



IAC-HX-MH/11-V1

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

Appeal Number: IA/09280/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20 May 2015**

**Decision & Reasons Promulgated
On 14 September 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**MS GRACE KWARTENG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hoshi

For the Respondent: Mr Tarlow

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born in 1970. She appealed against the decision of the Secretary of State made on 30 January 2014 to refuse a residence card as the former spouse of an EEA national under Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006.
2. The history is that on 26 October 2009 the Appellant was issued with a residence card as a confirmation of a right to reside in the UK valid until 29 July 2014.

3. On 15 August 2013 she made application for a residence card on the basis that she had retained a right of residence following divorce from an EEA national. This was refused on the basis that the Appellant, who it was accepted was divorced, had failed to provide evidence that her EEA national sponsor was exercising treaty rights at the point of divorce. Her existing card was revoked.
4. She appealed.
5. Following a hearing at Hatton Cross on 30 September 2014 Judge of the First-tier M A Khan dismissed the appeal under the EEA Regulations and on Article 8 ECHR grounds.
6. In his decision the judge (at paragraph [6]) noted that Counsel for the Appellant had made an application at the hearing for an adjournment and that the judge should make directions requiring the Respondent to make enquiries concerning the Appellant's ex-husband's treaty rights status in the UK. The Appellant had raised issues of domestic violence in her divorce statement and that was the basis of the divorce. The family court accepted the Appellant's statement in her petition for divorce.
7. The adjournment application was opposed by the Presenting Officer.
8. The judge refused the application because the Appellant had not raised domestic violence as the basis of her application under the EEA Regulations.
9. In his conclusions (at [29]ff) as to the merits of the case the judge having heard evidence from the Appellant and the father of her young child, Mr Eric Blair, found them both to be '*vague and evasive*' witnesses particularly in relation to how often Mr Blair saw their child and his involvement in the child's life. The judge found that Mr Blair had only seen the child twice.
10. The judge also found that the Appellant had met her ex-husband a few weeks before. The meeting had been brief but cordial. The Appellant had not asked him what he was doing or about his immigration status. There had been opportunity for her to raise these matters with him. Noting the onus was on her to establish that her ex-husband had been exercising treaty rights at the time of the grant of the divorce, the judge concluded that she had not done so.
11. The judge went on to consider the claim that the Appellant was the victim of domestic violence. He noted that she produced her petition which states that the marriage had broken down as a result of her husband's behaviour, and that the proceedings were uncontested. The judge also noted, however, that the Appellant did not mention domestic violence in her application to the Respondent and that her representatives only raised the issue with the Respondent in February 2014 after the refusal. Also,

that there was no police, medical report or any form of court order against her ex-husband.

12. On the evidence the judge did not accept that the Appellant was a victim of domestic violence as claimed, adding that, as such, there was no obligation on the Respondent to provide information with regard to the Appellant's ex-husband.
13. He concluded that on the evidence before him the Appellant failed to meet the requirements of Regulation 10(5).
14. Moving on to consider Article 8 the judge did so in brief (at [37]). He noted that the child is a British citizen and that his father Mr Blair is settled in the UK and '*has some contact with the child*'. The child '*has some one to care for him in the UK, if they choose to remain in the UK*'.
15. The judge went on: '*The child is only 21 months and is young enough to accompany his mother to Ghana. Mr Blair is a Ghanaian citizen. He has a very large family in Ghana. They can return to Ghana if they so wish. The child obtained his British citizenship through Mr Blair's settlement*'. The judge considered that the Appellant can '*return to Ghana with the child or if she choose the child to be brought up in the UK, Mr Blair is present to take over the responsibility. The Appellant's family/private life can continue in Ghana*'.
16. The Appellant sought permission to appeal. This was refused on 10 December 2014 but was granted on reapplication to the Upper Tribunal in a decision made on 31 March 2015.
17. At the error of law hearing before me Mr Hoshi sought to rely on the renewed grounds. He made two points. First, the judge had erred in refusing the application for an adjournment. Domestic violence had been raised in the divorce petition. Even if such had not been reported to the police and there was no medical evidence, it would have been fair for the adjournment to have been granted and the directions made. It would not have been onerous for the Respondent to have made the checks about the ex-husband's treaty status. It was accepted that no mention had been made of domestic violence when she made the application but she had been unrepresented at that time.
18. The second point was the judge's treatment of Article 8. It was inadequate, failing to show proper analysis. The best interests of the child had not been considered, nor had the s.117 issues. His conclusion that the child could live with his father was irrational in light of his finding that he had met the child only twice.
19. In brief reply Mr Tarlow submitted that the judge had been correct for the reasons he gave to refuse the adjournment application. There was no unfairness.
20. Mr Tarlow agreed that the judge's analysis under Article 8 was inadequate.

21. I raised the issue of whether, even though it was accepted that the judge's consideration of Article 8 was legally flawed, such was material as no removal decision had been made. Mr Hoshi submitted that it was material. Reference in that regard had been made to the First-tier judge to **Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089** which gave support to the claim that Article 8 is potentially engaged in such circumstances.
22. I reserved my decision.
23. In considering this matter I look first at the decision of the judge to refuse an adjournment and make directions for the Respondent to enquire about the Appellant's ex-husband's treaty status, she being unable to do so as, she claimed, she had been the victim of domestic violence by him.
24. In **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** it was indicated that the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?
25. It may well be, as the judge appeared to accept, that the Appellant raised domestic violence in her uncontested divorce petition. However, as he also noted, domestic violence was not raised as the basis of her EEA application to the Respondent in August 2013 (when she was represented). Nor was there any police or medical evidence or any court order against her ex-husband. Nor was it raised in the Grounds of Appeal. I note, indeed, that in her application (at 4.7) she answered 'No' to the question 'Were you...a victim of domestic violence or other difficult circumstances during the marriage...?' The first it appears to have been raised before the Tribunal was in the Appellant's statement lodged for the hearing. In these circumstances and noting that the adjournment application was only made at the hearing, I consider that the judge, for the reasons he gave was correct to refuse the application. I do not see there to have been any deprivation of the Appellant to a right to a fair hearing.
26. The other issue is Article 8. There was no dispute between Mr Tarlow and Mr Hoshi that the judge's treatment of Article 8 had been inadequate in law. I agree. The judge's analysis amounts, in effect, to one brief paragraph.
27. It suffices to say that the judge amongst other points, failed to treat the Appellant's young British citizen child's best interests as a primary consideration. Further, it was irrational for the judge to find that the child could stay in the UK with his father, Mr Blair, having earlier found that he had only seen his father twice. In addition, the judge failed to apply the mandatory statutory considerations in s.117B of the Nationality, Immigration and Asylum Act 2002, in particular s.117B(6).
28. These failings indicate that the judge erred in law. The remaining issue is whether such errors are material.

29. I conclude that they are not. In that regard I note the decision of the Presidential Panel in **Amirteymour and Others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)** where it concluded: *'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'*. (Headnote)
30. In this case there was no s.120 notice and no decision to remove. Indeed the decision to refuse to issue a residence card states *'... a separate decision may be made at a later date to enforce your removal from the United Kingdom. Any such decision and associated appeal rights will be notified separately'*.
31. In summary, no challenge is made to the judge's conclusion that the Appellant does not satisfy Regulation 10(5) of the EEA Regulations. There was no procedural unfairness. Whilst the judge erred in law in his analysis of Article 8 such was not a material error.

Decision

The decision of the First-tier Tribunal shows no material error of law and that decision dismissing the appeal shall stand.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Conway