Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52411/2013

THE IMMIGRATION ACTS

Heard at Field House
on 31 October 2014
and 16 February 2015

Decision and Reasons Promulgated
On 28 May 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR VRY PIERRE KOUSI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms C Record of counsel
For the respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of the Ivory Coast born on 14 July 1975. He appealed to the First-tier Tribunal against the decision of the respondent dated 29 November 2013 to refuse to issue him with a residence card as an ex-spouse of an EEA National under the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations').

2. First-tier Tribunal Judge Rothwell dismissed that appeal. In a decision of First-tier Tribunal Judge Reid granted the appellant permission to appeal to the Upper Tribunal stating that it was arguable that the Judge's failure to consider Article 8 was a material error with reference to section 86 of the Nationality, Immigration and Asylum Act 2002.

3. The main issues in the proceedings before the First-tier Tribunal were whether the appellant's ex-spouse was a qualified person and residing in accordance with the 2006 Regulations at the point of his divorce. It was noted from a previous refusal dated, 25 September 2012 that the appellant's EEA national spouse had not been exercising her treaty rights since July 2008 and therefore the appellant was refused under regulation 10 (5) and (6) of the 2006 Regulations.

4. The Judge took into account Mr Clarke submissions who relied upon the refusal letter dated 29 November 2013 and retained right of residence under regulation 10 (5). Mr Clarke submitted that the appellant cannot succeed as his witness statement at section 8 states that his sponsor left the United Kingdom in December 2011 and the decree absolute was granted in June 2013. He submitted that regulation 10 (5) (b) required the appellant's sponsor to be exercising her treaty rights at the termination of the marriage. He stated that there was no evidence that his wife is exercising treaty rights on that date. The judge stated that as there was no Article 8 appeal, as removal directions had not been made he asked that the appeal be dismissed.

5. The Judge recorded that it was submitted to him at the hearing by Miss Record the appellant has family life in the United Kingdom as he has two brothers and the appellant had a genuine marriage which ended. "The story is sad any meets the spirit of the Rules".

6. The Judge recorded that on the balance he does not find that the appellant has proved this case in accordance with the 2006 Regulations. He said that he takes note of Miss Record's submissions that this is a sad story that falls within the spirit of the Regulations. The 2006 Regulations are very clear and the position of the EEA spouse at the date of the termination of the marriage has to be exercising treaty rights which has not been proved in this case.

7. The Judge also stated that the appellant has referred to Article 8 but as there is no removal direction issued by the respondent and stated "I agree with Mr Clarke that I have no jurisdiction to hear an appeal relation to Article 8".

8. The appellant's grounds of appeal raise only one ground of appeal which is that the Judge materially erred in law by not considering the appellant's

appeal pursuant to Article 8 of the European Convention on Human Rights.

9. The grounds of appeal state the following which I summarise. The appellant is from Côte d'Ivoire and has lived in the United Kingdom for about 10 years and during that time was married to an EEA national, a French citizen. The couple separated in 2011 and were divorced in 2013. His wife had returned back to France as she had cancer. The appellant applied to remain in the United Kingdom on the basis he had retained the right of residence, but his application was refused that he could not meet the 2006 Regulations. It is not submitted that the couple have lived in the United Kingdom for at least one year and that the marriage had lasted for at least three years, although there were some difficulties in the marriage. The Judge found that the requirements of the rules is strict and this is not challenged.

10. The grounds of appeal continue that however the appellant does have an arguable Article 8 point which is the breakdown of his marriage due to ill-health which was a factor out of his control. The Judge has not considered Article 8 on the basis that there were no removal directions in place.

11. At the hearing Miss Record said that Article 8 grounds were raised in the grounds of appeal and the judge should have considered them.

12. Mr Melvin in his submissions said that the EEA Rules are said to trump the legislation of the United Kingdom.

Decision as to whether there is an error of law in the determination

13. The only ground of appeal for me to consider in this appeal is that the Judge did not consider Article 8 when were raised in the grounds of appeal. The Judge in his determination stated that the appellant has referred to Article 8 but as there is no removal direction issued by the respondent and stated therefore "I agree with Mr Clarke that I have no jurisdiction to hear an appeal relation to Article 8.

