IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/45559/2014
IA/45566/2014
IA/45571/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2015	**On 6th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

PAE (FIRST APPELLANT)
CDE (SECOND APPELLANT)
CME (THIRD APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss C Querton of Counsel instructed by Curling Moore Solicitors
For the Respondent: Mrs S Sreeraman, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against a decision of Judge Jackson of the First-tier Tribunal (the FTT) promulgated following a hearing on 18th May 2015.

2. The Appellants are Nigerian citizens, the First Appellant being the mother of the Second and Third Appellants who were both born in May 2008 and are therefore minors.

3. The Appellants appealed against decisions made by the Respondent dated 10th November 2014 to revoke their existing EEA residence cards, and to refuse their applications to be issued new EEA residence cards as family members with a retained right of residence pursuant to regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations).

4. The Appellants had previously been issued with EEA residence cards on the basis that they were family members of an EEA national exercising treaty rights. The First Appellant had married an EEA national on 9th June 2010. At the time of the marriage the EEA national was working, but in November 2011 commenced studies and he was a student, completing his studies in June 2014, and his certificates were awarded in July 2014.

5. The First Appellant filed for divorce on 5th December 2013. The decree nisi was made on 14th May 2014 and the decree absolute on 2nd July 2014.

6. The applications were refused on 10th November 2014, and the subsequent appeals were heard by the FTT on 18th May 2015.

7. The FTT gave three reasons for dismissing the appeals with reference to the 2006 regulations.

8. Firstly the FTT considered whether regulation 4(1)(d)(i) was satisfied and whether the First Appellant's former spouse was a qualified person by reason of being a student. The FTT decided that the relevant date for consideration, was the date of divorce which was 2nd July 2014. The FTT decided that the EEA national was no longer a student at that date, because his course had been completed on 19th June 2014, and although his certificates were not issued until 9th July 2014, after the date of divorce, the EEA national was not a student at that time, and therefore did not satisfy regulation 4(1)(d)(i).

9. Secondly the FTT decided that regulation 4(1)(d)(ii) was not satisfied because it had not been proved that the EEA national had comprehensive sickness insurance cover in the United Kingdom.

10. Thirdly regulation 4(1)(d)(iii) was not satisfied as it had not been proved that sufficient resources were available at the date of divorce on 2nd July 2014 to prove that the Appellants had sufficient financial resources.

11. The FTT therefore dismissed the appeals under the 2006 regulations, but decided, in relation to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) that it was appropriate to remit the case back to the Respondent to consider the best interests of the Second and Third Appellants pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

12. The Appellants applied for permission to appeal to the Upper Tribunal, contending that the FTT had erred in its consideration of the 2006 regulations. Permission to appeal was granted.

13. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT had erred in law such that the decision should be set aside.

The Appellants' Submissions

14. Miss Querton relied upon her written skeleton argument and the case law referred to therein.

15. In brief summary it was contended that the FTT had erred in considering whether the First Appellant's former spouse was a qualified person pursuant to the 2006 regulations at the date of divorce. Reliance was placed upon Singh and Others [2015] EUECJ C-218/14 which confirmed that the relevant date to be considered when deciding whether individuals have retained the right of residence is the date of commencement of divorce proceedings rather than the date of the decree absolute.

16. Therefore it needed to be proved that the First Appellant's former spouse was a qualified person on 5th December 2013 which is when the divorce proceedings were initiated, rather than 2nd July 2014 when the decree absolute was pronounced. The evidence before the FTT indicated that the First Appellant's former spouse was a student in December 2013 as his course had not finished, and therefore he satisfied regulation 4(1)(d)(i).

17. In relation to the issue of health insurance, it was contended that the FTT conclusion that the EEA national did not have comprehensive sickness insurance was against the weight of evidence. Again, the FTT had considered the wrong date, having considered 2nd July 2014 rather than 5th December 2013. It was submitted that the FTT had been unduly influenced by the fact that EEA national had taken out a new insurance policy on 9th July 2014, but this did not mean that comprehensive sickness insurance cover was not in force in December 2013.

18. Thirdly it was contended that the FTT had erred in law when considering sufficiency of resources and had failed to take into account extensive documentary evidence, and had again considered the position at 2nd July 2014, rather than 5th December 2013.

The Respondent's Submissions

19. Mrs Sreeraman accepted that Singh was authority to confirm that the relevant date to be considered in a case such as this, was the commencement of divorce proceedings rather than the conclusion.

