



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

**Appeal Number: IA/02339/2015**

**THE IMMIGRATION ACTS**

**Heard at Glasgow**

**Decision and Reasons**

**On 24<sup>th</sup> November 2015**

**Promulgated**

**On 8<sup>th</sup> December 2015**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**OZIOMA ERIUGO**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr C Jones, Advocate, instructed by Haque & Hausmann, Solicitors,  
Newcastle

For the Respondent: Mrs S Saddiq, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant applied on 15<sup>th</sup> September 2014 for a residence card under the Immigration (EEA) Regulations 2006. Her application was based on a retained right of residence following her divorce from an EEA national.
2. The respondent refused her application for reasons explained in a decision dated 23<sup>rd</sup> and served on 29<sup>th</sup> December 2014. The respondent said that the appellant required to provide evidence that her EEA national former spouse had been exercising free movement rights at the date of the divorce, which was 27<sup>th</sup> January 2014, and continued:

“You have provided no evidence as to whether the EEA national was exercising treaty rights in the UK at the date of divorce and we have conducted further checks and this shows that from 2013 [actual date unspecified] until present your [former spouse] has been claiming benefits and therefore does not qualify.”

3. The respondent went on to say that there was also insufficient evidence that the appellant herself had been a worker or otherwise qualified in terms of the Regulations.
4. The appellant appealed to the First-tier Tribunal. In her grounds, she said she had submitted evidence that her former spouse had been a worker from 2008 to 2012 and from 2013 (actual date again unspecified) had been on jobseeker's benefit. She referred to evidence submitted of her own employment. In additional grounds, she said that she believed she had a basis of stay in the UK because she had "a child with my ex-husband, who is 6 years of age an EEA national with Slovakian citizenship". She had custody of the child. She mentioned that she also has another daughter, age 9, who had been in the UK since birth.
5. First-tier Tribunal Judge McGrade dismissed the appellant's appeal by a determination promulgated on 20<sup>th</sup> May 2015. At paragraph 8 he held that as the former spouse had been "in receipt of benefits for some time prior to the date of divorce" the appellant could not meet the terms of Regulation 10(5). He did not deal with the question whether the appellant had any basis of stay in the UK in respect of her Slovakian national child. That point was raised, although not focussed in terms of the Regulations, in the additional grounds. He went on to dismiss the appeal under Article 8 of the ECHR.
6. The appellant was not represented at the First-tier Tribunal hearing. She subsequently instructed solicitors who submitted an application for permission to appeal to the Upper Tribunal, on three grounds:
  1. Definition of a 'qualified person' in Regulation 6(1) includes (a) a jobseeker. The judge failed to apply that provision.
  2. The judge failed to consider that the appellant is the primary carer of an EEA national child, under reference to *Zambrano case C/34/09*.
  3. The judge failed to consider Article 8 of the ECHR.
7. It is clear that the first ground discloses legal error. No doubt the judge was led into that error partly by the wording of the refusal letter, which is superficial and misleading, and partly by absence of the assistance he ought to have had from the presenting officer in the First-tier Tribunal. The respondent's decision and the determination are both insufficiently reasoned. The simple fact that the former spouse had been in receipt of benefits was not the end of the matter.
8. Mrs Saddiq sought to repair the damage to the respondent's case in this respect by reference to the length of time for which the former spouse had been in receipt of benefit prior to divorce, which appears to have been just over six months. That might have taken the remaking of the decision into another area, and Mrs Saddiq was ready to build an argument from *Yusuf* (EEA - ceasing to be a jobseeker) [2015] UKUT 00433 (IAC). However, it is not necessary to explore this aspect further, because the appellant was satisfied with the outcome which emerged on the basis of ground 2.

9. Although the appellant did not bring this issue into sharp focus in the First-tier Tribunal, it should have been picked up by the presenting officer and by the judge from the additional ground of appeal there.
10. The ground of appeal in the Upper Tribunal ought to have been directed not to *Zambrano* but to Regulation 15A, which in effect incorporates *Zambrano* into the Regulations. Only if the appellant could not meet the terms of the Regulations would it be apt to consider whether they fully respect *Zambrano* and the relevant provisions of EU law, including the Directive on free movement.
11. The evidence filed by the appellant included her own statement and bank statements of her former spouse dating up to 2014. That evidence shows that in terms of Regulation 15A (iii) the appellant's younger daughter (a) is the child of an EEA national; (b) resided in the UK at a time when the EEA national parent was residing in the UK as a worker; and (c) is in education in the UK and was in education there at a time when the EEA national parent was in the UK. The appellant accordingly shows entitlement to a derivative right of residence in terms of Regulation 15A.
12. I think the judge was correct to dismiss the appeal in respect of Article 8. There were no removal directions, and it was open to the appellant to apply on the basis of family life, if she thought she had such a case. However, as the appellant succeeds under the Regulations, the third ground is of no importance.
13. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal is **allowed** under reference to the terms of Regulation 15A(iii).
14. No anonymity order has been requested or made.



30 November 2015  
Upper Tribunal Judge Macleman