14. The Judge by this finding fell into material error. The appellant's appeal pursuant to Article 8 in respect of his family and private life in this country was lawfully before the Judge and he had jurisdiction to consider it. His failure to consider the appellant's rights under Article 8 and that of his family members in this country is a material error of law such as the decision cannot stand.

15. I was asked in the event that I find that there is an error of law in the determination of the first-tier Tribunal, I should send the appeal back to the First-tier Tribunal so that findings of fact can be made in respect of the appellant's Article 8 claim.

16. There is no dispute that the appellant does not meet the requirements of the 2006 Regulations. There is however an error of law in the Judge's failure to engage with Article 8 in his determination.

17. As such my decision is whether to send the appeal back to the First-tier Tribunal as requested by Ms Record or whether it should be retained in the Upper Tribunal for it to be heard on this Article 8 issue alone.

18. The appellant claims that he has two brothers in this country with whom he enjoys a family life sufficient to engage Article 8. This will be the only issue at the renewed hearing. The respondent has not taken issue that the appellant has two brothers who live in this country. The only issue which remains to be answered in respect of Article 8 is whether family life between the brothers engages Article 8 for both the appellant and his brothers and whether the appellant's exclusion from the United Kingdom is proportionate to the legitimate aim of a fair and transparent immigration control.

The rehearing on 16 February 2015

19. At the hearing I heard evidence from the appellant who adopted his written statement dated 16 February 2015 in which he adopted his previous statement and documents. He gave the following evidence which I summarise.

20. He last worked with Crossrail a year ago. He has made eight separate applications since his EEA residence expired in 2009 through different solicitors. His last leave to remain was in 2009 but he was given six months leave on two occasions to work. He has two brothers in the United Kingdom one is a citizen of the Ivory Coast and the other, Roger is a French citizen. His brother who is a citizen of the Ivory Coast is the supported by his brother Roger as part of his household. He went back to Ivory Coast in 2006 and 2007. His parents still live in Ivory Coast. He has no brothers and sisters who live there. He cannot work in Ivory Coast because of political reasons. His claim for asylum was dismissed in 2003 and he has not made any other asylum claim in this country. He was asked how he then makes the claim that he cannot return to Ivory Coast and yet he went back 2006 and 2007. He said it was not during the election period and it was a quiet moment. "There is a lot of killing in my area and life is uncomfortable in the Ivory Coast."

21. In re-examination it was put to him if he had not made only five applications and Mr Melvin read out the 8 applications he had made. He said that a lot of the applications were refused after which he would make another application. He said not every refusal was the subject of an appeal.

22. In questions from me he said that he is capable of supporting himself if he is allowed to work. He is not dependent on anyone in this country and this is equally true anywhere in the world if he is allowed to work.

23. I heard submissions from Mr Melvin and Miss Record in the full notes of the hearing are in my Record of Proceedings.

24. Mr Melvin submitted that the appellant cannot meet the requirements of the 2006 EEA Regulations and has made eight applications and has cogged up the system. In respect of his family life he claims that Roger, the appellant's brother had two children with the appellant's wife. This is because she was first the partner of Roger and thereafter married the appellant. There is no evidence that the brothers live together or that there is any dependency between the brothers. In respect of his private life, he has been here since 2003 and his asylum claim was dismissed. He has had no leave to remain since 2009 which shows that his immigration history has always been precarious. Apart from the longevity of the appellant's residence in this country, this does not in itself engage Article 1. His removal is proportionate response to the public interest. The appellant's argument is a near miss and it should not be entertained by the Upper Tribunal. The case of Sing, Upper Tribunal Judge Gill at paragraph 23 stated that it is not always necessary to engage the five step process in Razgar when it is obvious that the appellant does not have a family life or a private life in the United Kingdom.

25. Miss record submitted the following which I summarise. The appellant's evidence in his witness statement is that he lives with his brothers and this was not been challenged in cross-examination. If the appellant made an application up to the year 2011 as stated in Judge Ross, this determines that his French national spouse was exercising treaty rights up to that date, his application would have succeeded. The appellant is living with his brothers and this is an exceptional case. The respondent did not take any action for six years to remove the appellant to the Ivory Coast. The appellant's marriage broke down due to tragic circumstances and this should also be taken into account.

26. Mr Melvin said that the appellant made eight applications and a lot of them had been refused and not every refusal was appealed. He said that the appellant should have left when his applications were refused and his immigration status is always been precarious and he cannot benefit from the fact that he was not removed by the respondent.