20. Mrs Sreeaman's position was that Singh may be relevant in relation to Grounds 1 and 3 relied upon by the Appellants, but notwithstanding that decision, the FTT had not erred in law in finding that the First Appellant's former spouse did not have comprehensive sickness insurance cover, and adequate reasons for reaching that conclusion had been given. As there was no error of law on this point, any other errors were immaterial, as the appeals could not succeed because regulation 4(1)(d)(ii) was not satisfied.

21. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

22. The FTT cannot be blamed for taking as a relevant date for consideration, the date of termination of marriage. Singh was published after the FTT decision was promulgated.

23. As conceded on behalf of the Respondent, I find that Singh is authority to confirm that the relevant date to be considered is the date when divorce proceedings are commenced. In this case, that means the relevant date is 5th December 2013 rather than 2nd July 2014.

24. I therefore conclude that the FTT erred in considering whether the First Appellant's former spouse was a student as at 2nd July 2014, and should have considered whether he was a student at 5th December 2013.

25. I also find that the FTT erred in law in considering sufficiency of resources at the time of the decree absolute instead of when the divorce proceedings were commenced. The FTT based its decision (paragraph 30) on the fact that "only payslips are available which cover the month of the divorce and it is not clear from these alone that the family had sufficient resources as at 2nd July 2014."

26. However I conclude that the above errors are not material because the FTT did not err in considering the issue of comprehensive sickness insurance cover, and did not err in finding that regulation 4(1)(d)(ii) was not satisfied.

27. The FTT considered the evidence on this issue in paragraph 19 noting the First Appellant's evidence that her former husband had a card which he used "when he was sick which looked like a credit card and had his name on it." The FTT noted that the First Appellant had not really seen this card, and her former spouse had refused to give her the card or a copy of it.

28. The FTT noted that the First Appellant's former spouse took out a separate health insurance policy from 9th July 2014, but this did not cover the required period.

29. The FTT found the First Appellant to be a credible witness, but notwithstanding that finding, concluded that there was no evidence of her former spouse having comprehensive health insurance at the date of divorce.

30. According to Singh, the FTT erred in considering the date of divorce and should have considered 5th December 2013 when divorce proceedings were instituted. However this is not a material error, as the evidence considered by the FTT in relation to comprehensive sickness insurance, covered December 2013 as well as July 2014. There was insufficient evidence to prove that the First Appellant's former spouse had ever held comprehensive sickness insurance cover while he was a student.

31. The FTT noted that there was no evidence that the First Appellant had ever seen evidence of comprehensive sickness insurance cover held by her former spouse, who was not registered with the NHS, and there was no evidence of the dates of validity of any European health insurance card.

32. I find that the conclusion of the FTT in paragraph 29 that it had not been proved on a balance of probabilities that the First Appellant's former spouse had comprehensive sickness insurance, is a finding based on the evidence produced before the FTT, and is a sustainable finding, and that adequate reasons for that finding have been given.

33. Therefore these appeals cannot succeed with reference to the 2006 regulations.

34. There was no application to appeal the decision of the FTTto 'remit' the decision back to the Respondent for consideration of the best interests of the Second and Third Appellant. So far as I am aware, there is no power in law to remit back to the Respondent. If a decision is not in accordance with the law, the FTT could make a declaration to that effect, and the case would then remain outstanding before the Respondent for a lawful decision to be made.

35. In this case the FTT was wrong in law to purport to remit the case back to the FTT for consideration of the best interests of the children pursuant to Article 8 because no removal decision had been made. The position on this point was not clear when the FTT made its decision, but has since been clarified in Amirteymour [2015] UKUT 00466 (IAC) which confirms that where no notice under section 120 of the Nationality, Immigration and Asylum Act 2002 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. The decision in Amirteymour has been approved by the Court of Appeal in TY (Sri Lanka) [2015] EWCA Civ 1233.

36. Miss Querton in fact confirmed that following the FTT decision, the Respondent had issued a new reasons for refusal letter dated 11th December 2015 declining to consider section 55 of the Borders, Citizenship and Immigration Act 2009 as no decision had been taken to remove the minor Appellants from the UK.

Notice of Decision

Although the FTT decision discloses errors of law, they are not material, and do not mean that the decision of the FTT must be set aside.

I do not set aside the FTT decision, and the appeals are dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity direction was made by the FTT. I make an anonymity order of my own volition pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 because the Second and Third Appellants are minors.

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 18th December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed. There is no fee award.

Signed Date 18th December 2015

Deputy Upper Tribunal Judge M A Hall