



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

Appeal Number: IA/38651/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 January 2015**

**Decision & Reasons
Promulgated
On 3 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ROGERIO BORGES SILVA
(Anonymity Direction Not Made)**

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer

For the Respondent: Mr Ngwuocha, Carl Martin Solicitors

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this appeal I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Rogerio Borges Silva as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Brazil born on 30 March 1983 and he appealed against the decision of the respondent dated 12 August 2013 refusing to issue him a residence card as confirmation of his right of residence under the European Community law.
3. The appellant claimed that he was dependent on his sister with whom he was living and who was the sponsor. The respondent claimed that the appellant had not provided any evidence of his dependency at any time either in Brazil or in the United Kingdom and his application was refused further to Regulation 8 of the Immigration (European Economic Area) Regulations 2006.
4. The appellant's application was also considered under Article 8 of the European Convention on Human Rights and rejected further to paragraph 276ADE under Appendix FM.
5. The appellant's appeal appeared to be lodged under two provisions of the EEA law, namely that he was an extended family member further to paragraph 8(2) and also 8(3).
6. First-tier Tribunal Judge Wyman allowed the appellant's appeal stating at paragraph 39:

"It is not in dispute that the appellant's sister is a qualified person. I find that the appellant himself satisfies the Rules as an extended family member under paragraph 8(3) and I find that the appellant does require the personal care of the EEA national spouse due to his ongoing epilepsy"

7. And at paragraph 40 she stated "I note that the appellant lives with his sister and has done since he came to the United Kingdom [sic]. Prior to this he was not living an independent life but lived with his parents in Brazil".
8. It would appear that the judge allowed the appeal further to paragraph 8(3) and she stated at paragraph 33

"In this case, the appellant has provided some (although limited) evidence of his epilepsy. A letter dated 19 December 2011 from the Royal Free Hospital has been provided. The consultant neurologist, Dr Davey, confirms that the appellant has temporal lobe seizures. He has episodic attacks which tend to come in clusters where he can have a few attacks within a week or so. The letter goes on to state it is very important the appellant always takes his medication regularly"

9. Application for permission to appeal was made by the respondent on the basis that the appellant's sister was not an EEA national and nor was she the spouse of an EEA national since she was divorced.
10. There was no finding by Judge Wyman as to when the appellant's sponsor was divorced and she merely stated that it was not in dispute that the

appellant's sister was a qualified person. I note that the grounds for permission to appeal note that she was issued with a residence card on the basis that she was *married* (which was no longer the case) to an EEA national although this information had not appeared to have made its way to the judge.

- 11.** Permission to appeal was granted by First-tier Tribunal Judge Landes on the basis that the appellant's sister was a Brazilian national who was divorced from an EEA national and although it was stated that she "retained the right of residence" at paragraph 29 of the determination, even if this was the case it did not make the appellant the "relative of an EEA national or his spouse or civil partner". The sister being divorced was no longer the spouse of an EEA national. It is clear that the judge does not explain her findings and it is not clear how the appellant's sister is a qualified person not being an EEA national herself, and this does not explain how the appellant qualifies under Regulation 8(3).
- 12.** Permission was also granted on the basis that as the judge did not give adequate reasons why she found the appellant required the personal care of his sister given the rigorous test referred to in the grounds at paragraph 10 and the lack of medical evidence to establish personal care was needed.
- 13.** Submissions were made by Mr Nath at the hearing and he outlined the grounds of appeal. At paragraph 33 there was little detail in relation to the findings and no clarity. Nowhere were there serious health grounds explored. Indeed the judge herself stated that the appellant had provided some "albeit limited" evidence of his epilepsy. The letter from Dr Davey did not establish that the appellant required personal care.
- 14.** Mr Ngwuocha emphasised that the appeal was being centred on Regulation 8(3) which did not require that the appellant needed daily treatment but simply personal care. The judge had found at paragraph 33 that the appellant had temporal lobe seizures and the judge had assessed the evidence and provided a basis for finding that the appellant required personal care. His parents were in the UK.
- 15.** Mr Ngwuocha pointed out that the appellant's sister was married to an EEA national and had retained her rights. The appellant had always been dependent on the sister since coming to the UK and that he claimed rights through being dependent on the sister who retained the same rights as a qualified EEA national. I was referred to the Directorate 2004/38/EU in particular Article 13 which referred to family members retaining a right of residence on a personal basis. Notionally the sponsor was an EEA national.
- 16.** The judge allowed the appeal under Regulation 8(3) of the EEA Regulations and made no consideration of Article 8 of the European Convention on Human Rights.

