IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24736/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 June 2015	**On 22 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SARAH DIABATE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery of the Specialist Appeals Team
For the Respondent: Mrs F Clarke of Counsel instructed by Fadiga & Co., solicitors

DECISION AND REASONS

The Respondent

1. The Respondent, to whom I shall refer as the Applicant, is a citizen of Côte d'Ivoire born on 10 January 1973. On 9 June 2003 she married Jean-Philip Serele. She had three children by him born in 2006, 2009 and 2010. On 11 March 2014 the Decree Absolute dissolving their marriage was pronounced. The Applicant stated her ex-husband was the father of her eldest child in the United Kingdom. No details of

paternity are given in the birth certificates of the two younger children. Her claim is that the marriage had broken down in 2007.

2. The Applicant had previously made applications for a permanent residence card under the Immigration (EEA) Regulations 2006 as amended (the 2006 Regs) on 4 October 2011 and 19 July 2012. Both these applications were refused. A further application was made on 28 April 2014 leading to the decision under appeal dated 30 May 2014. Her three children similarly applied and were refused residence cards on the same day. It would appear that only the Applicant lodged notice of appeal under Regulation 26 of the 2006 Regs and Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. A copy of the bio-data page from the Côte d'Ivoire passport of each of the children has been filed. There is no evidence that any of them hold an EEA nationality.

3. The grounds of appeal to the First-tier Tribunal refer to the length of the Applicant's marriage, the exercise of Treaty rights by her former husband, the duration of the marriage and to the 2006 Regs and paragraph 276ADE of the Immigration Rules and Appendix FM as well as Article 8 of the European Convention.

The First-tier Tribunal's Decision

4. By a decision promulgated on 27 February 2015, Judge of the First-tier Tribunal Quinn allowed the Applicant's appeal under the Immigration Rules (not under the 2006 Regs) and on human rights grounds under Article 8.

5. The Appellant (the SSHD) sought permission to appeal on the basis that the Judge had no jurisdiction to allow the appeal under the Immigration Rules and that as the appeal was allowed under the 2006 Regs the Judge should not have allowed the appeal on human rights grounds. These grounds were made by reference to another appeal which had been heard in the Upper Tribunal, the decision on which had yet to be promulgated which it was said would address the question how judges should deal with grounds of appeal based on Article 8 raised in appeals against decisions made under the 2006 Regs.

6. On 28 April 2015, Judge of the First-tier Tribunal Colyer granted the SSHD permission to appeal on both issues.

The Upper Tribunal Hearing

7. The Applicant attended the hearing. At the start Mr Avery sought an adjournment on the basis that the decision following the recently heard case about the relevance of claims under Article 8 of the European Convention to appeals under the 2006 Regs was anticipated to be promulgated very shortly and referred to in the preceding paragraph.

8. Mrs Clarke for the Applicant opposed the application on the basis of the length of time the Applicant's children had been in the United Kingdom and that the First-tier Tribunal Judge had considered the position in the light of *HS (EEA: revocation and*

retained rights) Syria [2011] UKUT 00165 (IAC). She continued that the current practice of Judges in the First-tier Tribunal was that some did address Article 8 issues in appeals under the 2006 Regs and others did not. The SSHD grounds for appeal had not argued there was a material error of law in the decision of the First-tier Tribunal Judge on the Article 8 issue, just that the Judge should not have considered the Article 8 appeal.

9. I then had a discussion with the advocates in chambers in which I expressed certain concerns about the First-tier Tribunal's decision and the position of the Applicant who had not filed evidence about her ex-husband's employment at the date of her Decree Absolute. On resuming the hearing, I explained the position to the Applicant and that my decision was that the First-tier Tribunal's decision did contain errors of law and that I would remit it for hearing afresh in the First-tier Tribunal. I went on to explain the workings of Section 40 of the UK Borders Act 2007 which might be relevant in establishing whether the Applicant's husband was a qualified person within the meaning of the 2006 Regs at the date of her Decree Absolute.

Reasons

10. I now give reasons for my decision.

11. The starting point is that this is an appeal against refusal of an application made under the 2006 Regs. There is no provision enabling the decision on application made under the 2006 Regs to be considered by way of reference to the Immigration Rules except in very limited circumstances such as Regulation 8(4) none of which have application to this appeal. Consequently, it was a material error of law to allow the appeal under the Immigration Rules.

12. The SSHD had stated the requirements which the Applicant had to fulfil to comply with Regulation 10(5) of the 2006 Regs for a retained right of residence. She had also gone on in the top of the second page of the Reasons for Refusal Letter to set out the additional requirements for permanent residence. Also on page 2 of the Reasons Letter the SSHD had made it clear what evidence was needed to show the Applicant's ex-husband was exercising Treaty rights at the time of the divorce. In those circumstances the Judge erred at paragraph 49 of her decision. She erred at paragraph 50 in finding that the Applicant's eldest child was a British citizen for which there is no evidence in the file and for which the reasons given by the Judge are not a correct statement of the law.

13. There was no evidence that the child was an EEA citizen and consequently the conclusions drawn at paragraph 51 are also an error of law.

14. The consideration of the claim under Article 8 of the European Convention, whether or not it should have been conducted, is wholly deficient in that it fails to adopt the five-step structure endorsed in *R (Razgar) v SSHD [2004] UKHL 27*. The Judge failed to give proper consideration to the interests of the children, having regard to Section 55 of the Borders, Citizenship and Immigration Act 2009.

15. For all these reasons, I found that the decision contained errors of law and it would be appropriate for the matter to be remitted to the First-tier Tribunal for hearing afresh.

Future conduct of the appeal

16. Having regard to the nature of the errors of law, no findings can be preserved from the First-tier Tribunal decision. The scheme of the Tribunal's, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal.

17. Section 12(2) of the 2007 Act permits the appeal to be remitted to the First-tier Tribunal with directions. Having regard to Practice Statement 7.2(b) by the Senior President and the nature and extent of the fact-finding required I conclude that the decision should be remitted to the First-tier Tribunal for hearing afresh.

Anonymity

18. There was no request for an anonymity direction and, having heard the appeal, I consider none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal determination contained errors of law such that it must be set aside in its entirety. The appeal is remitted to the First-tier Tribunal for hearing afresh before a Judge other than Judge of the First-tier Tribunal Quinn.

No anonymity direction is made.

Signed/Official Crest Date 18. vi. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal