



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

Appeal Number: IA/26533/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 August 2015**

**Determination Promulgated
On 2 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

ZAHARA ABDALLAH TOCHA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Colin Yeo, Counsel, instructed by Wesley Gryk Sols.

For the Respondent: Ms Emma Savage, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant appeals against the decision of the First-tier Tribunal (Judge Doyle) dismissing the appellant's appeal against a decision taken on 23 June 2014 to refuse to grant a residence permit under the Immigration (EEA) Regulations 2006 ("the Regulations").

Introduction

3. The appellant is a citizen of Comoros born on 21 December 1976. The appellant states that she entered the UK in 1999 and married Mr Youssouf Hamadi, a citizen of France on 29 November 2006. The relationship began in 2004 and the parties had an Islamic marriage in France in December 2005. They have a child together, Adam, born on 29 June 2007. The parties separated around August 2008 and their divorce was finalised on 3 May 2011. Mr Hamadi left the UK at some point and returned to France. Prior to that he was working cash in hand in the UK.
4. The appellant made an application for a residence card and permanent residence under the Regulations on 2 November 2011. The Secretary of State refused the application on 23 June 2014 on the basis that the appellant had failed to show that Mr Hamadi was exercising treaty rights at the time of divorce. The appellant had failed to show that she meets the requirements of regulation 10(5).

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Richmond on 19 November 2014. She was represented by Mr Yeo. The First-tier Tribunal found that the appellant had lived in the UK for a long time and that her son is a French national. The appellant had been a victim of domestic violence. The appellant was divorced from a French national. The only reason why the appeal could not succeed was because Mr Hamadi was not a qualified person in terms of regulation 6 of the 2006 Regulations.
6. The judge found that Mr Hamadi worked cash in hand but chose not to declare his income to HMRC or to pay income tax or national insurance contributions. He was not a qualified person, having regard to the guidance in Begum (EEA - worker - jobseeker) Pakistan [2011] UKUT 00275 (IAC).

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The judge failed to address the Zambrano ground of appeal which was clearly pleaded in the grounds and was central to the appeal. The facts were uncontested and the appeal fell to be allowed. The judge also erred in concluding that Mr Hamadi was not a qualified person. The appellant's unchallenged evidence was that Mr Hamadi worked cash in hand and the judge needed to give reasons for finding otherwise. Considerable evidence of the appellant's finances was included in the evidence and the judge erred in finding that he had insufficient evidence regarding Adam's financial position. The judge further erred in law in finding that there was no breach of Article 8 because there was no imminent removal.

8. Permission to appeal was granted by Upper Tribunal Judge McGeachy on 31 May 2015. The grounds of appeal were arguable.
9. In a Rule 24 response dated 23 June 2014, the respondent indicated that the appeal was not opposed and invited the Upper Tribunal to determine the appeal with a fresh oral hearing.
10. Thus, the appeal came before me

Discussion

11. Mr Yeo submitted that the appeal should have been allowed on domestic violence grounds (regulation 10(5)(d)(iv) of the Regulations), on Baumbast grounds because Adam is the child of an EU citizen who is enrolled at an education establishment for the purpose of studies (regulations 10(3), 10(4) and 15A of the Regulations), on Zambrano grounds because there is no other family member in the UK to care for Adam (regulation 15A of the Regulations and on Article 8 grounds.
12. Mr Yeo further submitted that the appellant did have a right of residence as the spouse of a qualified person. At some point, Mr Hamadi did cease to be a qualified person but the appellant cannot say exactly when that was because she was a victim of domestic violence. The domestic violence provision cannot reasonably be interpreted as requiring that the EEA national spouse remains a qualified person at the precise moment of formal legal termination of the marriage because that would rob the protection of any real meaning. The appellant was previously granted a residence card on the basis that Mr Hamadi was a qualified person. It was not open to the judge to find that Mr Hamadi was never a qualified person.
13. Mr Yeo relied upon paragraphs 72-77 of Kuldip Singh. The fact that some part of the resources available to the EEA citizen derives from resources obtained by a spouse who is a third-country national does not preclude the condition regarding sufficiency of resources from being regarded as satisfied.
14. Ms Savage sought to withdraw the concession in the Rule 24 response and submitted that the error of law was not material. The appellant cannot succeed on Zambrano grounds because there is no evidence that Adam will be deprived of his rights as an EU citizen – he can reside in France. It was properly open to the judge to find that Mr Hamadi was not a worker as at the time of the marriage and divorce. The appellant has not established any retained right of residence. Illegal employment cannot create self-sufficiency. The appellant has no right to work independently of the child and it is circular to say that the appellant can derive a right to work from the child in order to give the child self-sufficiency. There is no evidence that Mr Hamadi was working in the UK when Adam was in the UK.
15. Both sides made submissions and cited authority in relation to Article 8. That matter has since been resolved by the Upper Tribunal in Amirteymour

& others (EEA appeals - human rights) [2015] UKUT 00466. No removal directions have been issued in this case nor has a “one stop” notice been served. This appeal cannot succeed on human rights grounds.

16. However, the judge has failed to properly address and make findings in relation to the remaining issues set out at paragraph 11 above and that is a material error of law. The issues arising in this appeal could not simply be resolved by finding that Mr Hamadi was not a qualified person. In any event, in making that finding the judge failed to have regard to the fact that the appellant was previously granted a residence card under the Regulations on the basis that Mr Hamadi was a qualified person. That is a further material error of law. The disputed issues can only be resolved through hearing evidence and findings of fact that cover all of the issues raised by both parties.
17. Thus, the First-tier Tribunal’s decision to dismiss the appellant’s appeal under the 2006 Regulations involved the making of an error of law and its decision cannot stand.

Decision

18. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge’s decision. Bearing in mind paragraph 7.2 of the *Senior President’s Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.
19. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed



Date 30 August 2015

Judge Archer
Deputy Judge of the Upper Tribunal