IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26394/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 November 2015

Decision & Reasons Promulgated
On 11 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

SOUMAYA AKROUTA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Bild, Camden Community Law Centre
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant appealed against a decision of the Respondent to refuse her a right of permanent residence under the Immigration (European Economic Area) Regulations 2006. Her appeal was heard by Judge Davidson sitting at Tailors House on 8 January 2015. Both parties were represented. In a decision of 14 February, promulgated on 19 February 2015, Judge Davidson dismissed the appeal under the Regulations and on Article 8 human rights grounds.

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2. Permission to appeal was refused on 22 April 2015 by Judge Pooler and granted on second application on 2 July 2015 by Judge Canavan in the following terms:

   “1. The Appellant appealed against the Respondent's decision to refuse to issue her with an EEA residence card on the grounds that she had a retained right to residence she applied for permission to appeal against First-tier Tribunal Judge Davidson’s decision to dismiss the appeal, which was promulgated on 19 February 2015.

   2. Although the Respondent queried whether the Appellant had a right of appeal under Regulation 26 at the hearing it is apparent from the Reasons for Refusal Letter that the Appellant was told that she a right of appeal. Whether there was technically a right of appeal is not a matter for this particular decision and is appropriate to be considered in more detail by the Upper Tribunal at a hearing.

   3. The grounds disclose no arguable error of law that would have made a material difference to the outcome of the appeal. The judge gave adequate reasons to explain why it would make no difference to adjourn in order to make a direction for HMRC evidence to be supplied by the respondent [15]. Although there is some authority in **Amos v SSHD** [2011] EWCA Crim 552 to suggest that a judge can make direction for HMRC evidence to be produced, it would have no material difference to this appeal because it is not arguable that the Appellant could retain a right of residence under Regulation 10 of the EEA Regulations because such rights only accrue on termination of a marriage and are not available to extended family members who are in a durable relationship.

   4. However, it is arguable that the decision discloses a **Robinson** obvious error of law in so far as the First-tier Tribunal failed to consider whether the Appellant nevertheless had a derived right of residence under Regulation 15A given that the judge appeared to accept that the Appellant's daughter was the child of a European national [21]. The decision also suggests that her son may have been in the process of applying to register as British citizen [50]. As such it is also arguable that the First-tier Tribunal’s findings relating to Article 8 are unsustainable. The original application seems to have been made on a misconceived basis and it is arguable that the First-tier Tribunal erred in falling to cosier obvious grounds that were relevant to the case.

   5. Permission to appeal is granted.”

3. The Appellant, bringing with her her two small children, attended the error of law hearing, which took the form of submissions. I have taken these into account, together with the permission application. I reserved my decision.

Determination

4. The submissions indicated a possible pragmatic resolution of the matter to which both representatives assented and which I am content to adopt.

5. The decision did not incorporate a removal decision, and no Section 120 notice was served. Accordingly, it was not open to the Appellant to bring a human rights challenge: **Amirteymour and Others** (EEA appeals; human rights) [2015] UKUT 00466 (IAC). This decision did not emerge until August 2015, so that it was not law when Judge Davidson heard the appeal in January 2015. Jurisprudentially, however, it is to be taken to have represented the law. It follows that, in conscientiously considering Article 8 at paragraphs 42 to 53, Judge Davidson, who was not endowed with the power of prophecy, erred in law. Both representatives are content for me to set aside paragraphs 42 to 53 of his decision, which I accordingly do.

6. This decision is pragmatic because the Appellant has made a separate human rights application, which is due to be heard on 20 November, when the Tribunal will be able to consider human rights issues.

7. Although there are challenges to the remainder of the decision, addressing the position under the Regulations, both representatives are content for me to uphold that part of it. Since this avoids some jurisprudential labour, I am content to do so.

Notice of Decision

8. The original decision contained an error of law in relation to human rights. I accordingly set aside paragraphs 42 to 53 of the decision, which address human rights.

9. The remainder of the decision is to stand.

10. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge J M Lewis