



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/30458/2014**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On 17 September 2015**

**Decision Promulgated
On 25 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JENNIFER ANINO

Respondent

Representation:

For the Appellant: Ian Jarvis, Senior Home Office Presenting Officer
For the Respondent: absent

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge M J Gillespie, promulgated on 20 March 2015, which allowed the appellant's appeal on article 8 ECHR grounds only.

Background

3. The appellant was born on 23 August 1979. She is a national of Nigeria.

4 On 16 July 2014, the respondent refused the appellant's application for a derivative residence card as confirmation of a derivative right of residence in the UK as the primary carer of a dependent who is resident in the UK.

The Judge's Decision

5 The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge M J Gillespie ("the judge") dismissed the appellant's appeal under the Immigration (EEA) Regulations 2006 but allowed the appellant's appeal on Article 8 ECHR grounds.

6 Grounds of appeal were lodged and on 12 May 2015, First Tier Tribunal Judge J Grant Hutchison gave permission to appeal, stating *inter alia*:

"It is arguable that the judge misdirected himself in law by allowing the application which was made under the provisions of the EEA Regulations 2006 on the basis of Article 8 when no "one stop" Section 120 notice of the Nationality, Immigration and Asylum Act 2002 and no removal directions have been served."

7 This appeal originally called before the Upper Tier on 28 July 2015. That hearing was adjourned to a for mention hearing because the decision in the case of Amirteymour & others (EEA appeals; Human Rights) [2015] UKUT 00466 was awaited which, it was thought, might be determinative of this appeal. When this case called before me for mention on 17 September 2015, the appellant was neither present nor represented. The case file contains a letter dated 16 September 2015 from the appellant's solicitors (Kingscourt Solicitors) stating "*Kindly note that our client will not attend the mentioning hearing scheduled for Thursday 17 September 2015...at 10am*". By letter dated 16 September 2015, the appellant's solicitors wrote saying that they would not attend the hearing on 17 September and went on to say "*In our appeal hearing to the Upper Tribunal we wish to rely on the skeleton argument and witness statement used in the hearing of the First Tier Tribunal. We will also mention the decision of the President of the Upper Tribunal, the Honourable Mr Justice McCloskey dated 23 July 2015*".

8. Neither the appellant nor her representative was present. I am satisfied that due notice of the appeal was served on the appellant and her solicitors. I am satisfied that both the appellant and her solicitors made a conscious decision not to attend the hearing. I consider Paragraph 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It is in the interests of justice to proceed with consideration of this appeal in the appellant's absence.

9 I heard submissions from Mr Jarvis, senior Home Office presenting officer, who quite simply relied on the case of Amirteymour and invited me to allow the judge's decision to dismiss the application in terms of the Immigration (EEA) Regulations 2006 to stand, but to find that the judge

could not go further than consideration of the 2006 Regulations, and so to set aside the decision to allow the appeal on Article 8 ECHR.

Analysis

10. In Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 it was held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.

11 The respondent's decision of 16 July 2014 refused the appellant's application by reference to the 2006 Regulations alone. No section 120 notice was served on the appellant and there are no removal directions.

12 The judge's decision that the appellant cannot fulfil the requirements of the Immigration (EEA) Regulations 2006 remains unchallenged. The appellant has not appealed the decision promulgated on 20 March 2015. The only challenge in this case is to the consideration of Article 8 ECHR. Having considered the decision as a whole, I find that there are no material errors of law contained in [2] to [8] of the determination and that the judge's decision to dismiss the appeal under the Immigration (EEA) Regulations 2006 does not disclose a material error in law and must stand.

13 However, I find that the judge's consideration of Article 8 ECHR constitutes a clear material error in law. In the last sentence of [1] of the decision promulgated on 20 March 2015, the judge incorrectly refers to the appellant's "...rights of private and family life". From [9] to [12], the judge embarks on an exercise considering the appellant's rights in terms of Article 8 ECHR. It is beyond dispute that there is neither a Section 120 notice nor removal directions in this case. The case of Amirteymour makes it quite clear that Article 8 ECHR was not a consideration in this case and was not a matter which could competently be considered by the judge.

Conclusion

14 I therefore find that the determination contains a material error of law and must be set aside.

Decision

15 The decision promulgated on 20 March 2015 is tainted by a material error of law in regard to the consideration of Article 8 ECHR and must be set aside.

16 I consider the case of new and substitute the following decision.

17 The appeal is dismissed under the Immigration (EEA) Regulations 2006.

Signed:

Deputy Upper Tribunal Judge Doyle
23 September 2015