17. At paragraph 39 of her decision the judge stated that it was not in dispute that the appellant's sister was a qualified person but she gave no reasoning for this finding, and bearing in mind the terms of Article 8(3) which refer to a person satisfying the condition if they were a relative of *an EEA national or his spouse or his civil partner*, I find that there is an error of law. The evidence was that the appellant's sister had divorced but there was no finding as to when the appellant's sister had divorced and thus whether she could still be a spouse for the purposes of Regulation 8(3).

18. It was suggested by Mr Ngwuocha that the sponsor was a person who had retained the right of residence and referred me to paragraph 10(6) of the EEA Regulations:

19. 10(6) of the EEA Regulations states

“6 The condition in this paragraph is that the person—

(a) 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; or

(b) is the family member of a person who falls within paragraph (a).”

20. This specifically states that the person first of all ins (a) is not an EEA national and in (b) the reference is to *family member*. This section does not refer to extended family members.

21. Even if that were not an error, I am not persuaded that the judge has made a clear finding with adequate reasoning in the light of **TR (Regulation 8(3) EEA Regulations 2006) [2008] UKAIT 00004** which established the following principle:

“For a relative to satisfy Regulation 8(3) of the EEA Regulations 2006 the ‘serious health grounds’ need to be significantly beyond ordinary ill health and as a matter of practice will require detailed medical evidence in support of any claim. Personal care must be provided on a day-to-day basis and relate either or both to the physical and mental tasks and needs required for a person to function. ‘Strictly’ is a restrictable limiting requirement and imports a need for complete compliance or exact performance and reinforces the need for personal care to be provided on a day-to-day basis.”

22. As the judge stated at paragraph 33; “The appellant has provided some (although limited) evidence of his epilepsy.” The judge referred to a letter dated 19 December 2011 from the Royal Free Hospital in which the consultant neurologist Dr Davey confirmed that the appellant had temporal lobe seizures.

- 23.** In fact there were further letters which detailed the severity *or lack of it* of the appellant's condition and the judge does not appear to have taken note of these.
- 24.** At paragraph 39, having set out the evidence the judge merely states: "I find that the appellant does require the personal care of the EEA national spouse due to his ongoing epilepsy" although she does not set out the reasons for why she finds there are serious health grounds which "strictly requires the personal care of the EEA national, his spouse or his civil partner".
- 25.** It appears that by the time the appellant's sister submitted her own application for a residence card on 28 January 2013 her marriage had already been dissolved.
- 26.** Bearing in mind that this appeal was made on the basis of paragraph 8(2) which is that the appellant was dependent on his sponsor, and I note the judge found that the appellant lived with his parents in Brazil, the initial application form should be provided by the respondent. In response to Mr Ngwuocha's submissions regarding Directive 2004/38/EU, further to **AA (Algeria) v SSHD** [2014] an appellant is not entitled to residence as an 'extended family member' within regulation 8(2) of the EEA Regulations where he claimed to be a dependant or member of the household not of an EEA national but of the spouse of an EEA national. There is no linguistic or conceptual justification for reading the clear wording of the provisions otherwise.
- 27.** As stated in **AA (Algeria)**
14. *It is common ground that Regulation 8 properly transposes Article 3 of the Directive.*
 15. *It will be noted that both the Citizens' Directive and the 2006 Regulations distinguish between family members and other or extended family members, and that an "other family member" for the purposes of Article 3.2 of the Citizens' Directive must be a dependant or a member of the household of the Union citizen. On a straightforward reading of the wording of Article 3.2, it is not enough that they are dependent on or a member of the household of the Union citizen's spouse.*
 16. *In respect of this limitation Regulation 8(2) mirrors Article 3.2: the "extend family member" must, prior to coming to the United Kingdom, have been dependent upon or a member of the household of the EEA national.*
- 28.** For the reasons given above I find that there is an error of law in Judge Wyman's decision. Despite allowing the appeal on the EEA Regulations there was no finding in relation to the status of the sister or consideration of Article 8. As Mr Nath pointed out, there was no consideration of any available health care in Brazil.

29. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed

Date 31st January 2015

Deputy Upper Tribunal Judge Rimington

Directions

The respondent shall use her best endeavours to supply a copy of the appellant's application form.

All further evidence submitted by either party should be served on the Tribunal and the opposing party at least 14 days prior to any substantive hearing.