Findings of fact

27. In looking at Article 8 I have considered the decision of the House of Lords in **Huang v SSHD [2007] UKHL 11**. The House of Lords gave guidance that in assessing proportionality there was no legal test of truly exceptional circumstances, reaffirmed the analysis they had given in

Razgar, R (on the Application of) v SSHD [2004] UKHL 27 and also reaffirmed the importance of continuing reliance on established Strasbourg jurisprudence relating to Article 8. Lord Bingham's step by step approach in **Razgar** continues to apply in all expulsion cases. Firstly, it is necessary to establish whether there is a private or family life with which removal would interfere and then Lord Bingham's five questions, the step by step approach, should thereafter serve as a framework for deciding such cases.

28. I remind myself that the mere existence of a family relationship or a private life is not sufficient for the applicability of Article 8(2). Much more is needed. At paragraph 20 of Lord Bingham's judgment in the case of **Huang** he said this:

> "In an Article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

29. The appellant does not meet the requirements of the Immigration Rules and the EEA Regulations. I therefore consider whether there are any arguably good grounds for granting the appellant leave to remain outside them and to consider whether there are compelling circumstances not sufficiently recognised under them.

30. The appellant claims that he has family life with his two brothers which will be infringed if he is removed from this country. I therefore have to consider the appellant's and his brother's rights under Article 8.

31. In **Kugathas v SSHD [2003] EWCA Civ 31**, a case which concerned an adult's relationship with his mother and adult siblings, the Court of Appeal thought that the following passage in **S v United Kingdom [1984] 40 DR 196** was still relevant:

> "… generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults … would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

32. However, the Court of Appeal considered that the further element of dependency did not have to be economic. Accordingly, in the case of the "other relationships" referred to, it will be necessary to show that ties of support, either emotional or economic, are in existence and go beyond the ordinary and natural ties of affection that would accompany a relationship of that kind.

33. The appellant said at the hearing that he can live independently of his brothers if he is allowed to work. Asked whether this is equally true of living anywhere in the world, the appellant answered in the affirmative. This demonstrates to me that the appellant is an adult independent man who can look after himself and his reliance on his brother is because he does not have permission to work. The appellant worked at Crossrail when he was given permission to work by the respondent and at that time did not rely on his brothers.

34. The appellant claims that his relationship with his brothers is very close and that he wants to continue to live with them. I find there is no credible evidence before me that the relationships between the brothers is such that it amounts to ties of support, either emotional or economic, which go beyond the ordinary and natural ties of affection that would accompany a relationship between brothers. I find that the respondent's decision will not interfere with the appellant and his brothers Article 8 rights.

35. I take into account that the appellant has been in this country since 2003 which would make it nearly 10 years. The appellant does not meet the requirements of the Immigration Rules which requires residence of 20 years. The appellant also does not meet the requirements of the 2006 EEA Regulations.

36. It is suggested by Miss Record that the special circumstances which are not covered by the Immigration Rules is that the appellant's marriage broke down because his wife had breast cancer. She submitted that the wife has had her breasts removed. She also said that if the appellant had made an application when his wife was exercising treaty rights in the United Kingdom which was up to 2011, he would have succeeded. I frankly have some difficulty in understanding this argument. The appellant made eight applications for leave to remain in this country which have all been refused by the respondent.

37. I find there are no compelling or special circumstances in the appellant's case that he should succeed pursuant to Article 8 when he cannot succeed pursuant to the Immigration Rules and the 2006 Regulations.

38. I take into account the respondent's statutory interest in a fair and transparent immigration control. The appellant has continued to live in this country even when all his applications have been refused and his

immigration status has always been precarious. I find that the appellant refuses to comply with any decision which is adverse to him and after so many adverse decisions he has refused to leave the country.

39. Miss Record's submission that the respondent did not remove the appellant for six years and this somehow benefits the appellant's application, is disingenuous. The burden is on the appellant to leave the country when his applications have been refused and after his appeals have been refused. The appellant did not accept any adverse decisions and continued to live in this country making applications for leave to remain.

40. I find in this case that the respondent's interests must trump this persistent appellant's interests.

Dated this 25th day of May 2015

Signed by

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Mrs S Chana
A Deputy Judge of the Upper Tribunal Chana