Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02735/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 5th of December 2017	**on 10th of January 2018**
Prepared on 15th of December 2017	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS DORIS OGUNBA
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

The Appellant appeared in person
For the Respondent: Mr Deller, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 25th of May 1978. The Respondent has appealed against a decision of Judge of the First-tier Tribunal Mailer sitting at Hatton Cross on 23rd of January 2017 in which the Judge allowed the appeal of the Appellant against a decision of the Respondent dated 4th of November 2015. That

decision was to refuse the Appellant's application for a permanent residence card pursuant to Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). For the reasons which I have set out below, see [16], I have set that decision aside and re-made the decision in this appeal. Although this matter came to me in the first place as an appeal by the Respondent, for the sake of convenience I will continue to refer to the parties as they were referred to below.

2. The Appellant entered the United Kingdom in or about 2007 and married her former husband, a citizen of France, on 2nd of January 2008. She applied for a residence card as a family member of an EEA national exercising treaty rights on 17th of December 2009 and this was granted in September 2010. On 5th of April 2013 she applied for permanent residence on the basis of retention of rights as by then she had divorced but this was refused by the Respondent. On 15th of February 2014 she again applied for permanent residence on the same basis, that she resided with her husband throughout their marriage until they divorced in December 2012 but had not seen him since late 2014/early 2015 when he was still working.

3. She made a further application for leave to remain in 2013 without legal assistance merely including a few documents in that application which was also rejected by the Respondent. She appealed that rejection and the matter came before the First-tier Tribunal on 11th of May 2015. The Appellant's appeal was dismissed, the Judge finding that the Appellant had "woefully failed" to provide any evidence which met the specific requirements of the 2006 Regulations. The Appellant did not attend at the hearing, her solicitors at the time having come off the record shortly before. She then instructed other solicitors to assist her with another application gathering some further documentation included in the application made on 19th of May 2015. It was the refusal of that application on 2nd of November 2015 which gave rise to these proceedings.

The 2006 Regulations

4. Regulation 10 of the 2006 Regulations provides that a family member such as a spouse will retain the right of residence if they cease to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage. They must have been residing in the United Kingdom in accordance with the Regulations at the date of the termination. Regulations 10 (5) contains further requirements such as the length of the marriage, the effect of domestic violence and custody of a child but for the purposes of this appeal the important sub paragraph is (a), that is whether the Appellant's ex-husband was a qualified person, exercising treaty rights on the termination of the marriage.

5. Regulation 15 provides that a family member of an EEA national who has resided in the United Kingdom with the EEA national in accordance with the 2006 Regulations for a continuous period of 5 years shall acquire the right to reside in the United Kingdom permanently. The burden of proof of establishing this rests upon

the Appellant and the standard of proof is the usual civil standard of balance of probabilities.

The Appellant's Case

6. The Appellant's case is that she is entitled to a grant of permanent residence because she had lived with an EEA national exercising treaty rights for more than 5 years. Her ex-husband had been exercising treaty rights as a worker throughout the duration of their marriage. He commenced employment in 2008 with Omega Travel and Emplex Limited. She herself had been working in the United Kingdom since 2007. As at the date of the hearing before the First-tier Tribunal she was still working although she informed me in oral evidence that she was now no longer working. She was the sole parent of a 12-year-old son who was born in the United Kingdom. He was in full-time education. The father of the child is not her ex-husband and the child's nationality is Nigerian. She informed the Judge at first instance that she had applied for her son to be naturalised as a British citizen. I was informed by the parties that that application had been granted by the Respondent in January 2017. I assume that if the Appellant's son was naturalised it was after 23rd of January when the hearing took place. It does not seem to have been brought to the Judge's attention before his decision was promulgated three weeks later.

The Decision at First Instance

7. At [41] of his determination the Judge stated that the issue on appeal was whether the Appellant had shown on the balance of probabilities that her ex-husband was exercising treaty rights as at the date of the final dissolution of their marriage in December 2012. The Appellant had produced a number of documents in support of her contention that her ex-husband was so working. These were 3 P60 certificates said to have been issued to her ex-husband between 2009 and 2012. In each case the employer was stated to be Empex Limited at the address set out in the certificate.

8. The Respondent queried how the Appellant had been able to obtain these P60s in time for the present appeal when she had not produced them in her previous applications and appeals. The Appellant's response was that she had discovered the P60s in her house although accepted in oral testimony that that meant the documents would have been there and thus discoverable at least as far back as 2012. She acknowledged that she had been advised by solicitors to find and collate all documents relating to her ex-husband's employment. She could not obtain further verification about her ex-husband's employment because the company he worked for was no longer trading.

9. During the course of the hearing the Appellant's counsel informed the Judge that the Appellant and her ex-husband had separated in or around June 2012 which was inconsistent with the Appellant's own evidence that she had separated from her husband prior to the dissolution of the marriage in December 2012. The significance of this contradiction was that not only was it now in issue whether the ex-husband

had been residing in the United Kingdom in accordance with the regulations but whether that had been going on for a continuous period of 5 years. If the marriage was in January 2008 and the parties separated in June 2012 the 5-year period could not be met by at least 6 months.

