



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/29682/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Centre City Tower Decision & Reasons
Birmingham On 12th April 2016 Promulgated On 22nd April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**FELIX RALPH SEYMON
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mrs A Imamovic of Counsel, instructed by Peer & Co

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge V A Osborne of the First-tier Tribunal (the FTT) promulgated on 28th October 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant.
3. The Claimant is a male citizen of Gambia born 24th August 1985.
4. The Claimant married a Swedish citizen in the United Kingdom on 2nd July 2008, and was granted a residence card on 6th November 2009. The Claimant and his wife subsequently separated and divorce proceedings were commenced, and a decree absolute of divorce pronounced on 16th July 2014.
5. The Appellant on 30th May 2014 had submitted an application for permanent residence, which application was refused on 10th July 2014.
6. The Appellant applied to the FTT and a hearing took place on 8th October 2014. The FTT dismissed the appeal with reference to The Immigration (European Economic Area) Regulations 2006 (the 2006 regulations) but allowed the appeal pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) based upon the private life that the Claimant had developed in the United Kingdom.
7. The Secretary of State applied for permission to appeal to the Upper Tribunal contending, in summary, that the FTT had erred in allowing the appeal pursuant to Article 8. It was contended in particular, that the judge had erred in concluding that the Claimant's presence in the United Kingdom was not precarious, and the FTT should have accorded little weight to the Claimant's private life pursuant to section 117B(5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) on the basis that his private life had been established when his immigration status in the United Kingdom was precarious.
8. It was contended that the FTT had erred in considering Article 8, and should have taken into account and attached considerable weight to the fact that the Claimant could not satisfy the requirements of the 2006 regulations.
9. Permission to appeal was granted on 15th December 2014.

The Upper Tribunal Hearing

10. Mrs Imamovic conceded that the FTT had erred in law in allowing the appeal pursuant to Article 8, in the light of subsequent case law, Amirteymour and Others (EEA Appeals; human rights) [2015] UKUT 00466 (IAC) and TY (Sri Lanka) [2015] EWCA Civ 1233. It was accepted that the decision of the FTT in allowing the appeal pursuant to Article 8 could not stand and must be set aside. As there had been no challenge to the findings made by the FTT that the Claimant's appeal could not succeed pursuant to the 2006 regulations that meant that the Claimant's appeal must be dismissed.

11. In view of the concession made on behalf of the Claimant, I did not need to hear from Mr Mills, who supplied the Tribunal with copies of the case law referred to above.

My Conclusions and Reasons

12. The FTT materially erred in law in allowing the Claimant's appeal pursuant to Article 8 of the 1950 Convention. The law has subsequently been clarified, and I set out below the headnote to Amirteymour;

“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.”

13. In this case, the decision made by the Secretary of State was to refuse the application for permanent residence, and there was no removal decision made. No notice under section 120 of the 2002 Act was served. Therefore the FTT should not have considered Article 8.
14. The decision of the FTT must therefore be set aside but the findings made that the Claimant's appeal could not succeed pursuant to the 2006 regulations are preserved. These findings are contained in paragraphs 31-40 of the FTT decision. In very brief summary, the FTT dismissed the appeal under the 2006 regulations, finding that the Claimant had not proved that his former wife was, (paragraph 39) “at all relevant times, a qualified person within the meaning of the Regulations.”
15. I therefore re-make the decision by dismissing the Claimant's appeal.

Notice of Decision

The decision of the FTT contained an error of law and was set aside. I substitute a fresh decision. The Claimant's appeal is dismissed.

Anonymity

There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date 13th April 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 13th April 2016

Deputy Upper Tribunal Judge M A Hall