was only that the EEA national was self-sufficient and had comprehensive sickness insurance.

5. It was common ground that on 17 September 2018, after the date of the hearing in the FtT, the EEA national was issued with a registration certificate, and that a fresh decision fell to be made on the evidence, not as matters stood at the date of the respondent's decisions. That left two issues, as stated in the rule 24 response. The respondent maintained that the evidence failed to show in terms of regulation 16 (b) (iii) that the EEA national "would be unable to remain in the UK" if the first appellant "left the UK for an indefinite period". The second appellant is a 23-year-old adult, is not an EEA national or a carer for the EEA national in terms of the regulations, and has no apparent basis of claim. The respondent's position was that there should be a remit to the FtT so that the appellants might have the opportunity to make out any case they had on those issues, but that in absence of further evidence, both appeals should be dismissed.

6. The appellants did not seek a remit. The argument on their behalf was that both appeals should be allowed on the evidence which had been before the FtT. The following items were founded upon.

7. The EEA national child lives in Airdrie and his father in London. Item 10 of the FtT inventory of productions is his father's brief affidavit dated 29 November 2017. He says that the first appellant is the primary carer for the child, and that in the event of her leaving the UK for an indefinite period, he would be unable to care for his son. There is no elaboration on that matter.

8. Item 12 is a psychological report, which shows the child to have some learning needs, such as to be considered as a child with dyslexia, and some need for support.

9. Item 14 is an extract of a decree of the Sheriff Court dated 14 February 2017, finding the first appellant (the defender) entitled to residence with the child and the child's father (the pursuer) entitled to residential contact every second weekend and for 4 weeks a year of holidays.

10. The second appellant is the son of the first appellant and the half-brother of the EEA national child. His statement at item 23 was said to establish that he is a family member.

11. The first appellant's case was that she met the requirements of regulation 16 (b) (iii). The second appellant's case was advanced not under the regulations but under article 8 of the ECHR.

12. I reserved my decision.

13. The grounds of appeal to the UT vastly overstated the concession made by the respondent in the FtT. That false impression led to the grant of permission being made in the terms it was, and to the appellants being given hope of an easy outcome. Any such impression, however, should have been extinguished on sight of the rule 24 response.

14. The evidence suggests that the EEA national's father cares for him directly every second weekend and for 4 weeks annually. There is nothing to support the bland assertion of "inability to care", if the other were to leave. The present situation may well be preferred by both parents, but that is a different matter.

15. The case of the first appellant is not made out in terms of the regulations.

16. Article 8 of the ECHR is irrelevant to both appeals. Any case on that basis needs to begin with an application to the respondent, and is not within the scope of these proceedings.

17. The second appellant, as correctly conceded, has no case to advance in terms of the regulations.

18. In the wider, non-legal, sense of the term, the second appellant is a member of a family which includes his mother and his half-brother. However, he is an adult, and there is little in his statement which might lead to a finding that he has family life with them within the narrower scope of article 8.

19. Even if the second appellant has family life in that sense, there is nothing to show that the respondent's decision interferes with the article 8 rights of anyone to a disproportionate extent.

20. By concession and agreement, the decision of the First-tier Tribunal is set aside. The decision substituted is that both appeals, as brought to the FtT, are dismissed.

21. No anonymity direction has been requested or made.

Dated 7 January 2019
UT Judge Macleman