10. The Judge was concerned at [51] about the lack of detail given by the Appellant in her evidence about the work of her ex-husband. She had not sought to obtain any evidence from any fellow employees or friends. Crucially the 3 P60s had been examined by the Respondent and in effect found to be fake. The Judge put the matter thus: "Interdepartmental checks were conducted but there was no record found of an employment history for [the Appellant's ex-husband]. Accordingly there were serious doubts of the credibility of the P60 certificates in respect of her former spouse, evidencing his exercise of treaty rights in the UK". The Appellant had not dealt with any of those issues and the Appellant had given no details of her enquiries that had apparently established that Empex limited was no longer trading.

11. There was also no further evidence about the ex-husband's employment with Omega Travel (where he was said to have been employed as a travel consultant commencing on 2nd of February 2009). There were no documents from HMRC regarding this particular employment. At [60] the Judge concluded: "having regard to the evidence as a whole, I find that the Appellant has not shown on the balance of probabilities that her husband was employed as at the date of the finalisation of their divorce in December 2012". The next subheading in the determination was "notice of decision" but underneath that the Judge had written "the appeal is allowed under the 2006 Regulations. No anonymity direction is made. No fee award is made."

The Onward Appeal

12. The Respondent appealed against that decision on 21st of February 2017 arguing that the Judge had concluded in great detail that the Appellant's assertions about her ex-husband's status at the date of the divorce had not been supported by reliable documentary evidence. The Judge had not accepted the Appellant's claim that her ex-husband was exercising treaty rights in United Kingdom at the date of the divorce. That was the core issue relevant to the appeal against the decisions taken under Regulations 10 and 15 of the 2006 Regulations. The final decision to allow the appeal was plainly inconsistent with the findings which preceded it. The decision must have been a typographical mistake and as such the First-tier Tribunal was invited to correct the obvious slip or to review the decision under Rule 35 and set it aside.

13. The power of review arises under Rule 34 because on receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with Rule 35. In fact, the Tribunal took neither course suggested by the Respondent. Instead of a review the application was treated as an

application for permission to appeal and came on the papers before First-tier Tribunal Judge Robertson on 19th of September 2017. Not surprisingly she found it arguable that the Judge's findings did not suggest that the criteria had been met for the grant of a permanent residence card and that Judge Mailer had erred in stating that the appeal was allowed. Permission to appeal was granted on the basis of the Upper Tribunal authority of **Katsonga [2016] UKUT 228**. I pause to note here that the head note of that case insofar as it is relevant states: "The 'Slip Rule', Rule 31 of the First-tier Tribunal Procedure Rules, cannot be used to reverse the effect of a decision." The case appears to leave open when it is appropriate for the First-tier Tribunal to exercise its powers under Rule 35.

The Error of Law Hearing

14. There was no Rule 24 response to the grant of permission from the Appellant who appeared before me in person. She explained that she had been unable to afford to pay for legal representation but was content for the case to proceed without a representative present. I asked the Appellant a number of questions to assist her with the presentation of her case.

15. I explained to the Appellant the difficulty in the case which was that it was clear from the tenor of the Judge's determination that he intended to dismiss the appeal because he was not satisfied on the core issue of the claim which was that the Appellant was unable to satisfy him on the balance of probabilities that her ex-husband was working at the date of the divorce. It was not possible to read the determination in any other way than that the Judge had made a clerical error in allowing the appeal under the subheading "notice of decision". The Judge made no fee order (£140 was paid on appeal), if he had meant to allow the appeal it is reasonable to expect the Judge to give a brief explanation why he was still not making an order having allowed the appeal. That he did not do so strongly suggests he did not intend to allow the appeal.

16. The Presenting Officer commented that following the decision of **Katsona** the Judge granting permission to appeal was correct to observe that it was not possible to correct the determination under the so-called slip Rule, Rule 31 if such a correction had the effect of altering the final decision. The First-tier Tribunal Judge granting permission had had no alternative but to grant permission to appeal to the Respondent and for the matter to come before the Upper Tribunal. I indicated to the parties that there was a clear material error of law in allowing the appeal when the reasoning of the body of the determination clearly pointed to a dismissal of the appeal. I set aside the decision at first instance and after further discussion indicated to the parties that in the light of the Judge's findings which were full this was not an appropriate case to remit back to the First-tier to be reheard but that I would proceed to rehear the appeal.

