IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45865/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice-Belfast	**Decision & Reasons Promulgated**
On 26 October 2015	**On 30 November 2015**
Judgment given orally at hearing	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FRANCIS NKETIA DUMONT

Respondent

Representation:
For the Appellant: Ms M. O'Brian, Home Office Presenting Officer
For the Respondent: Ms F. Connolly, Counsel

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State but for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Ghana, born on 28 February 1982. On 13 February 2013 he made an application for a residence card as confirmation of a permanent right of residence in the UK. That application was refused in a decision dated 21 October 2013. The respondent's decision considered the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") and refused the

application because the respondent concluded that the appellant had not established that he and his partner had been living together as partners in a durable relationship for at least two years.

3. The appellant's partner is a SK who is both a British and Irish national. So far as she is concerned, there was also an issue in terms of whether in terms of her exercise of Treaty rights, she was 'permanently incapacitated' so as to come within regulation 5(3) of the 2006 Regulations.

4. The appeal against the respondent's decision came before First-tier Judge Farrelly on 13 June 2014. At [8] he records that the representative on behalf of the appellant stated that the appeal was not being pursued on the basis of the EEA Regulations. The appeal on that basis was untenable in the light of the amendments to the 2006 Regulations, the sponsor also being entitled to British nationality.

5. The judge went on however, to consider the contention that the appellant was able to succeed under Article 8 of the ECHR. At [12] the issue of whether the appellant should have made a separate Article 8 application was canvassed. Ms Connolly, who also appeared below, indicated that there was a substantial fee that would otherwise have been required, although it may be that in this case the appellant might not have been expected to pay it.

6. From [13] onwards the judge referred to authorities on the issue of whether he had jurisdiction to consider Article 8, in particular *JM Liberia v Secretary of State for the Home Department* [2006] EWCA Civ 1402. He concluded that he did have jurisdiction and went on to consider Article 8 outside the Immigration Rules and allowed the appeal. He took into account the best interests of couple's daughter, A, she having been born on 8 May 2010.

7. At [27] the judge said that

> "On balance, purely for the sake of [A] the appeal should be allowed on article 8 grounds. Were it not for [A] the respondent's decision, which ultimately would require the appellant to leave, would not breach article 8. By allowing the appeal in this way there is the hope that he will remain as a father figure in her life and she is an innocent to her parents' behaviour."

8. The initial challenge to the decision of the First-tier Tribunal was based on the judge's assessment of Article 8 outside the Rules. At [2] of the grounds it was argued that the Tribunal erred by not having regard to the Rules and that the subsequent proportionality assessment is unsustainable because of this omission. Latterly, and indeed on the occasion when this matter was last before the court and was adjourned, it was apparent that a decision of the Upper Tribunal was awaited in terms of whether a judge has jurisdiction to consider Article 8 on the refusal of a residence card. That is because, as asserted by the respondent, the refusal of a residence card does not involve any removal directions and, so the argument goes, Article 8 is not engaged.

9. The notice of immigration decision in this case has passages or phrases in it that could be supportive of the argument on either side of that line. However, the matter is now conclusively decided, for the time being at least, by the decision of the Upper Tribunal in *Amirteymour and Others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC), that being a decision of the President, the Vice President, Mr C M G Ockelton, and Upper Tribunal Judge Rintoul. It is only necessary for present purposes to refer to the headnote of that decision which reflects what is in the body of the determination. The headnote reads as follows:

> "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."

10. It is not suggested that in this case there was a s120 notice and none has been drawn to my attention.

11. In submissions on behalf of the appellant I was invited to take into account that that decision is presently subject to appeal to the Court of Appeal. I was also informed that the President himself had adjourned some cases on the same point. However, I am not aware of the facts of those other cases and it was not apparent to me as to when the Court of Appeal would hear the appeal against that decision; it may be some many months in the future. I did not consider therefore, that it was appropriate to adjourn this appeal pending the outcome of the Court of Appeal's decision.

12. It seems to me that the point about whether the judge had jurisdiction to consider Article 8 at all is conclusively dealt with in *Amirteymour*. I was not addressed in detail on the essence of that decision in terms of whether or not it was correctly decided. However, I have for my part considered the decision and the reasoning in it. I adopt that reasoning and apply it to the circumstances of this case which it seems to me are not materially different.

13. The First-tier judge of course did not have the benefit, as I do, of the decision in *Amirteymour*. Nevertheless, I am satisfied that he did err in law in considering Article 8 of the ECHR. He had no jurisdiction to do so and in those circumstances I set aside his decision and re-make it, concluding that there is no jurisdiction in this case to consider Article 8.

14. If I had to decide the Article 8 argument as advanced on behalf of the respondent I would have decided the point in the respondent's favour, in that it does seem to me that in the judge's assessment he did not have as his reference point the Immigration Rules on Article 8, which would otherwise have governed an Article 8 case. The judge went straight on to consider Article 8 proper without using the Article 8 Immigration Rules as his reference point.

15. Whilst I doubt what is said in the respondent's grounds about the Immigration Rules being a complete code in cases which are not concerned with deportation, it is nevertheless the case that the judge ought to have measured the Article 8 consideration using the Immigration Rules as the primary yardstick, and then going on to consider whether there were grounds to consider Article 8 otherwise than under the Immigration Rules. In failing to do so his decision in my judgement was in error. It is not necessary for me to go further to consider the Article 8 argument because, as I have said, there is no jurisdiction to consider Article 8 at all.

Decision

16. The decision of the First-tier Tribunal involved the making of an error on a point of law. The First-tier Tribunal's decision is set aside. I re-make the decision and dismiss the appeal.

Upper Tribunal Judge Kopieczek 26/11/15