



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

Appeal Number: IA/00524/2016

THE IMMIGRATION ACTS

Heard at Field House

**Oral decision given following hearing
On 15 October 2018**

**Decision & Reasons
Promulgated
On 06 December 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**MR VICKNESWARAN SELVARATNAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Davison, Counsel, instructed by Thakrar and Co,
Solicitors

For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Sri Lanka who appealed against the respondent's refusal to grant him a residence card as the extended family member of his sister who is a doctor in this country and is a national of Finland. She is exercising treaty rights in this country.
2. The application was made under Regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 (subsequently re-enacted in

the 2016 Regulations) and the respondent had refused the application under that part of the Regulations.

3. The appeal against this decision was also brought under Regulation 8(2) but was dismissed on the basis that the judge was not satisfied that the appellant had been a member of his sister's household prior to coming to this country and he had not entered with her. In those circumstances insofar as the decision was made under Regulation 8(2) the decision is adequately reasoned and is unappealable.

4. This is however an unusual case, in that in between the decision of the respondent and the hearing of the appeal the appellant had a very serious stroke. This is dealt with or the history of this is set out at paragraph 3 of the decision of First-tier Tribunal Judge Borsada, in which he set out his reasons for dismissing the appeal following a hearing at Birmingham (Priory Court) on 20 March 2018. Judge Borsada recounts as follows:

"3. The matter came before me on 20 March 2018 at the hearing centre in Birmingham, Priory Court. The appellant was not present but he was represented by [Counsel]. [Counsel] explained that his client had been admitted to hospital having suffered a stroke and having now become paralysed down the left-hand side of his body (evidence of hospital admission supplied). I was also told by the sponsor that there was little prospect of his being able to attend the hearing in the near future given his need for treatment and extensive rehabilitation. [Counsel] indicated that his instructing solicitors had received his instruction which were to proceed in his absence ...".

5. At the end of the decision, at paragraph 10, when giving his reasons why the appeal had to be dismissed, the judge dealt with the appellant's medical condition and his current circumstances as follows:

"... I note too the appellant's recent catastrophic brain injury and that he is likely to need a long period of convalescence. The sponsor is a qualified and legally registered doctor and therefore under a particular duty to provide accurate information about any given patient's clinical condition particularly if that information is given in a public forum such as a Tribunal and therefore I accept on the basis of the sponsor's oral evidence that the appellant is likely to be severely incapacitated (there [is] also some evidence from the hospital confirming his current admission). In those circumstances it is likely that he will remain physically, emotionally and financially dependent on the sponsor for the foreseeable period".

6. In other words, while rejecting the appellant's appeal on the basis that he did not satisfy the requirements set out within Regulation 8(2) the judge nonetheless accepted that he was extremely seriously ill and that he was dependent (physically, emotionally and financially) on the sponsor and would continue to be so for the foreseeable future.

7. It is argued in the grounds (as the basis of the appeal to the Upper Tribunal) that in these circumstances and given this finding the judge

ought also to have considered whether or not Regulation 8(3) of the 2006 Regulations applied, which provides as follows:

““Extended Family Member”

8 - (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 a condition in paragraph (2), (3), (4) or (5) ...

(3) the condition in this paragraph is that the person is a relative of an EEA national and on serious health grounds, strictly requires the personal care of the EEA national ...”.

8. Unlike Regulation 8(2) there is no requirement that an applicant had to have been previously a member of the EEA national’s family.
9. Given the judge’s acceptance of the very serious nature indeed of the appellant’s medical condition, it is submitted that he ought to have gone on to consider whether the conditions set out within Regulation 8(3) was satisfied.
10. When setting out his reasons for granting permission to appeal, First-tier Tribunal Judge Keane stated as follows:

“The appellant applied in-time for permission to appeal against the decision of Judge of the First-tier Tribunal D S Borsada promulgated on 16 April 2018 in which the judge dismissed the appeal in respect of the Immigration (EEA) Regulations 2006 (the Regulations). The grounds disclosed an arguable error of law but for which the outcome of the appeal might have been different. The judge arrived at findings of fact at paragraph 10 of [his] decision. [He] accepted that the appellant had recently sustained catastrophic brain damage, that he was likely to need a long period of convalescence, that he was severely incapacitated and in such circumstances would remain physically, emotionally and financially dependent on his sister for the foreseeable period. Having arrived at such findings it was arguably incumbent upon the judge to consider whether the appellant satisfied the condition in paragraph 8(3) of the Regulations. The judge is deserving of sympathy because it does not appear that [he] was referred to paragraph 8(3) of the Regulations. Nevertheless, it was arguably incumbent upon the judge to consider paragraph 8(3) of the Regulations given the findings of fact which [he] had made ...”.

11. At the hearing before me, Mr Davison, representing the appellant sought to rely upon the grounds. On behalf of the respondent Mr Whitwell asked the court to note that Counsel representing the appellant had not seen fit to rely on this argument, but it is the appellant’s case that whether or not Counsel at the hearing had or had not made the argument, in a case such as this is not determinative of the issue, if it be the case that the point was one which was or should have been obvious to the judge hearing the case. Mr Whitwell did not seek to argue that the Tribunal should not have considered post-decision evidence, but did refer the Tribunal to the old but nonetheless still relevant decision of a presidential Tribunal in *TR v SSHD*

[2008] UKAIT 00004 in which this Tribunal, when considering this provision, had made it clear that the hurdle to be overcome was a high one.

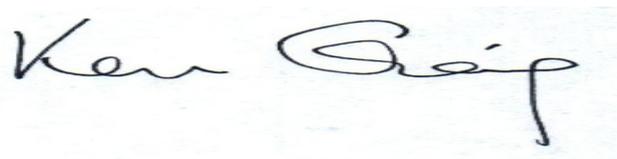
12. He submitted that in the event that this Tribunal was now to find that the decision of Judge Borsada should be set aside it would be necessary for this issue to be considered properly before a decision was made.
13. In the judgment of this Tribunal in light of Judge Borsada's finding as to the severity of the appellant's health condition and his current dependence on his EEA national sister, he should then have gone on to consider the appeal with regard to Regulation 8(3) and as to whether or not the conditions set out within 8(3) were satisfied. The decision will accordingly have to be remade. The test is, on the wording of this sub-paragraph itself and in light of the decision of the presidential Tribunal in *TR* a high one, and the Tribunal will have to consider not just whether or not the applicant is currently dependent upon his sister but whether the management of his condition strictly "requires" her personal care. This will involve consideration of whether and if so what alternative arrangements might or might not be available for him. These are not matters which this Tribunal can now determine without a further hearing.
14. In the circumstances, both Mr Davison and Mr Whitwell urged the Tribunal to remit the appeal back to the First-tier Tribunal so that these issues can be properly considered afresh, and I shall do so. Given the complexity of this case it would be appropriate for this case to be listed for a case management review at the First-tier Tribunal so that the parties can canvass with the First-tier Tribunal what evidence ought now to be sought.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Borsada as containing a material error of law and remit the appeal to the First-tier Tribunal sitting at Birmingham to be reheard by any First-tier Tribunal Judge other than Judge Borsada.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', written over a light blue grid background.

Upper Tribunal Judge Craig
December 2018

Date: 3