The Rehearing

17. The Appellant confirmed that she was no longer working because of the visa difficulties she now had as a result of the expiry of her residence card. She had been working consistently in this country for the last 10 years, had paid tax and had a family life here which would be disrupted by requiring her to return to Nigeria. She had no further contact with her ex-husband or with the father of her child. When she was asked about the last time she had seen her ex-husband she had not answered the question properly, the Judge had asked her to give a year but the truth was she had not seen her ex-husband in 2014. I asked the Appellant to explain what her case was on the P60s as the Judge had been clearly influenced by the Respondent's submission that the credibility of the P60s was seriously questioned. The Appellant reiterated what she had told Judge Mailer that she had made a search at her property and had found the P60s. She found the P60s in a bag in storage outside the house. She could have produced five of them. Empex Ltd was no longer in existence.

18. The Presenting Officer submitted that as no removal directions had been made in this case and no section 120 notice had been served, the Appellant could not bring an Article 8 claim. The matter was solely to be determined on the basis of the 2006 Regulations. If the decision was set aside it was unlikely that the Tribunal would be assisted by further evidence, the swiftest method of resolving the case might be to hear it now under *Zambrano* principles. Alternatively, it was open to the Appellant to make a further application now that her son was naturalised as a UK citizen. The Appellant responded to this stating that whilst she appreciated that she could make a further application for leave to remain under Article 8 in relation to her family life, she did not wish to do this because she would have to pay a fee to the Respondent for such an application. She did not have the necessary funds at the present time to pay for that application (although an EEA application would not attract a fee). Her appeal should be allowed now.

Findings

19. At first instance, this was an appeal under the 2006 Regulations. If the Appellant's son had been naturalised as a United Kingdom citizen before the hearing she might have been able to argue that following the decision of the Court of Justice of the European Union in **Zambrano** she should remain in this country as the family member of an EEA citizen. The argument potentially would be that the EEA citizen, her son, would be forced to leave the European Union if she were to leave there being no other carer available. She could also make a fresh application under the Immigration Rules as her son is a qualifying child. The Appellant could make an application under Appendix FM of the Rules and/or Article 8 outside the Rules but in either event that could not be brought in the course of this appeal since it is an EEA appeal, see the Court of Appeal authority of **Amirteymour**.

20. The EEA issue in this case was whether the Appellant could show that her ex-husband was exercising treaty rights at the date of the divorce. She produced no further documentary evidence to me in support of her case. Judge Mailer had set out in his determination the types of further evidence which she could have produced, assuming they existed. I appreciate that the Appellant is unrepresented but she had been given advice by previous solicitors along broadly similar lines to the indication given by Judge Mailer of the type of further evidence she needed to produce. Whether or not she was legally represented would not of itself affect the existence of further evidence. As a result, the question marks over the documentation the Appellant produced remain and the Appellant cannot show on the basis of that documentation that her ex-husband was working. The divorce was shortly before the expiry of the 5-year period required by Regulation 15. The inability of the Appellant to produce supporting evidence when it was reasonable to have expected that supporting evidence to be available means that I too find that the Appellant could not show her ex-husband was working at the relevant time. This is compounded by the fact that the evidence she produced was highly questionable.

21. I have some sympathy for the Appellant's predicament that the cost of an application for leave to remain under the Immigration Rules, on the basis that her son is a British citizen might involve her in further expenditure. That however is not a good reason to allow her appeal outright at this stage. I do not accept that I can remit this appeal back to the First-tier Tribunal on the basis that Article 8 would then become arguable. There would have to be a further decision by the Respondent before the Appellant could argue Article 8 in what remains an EEA appeal. For a further decision to be taken, the Appellant would have to lodge a notice of application paying the appropriate fee. This is the procedure laid down by Parliament and does not of itself represent a breach of the European Convention on Human Rights.

22. The situation has changed since Judge Mailer allowed the appeal (when, I find, he meant to dismiss it). The Appellant now has a British citizen child but there is little evidence of the involvement of the child's father in the child's upbringing. This is important to ascertain in the light of a possible *Zambrano* argument (see [19] above). The evidence strongly suggests that the Appellant cannot meet the requirements of the 2006 Regulations in relation to her ex-husband and that the correct course of action in this case is to dismiss her appeal.

23. The Appellant can then make such further applications as she sees fit. I do not consider it appropriate to decide the case on a basis not before Judge Mailer, that is on a potential *Zambrano* argument, since that is to make the Upper Tribunal a primary fact finder. Nor do I consider it appropriate to remit the case back to the First-tier for an issue to be decided that has not been previously raised in these proceedings or considered by the Respondent. There is no fee for making an EEA application (which addresses one of the concerns the Appellant has) and the Appellant could make the appropriate application now for leave to remain on the basis that she is the carer of an EEA citizen child. She would have to provide

supporting evidence of her argument (for example of the non-involvement of the father) which could then be properly looked at by the Respondent and if appropriate granted. I therefore dismiss the Appellant's appeal against the Respondent's decision to refuse to issue her with a permanent residence card. I make no anonymity order as none was made at first instance.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant a permanent residence card.

Appellant's appeal dismissed

Signed this 15th of December 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 15th of December 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge