IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24247/2013

THE IMMIGRATION ACTS

Heard at Belfast	**Determination Promulgated**
On 12 June 2015	**On 20 October 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SANSAO DUMANGANE JUNIOR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K. Linkin, Solicitor, MSM Law Solicitors
For the Respondent: Mr M Diwnyez, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before the Upper Tribunal following a grant of permission in respect of a decision of the First-tier Tribunal whereby the appellant's appeal against a decision to refuse to issue a permanent residence card was dismissed by First-tier Tribunal Judge P.A. Grant-Hutchinson after a hearing on 23 June 2014.

2. The respondent's decision was to the effect that the appellant had not established that his wife, an Irish citizen, had been exercising Treaty rights for a continuous period of five years.

3. It is recorded at [5] of the determination that at the outset of the hearing before Judge Grant-Hutchinson the appellant confirmed that his wife had not been exercising Treaty rights for a continuous period of five years. In the same paragraph the judge concluded that as the hearing progressed it was apparent that the appellant was correct to make that concession. He then stated that the appeal proceeded on the footing that he was required to consider Article 8 of the ECHR in terms of the respondent's refusal to grant a residence card.

4. The evidence before the First-tier Tribunal was that the appellant's wife has not been able to find employment, despite having tried hard to do so. She had been in receipt of Jobseekers' Allowance for a period but latterly had been caring for her elderly mother. Judge Grant-Hutchinson concluded at [12] that the sponsor had neither been employed nor seeking employment such as to allow the appeal to succeed under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

5. Although it was concluded that the appellant does have private and family life in the UK, it was found that there would be no interference with that private and family life. No removal notice had been served and the appellant had not been advised that there was any intention to remove him.

The grounds of appeal and submissions

6. The grounds of appeal before me essentially concern the conclusion that the respondent's decision would involve an interference with the appellant's Article 8 rights, relying on *JM (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1402 and *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* [2013] UKUT 00089 (IAC). The grounds also make reference to the terms of the respondent's decision, which amongst other things states that he has no alternative basis of stay in the UK, should make arrangements to leave and that if he did not do so a decision may be made at a later date to enforce his removal.

7. At the start of the hearing Mr Diwnyez indicated that the concession at [3] of the 'rule 24' response, to the effect that it was conceded that the First-tier judge had erred in law in failing to consider Article 8, was erroneous. Ms Linkin indicated at that stage that she had no submissions to make in terms of the withdrawal of that concession. I allowed that concession to be withdrawn, there being no submissions to the contrary, and taking into account that it was a concession as to law rather than fact.

8. Before me the parties were aware that a reported decision of the Upper Tribunal, dealing with the interrelationship between refusal of a residence card and Article 8, was awaited, although I was told that Ms Linkin's instructions were that the appellant wanted the appeal to proceed nevertheless.

9. In submissions on behalf of the appellant the grounds of appeal summarised above were relied on. It was accepted that a residence card confers no substantive rights but it was clear that the refusal of the residence card in this case indicated that the appellant had no basis of stay and was liable to be removed. In that case the appellant would not have his Article 8 case heard.

10. It was submitted that there was clearly an arguable case under Article 8 in terms, for example, of employment, the appellant's voluntary work, and the six children of the sponsor. The evidence of the sponsor was that she was not able to support herself in Mozambique, and could not save to visit her children and grandchildren there.

11. As regards the respondent's rule 24 response, it was submitted that it was in error in suggesting that the appellant needed to establish "very compelling circumstances" in order to succeed under Article 8. Without having his Article 8 case considered the appellant would be forced to stay in the UK unlawfully, which was a matter considered in *JM (Liberia).* I was also referred to the decision in *Ahmed*, which itself relied on the decision in *JM (Liberia)*. The further appeal from *Ahmed* to the Court of Appeal, cited as *NA (Pakistan) V Secretary of State for the Home Department* [2014] EWCA Civ 995, did not involve any challenge to the Article 8 point.

12. Mr Diwnyez submitted that the decision notice in this case indicated only that the Secretary of State has the power to make a removal decision, not that there is any intention to remove.

13. In the light of the fact that a reported decision of the Upper Tribunal was awaited in relation to the Article 8 point, I indicated to the parties that if that case was reported before my determination of this appeal, I would allow the parties to make further submissions in the light of it. Although I also indicated that I may decide to determine this appeal without waiting for the reported decision of the Upper Tribunal. In the event I delayed determining the appeal pending that decision.

14. Subsequent to the hearing, the decision in *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC) was promulgated. In directions I invited the parties to make any further submissions they wished to make in the light of that decision. I received submissions on behalf of the appellant only, on 7 October 2015.

15. The appellant's further submissions contend that the decision in *Amirteymour* does not prevent the appellant succeeding in his appeal (on Article 8 grounds). It is argued that the decision is wrongly decided, not being in accordance with EU principles in terms of free movement rights. The decisions in *Ahmed* and *NA (Pakistan)* are again relied on, as well as a case referred to as "*Levin" (*not cited but believed to be the case of *D.M. Levin v Staatssecretaris van Justitie* [1982] EUECJ R-53/81), and *Carpenter* [2002] EUECJ C-60/00.

16. However, the Tribunal in *Amirteymour* was plainly aware of the free movement issues inherent in its decision, and the basis of the decision in *NA (Pakistan).* Although I am not bound by the decision in *Amirteymour*, I find the reasoning in it compelling. It is not suggested that in the case of the appeal before me any s.120 notice was served on the appellant. In principle therefore, the issue in this appeal is the same as that considered in *Amirteymour*. I adopt the Tribunal's reasoning in that case.

17. In consequence, I am not satisfied that the decision of the respondent involves any question of an interference with the appellant's human rights in terms of Article 8 of the ECHR. In this the First-tier Tribunal was correct. Accordingly, there is no error of law in the decision of the First-tier Tribunal.

Decision

18. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 15/10/15