Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02632/2018**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On: 13 November 2018	**On: 27 November 2018**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

WUGA NORNUBARI BIRABE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Omorere of Bestway Solicitors
For the Respondent: Ms N Willock-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 31 March 1987. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 as the family member (father) of an EEA national. First-tier Tribunal Judge Hamilton dismissed his appeal.

2. The background to this appeal, as far as I can gather form the papers before me, is as follows. The appellant married a Polish national in Poland on 9 April 2011 and together they had a son, D, born on 22 June 2011 in Poland. They moved as a family to the UK and on 21 September 2015 the appellant was issued with an EEA residence card. The appellant and his wife subsequently separated. An interim Child Arrangements Order was made in the Family Court on 7 October 2015 in which it was agreed that D would live with his

mother and would have regular contact with the appellant. The appellant and his wife were divorced on 13 April 2016 and the appellant informed the Home Office on 20 October 2016 that his marriage had ended. On the basis that the appellant had failed to show that he qualified for a retained right of residence on divorce under regulation 10(5) of the EEA Regulations 2016, the respondent revoked the appellant's residence card on 1 February 2017. On 24 March 2017 the respondent made a decision to remove the appellant. The appellant appealed against that decision and the appeal was listed for hearing under the appeal reference EA/03637/2017.

3. In the meantime, on 18 December 2017, the appellant's solicitors applied on behalf of D for a registration certificate as confirmation of a right to reside in the UK as an EEA national exercising treaty rights as a student. They also applied on behalf of the appellant for a residence card under the EEA Regulations 2016 as a non-EEA family member. Those applications were refused by the respondent on 12 March 2018.

4. In refusing the applications, the respondent was not satisfied that D was exercising treaty rights in the UK as a student for the purposes of regulation 6 and 4 of the EEA Regulations 2016, since (a) he had not provided a declaration confirming that he had sufficient resources for him and his family members living in the UK not to become a burden on the UK's social assistance system; and (b) he had not provided evidence that he held comprehensive sickness insurance in the UK, as the document provided was for the appellant and not the sponsor D. The appellant appealed against the decision refusing his application. There was no appeal by D. The appellant's appeal was listed for hearing under the appeal reference EA/02632/2018.

5. The appellant's combined appeals came before First-tier Tribunal Judge Hamilton on 30 April 2018. The first appeal, EA/03637/2017, was withdrawn at the hearing on the basis that it had been superseded by the second appeal.

6. Judge Hamilton was satisfied, from the interim Child Arrangements Order, that the appellant was seeing D. The judge was not satisfied that the appellant was entitled to a derived right of residence under the Regulations as there was no evidence that D would be forced to leave the EU if he had to leave. The judge went on to consider whether D met the definition of a "student" under the Regulations. He accepted, having received the terms and conditions of the comprehensive health insurance policy submitted after the hearing, that the policy covered both the appellant and D and that the terms of regulation 4(d)(ii) of the EEA Regulations were therefore met. He then turned to regulation 4(d)(iii) and, whilst accepting that D could not make a declaration himself as a minor, considered whether this requirement had been satisfied by alternative means. The judge considered that the requirement might be met if there was clear evidence from both of D's parents showing that their earnings were sufficient to make it unlikely that they would need to claim benefits. He noted the appellant's oral evidence that D's mother was working and that he was also supporting D financially using tips received from football coaching. However the judge noted that no evidence had been provided from D's mother and that there was no independent evidence to show that she was not working or claiming benefits. The judge noted the claim in the appellant's handwritten letter to be on good terms with D's mother and therefore considered it reasonable to expect him to have been able to produce such

evidence. The judge considered that there was inadequate evidence to show that the appellant or D's mother were able to support D without recourse to public funds and that the requirements of regulation 4(d)(iii) were therefore not met. He dismissed the appeal.

7. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had erred by failing to take into account the proper guidance under regulation 6 in regard to exercising treaty rights as a student. It was asserted in the grounds that all parties had agreed at the hearing that the appeal rested on whether there was a comprehensive insurance policy covering D and that the judge had directed that the appellant's solicitors submit the complete terms of the insurance policy within 7 days which would then resolve the appeal. It was asserted that the policy had been sent to the Tribunal within 7 days and that the judge had dismissed the appeal contrary to the indication given at the hearing. It was also asserted in the grounds that the judge had erred by assuming without any evidence that D's mother was in receipt of benefits on his behalf.

8. Permission was granted in the First-tier Tribunal on 12 September 2018 on the following basis:

> "The grounds assert that the Judge may have indicated that the appeal would be allowed upon production of a document then refused the appeal.
>
> In order to resolve the matter, permission to appeal is granted. There will need to be a witness statement from the representative in the appeal and the Judge should also be asked to provide his comments, as should the Home Office."

9. At the hearing before me, there was no statement from the appellant's representative and no comments from the judge or the Home Office. Ms Willock-Briscoe advised me that there had been no representative for the Home Office at the hearing. I noted that Judge Hamilton had not been asked for his comments, but I have the record of proceedings before me in any event. The appellant himself provided a statement in which he confirmed that he had provided the comprehensive insurance policy as requested and was surprised when the appeal was dismissed as the judge had given the impression that the appeal would be allowed once the document was submitted.

10. Mr Omorere submitted that the appellant met the requirements in regulation 16 on the basis of derivative rights and that the appeal should have been allowed once the complete comprehensive insurance policy had been submitted. The judge had had sufficient evidence to show that D was a student. The appellant's handwritten letter sufficed in terms of the declaration to be made for the purposes of regulation 4(d)(iii). The judge was wrong to consider that D's mother was claiming state benefits. No one was in receipt of public funds.

11. Ms Willock-Briscoe submitted that the appellant's grounds did not reflect what the judge had said in granting permission. There was no indication that the judge would allow the appeal on the basis of the comprehensive sickness insurance policy being produced and there must have been a misunderstanding by the appellant. The judge gave proper reasons why the evidence did not show sufficient resources so that A did not

become a burden on the state. The appellant was therefore unable to meet the requirements in regulation 4(d)(iii) and therefore did not get as far as regulation 16.

12. In response Mr Omorere submitted that it was not a matter of what the judge believed to be the case, but what the law actually was and the appellant had met the requirements of regulation 4(d)(iii) and regulation 16(3).

The EEA Regulations 2016

13. In so far as they are relevant the 2016 Regulations are as follows:

> **Regulation 4**
>
> **"4.**—(1) In these Regulations—
>
> (d) "student" means a person who—
>
> (i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment …
>
> (ii) has comprehensive sickness insurance cover in the United Kingdom; and
>
> (iii) has assured the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that the person has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's intended period of residence."

Discussion

14. Permission was granted in the appellant's case on the basis that there was a concern that the judge may have indicated that the appeal would be allowed on the production of a document which was then produced but the appeal dismissed. However there is nothing in the evidence before me to indicate that there was any such concession by the judge and it seems to me that the appellant has simply misunderstood the judge's indication. The only evidence to support such a suggestion is a statement from the appellant himself. Mr Omorere, who was the representative at the hearing, did not produce a statement despite the direction in the grant of permission. The respondent was not represented at the hearing and therefore could not have produced any comments. Judge Hamilton has not been asked to comment, but his contemporaneous notes, which are far more relevant, are available and do not indicate any such concession. It is correct that the judge provided the appellant with an opportunity to produce the terms and conditions of the comprehensive insurance policy, but there was no indication that the production of that document would resolve the appeal in his favour.

15. It is clear, in any event, that the judge could not have allowed the appeal on that basis alone, given the observations and findings he made at [43] to [47] with reference to regulation 4(d)(iii). It is not the case, as the appellant asserts, that the judge based his findings on D's mother being dependent upon public benefits. At [46] the judge commented that it was likely that she was in receipt of child benefit but then went on to accept that that may not qualify as being a burden on the state and that the question was whether there was evidence to show that she was able to support D without reliance on

state benefits, which he found there was not. The judge noted the appellant's oral evidence at [44] in regard to his own income and that of D's mother and had before him payslips for the appellant showing sporadic payments but nothing for D's mother. The judge noted that the appellant had specifically stated in his letter at page 83 that he was on very good terms with D's mother and he was therefore perfectly entitled to find it reasonable to expect him to obtain evidence of her income and to draw the conclusions that he did from the absence of such evidence. Contrary to Mr Omerere's submission, the appellant's handwritten letter at page 83, his statement at page 1 and his oral evidence were not in themselves such as to require the judge to find that the criteria in regulation 4(d)(iii) had been met. The judge was entitled to conclude that that was not sufficient for the purposes of regulation 4(d)(iii) and to conclude that D did not meet the definition of "student" in regulation 4(d)(iii) and was not a qualified person for the purposes of regulation 6.

16. As Ms Willock-Briscoe submitted, the appellant did not get as far as regulation 16 if he could not succeed in satisfying the criteria in regulation 4(d)(iii). It also seems to me that Mr Omerere misunderstood the regulations in so far as he relied upon regulation 16, and it is not entirely clear to me which part of regulation 16 he was relying upon. The appellant plainly could not succeed under regulation 16(2) as he was not the primary carer of D and there was no evidence that D would have had to leave the EU if he left, as the judge properly found at [36]. Likewise he could not rely on regulation 16(3) as that was relevant to the derivative rights for a child and would not be relevant to the appellant.

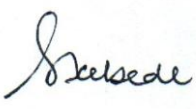
17. Accordingly, for all these reasons, the judge was fully and properly entitled to conclude that the appellant could not meet the requirements of the EEA Regulations 2016 and was entitled to dismiss the appeal on the basis that he did. He did not make any concessions to the appellant requiring the appeal to be allowed. There were no errors of law in his decision.

DECISION

18. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Anonymity

The First-tier Tribunal made an order for anonymity. I see no reason to continue the order in its current form but I limit the order in relation to the identification of the appellant's child pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed:  Dated: 14 November 2018

Upper Tribunal Judge Kebede