



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: EA/06956/2018 (V)

**THE IMMIGRATION ACTS**

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 4 November 2020

On 9 November 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YZ

(ANONYMITY ORDER MADE)

Respondent

For the appellant: Mr C Bates, Senior Presenting Officer

For the Respondent: Mr K Joshi of Joshi Advocates Ltd

**DECISION AND REASONS (P)**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I made the decision set out below and explained in brief terms the rationale

of my decision but reserved my full reasons, which I now give. The order made is described at the end of these reasons.

1. For the purposes of this decision, the parties will be referred to below as they were before the First-tier Tribunal.
2. The appellant is an Algerian national with date of birth given as 29.4.83.
3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 29.8.19, allowing the appellant's appeal against the respondent's decision, dated 15.10.18, to refuse his application made on 20.8.18 for an EEA Permanent Residence Card as the sponsoring spouse of an EEA national purportedly exercising Treaty rights in the UK, pursuant to the Immigration (EEA) Regulations 2016, as amended (the Regulations).
4. The application was refused because the respondent was not satisfied that the appellant's spouse was exercising Treaty rights in the UK.
5. The relevant background is that the appellant first entered the UK in September 2009 on a visit visa. In March 2012 he married his sponsoring spouse, KR, a French National, and was granted an EEA Residence Card, valid for 5 years. Their child, Z, was born in February 2013 and is now 7 years of age. The child is also a French national.
6. The appellant and KR subsequently separated but they are not divorced. In consequence of a Child Arrangement Order made in August 2018, disclosed with the permission of the Family Court, the sponsor has permission to remove their child from the jurisdiction permanently but there is to be extensive contact between the child and the appellant, including staying with the father in the UK during school holidays and for the father to have direct contact for overnight stays in Germany, subject to immigration status permitting him to travel to Germany.
7. In the refusal decision, the respondent accepted that there was some evidence that the sponsor was employed in the UK in 2012 and as a self-employed person in 2012 and 2013. However, no evidence was submitted with the application to demonstrate the exercise of Treaty rights in subsequent years. It appears that the sponsor was living in Germany between March 2016 and January 2017. At some stage, she returned to the UK but there was no evidence that she resumed exercising Treaty rights in the UK. She and the child returned to live in Germany, where they remained at the date of the First-tier Tribunal appeal hearing in August 2019.
8. The First-tier Tribunal concluded at [22] of the decision that the appellant could not meet the requirements of the Regulations for a Permanent Residence Card. The judge found that the sponsor left the UK in March 2016 with the legal consequence that she was not exercising Treaty rights whilst away from the UK and the appellant could not be the family member of a qualified person during that period.

9. The judge agreed that following Amirteymour, the appellant could not rely on article 8 rights in an EEA application and appeal. However, the judge considered that the decision of the Upper Tribunal in Abdul (section 55 – Article 24(3) Charter) [2016] UKUT 106, required the Tribunal to take account of the child’s best interests as a primary consideration, and that the right under Article 24(3) for every child to maintain on a regular basis a personal relationship and direct contact with both parents, unless contrary to the child’s interests, required the appellant to be given a right to reside in the UK because otherwise he would not be able to travel to Germany to visit his son in accordance with the order of the Family Court. At [32] of the decision, the judge concluded that “failure to resolve the appellant’s immigration status in a manner that will enable that contact to take place both within Germany and England and Wales is a breach of the fundamental right within Article 24 of the Charter. Accordingly, I allow the appeal on the basis that the decision breaches the rights of the appellant (and his young son) under the EU Treaties.”
10. In granting permission to the Secretary of State to appeal to the Upper Tribunal on all grounds on 22.11.19, the First-tier Tribunal Judge considered it arguable that there was no scope to allow the appellant’s appeal against a refusal to grant a Permanent Residence Card if he does not qualify for the same under the EEA Regulations. It was also considered arguable that the appellant does not need to remain in the UK to enable contact with his son. *“As was set out in the grounds, there is nothing to prevent the appellant’s son visiting him in Algeria. Contact would not however be as frequent as at present but presumably the appellant would be able to apply to the relevant German authorities to visit Germany in order to see his son.”*
11. The appeal to the Upper Tribunal was listed for an error of law hearing on 4.11.20. However, on or about 30.9.20, the appellant was granted Indefinite Leave to Remain in the UK under the EU Settlement Scheme. In consequence, the appellant’s legal representatives submitted that the issue in the appeal had become ‘academic’ and that the appeal should be withdrawn. In response, by email dated 7.10.20, the respondent’s representative declined to withdraw the appeal, on the basis that the case raises legal issues of importance.
12. By directions issued on 8.10.20, the Upper Tribunal left the matter listed for hearing on 4.11.20, noting that it will be for the Upper Tribunal Judge dealing with the matter to determine the appropriate course of action on the procedural and substantive issues raised by the appeal.
13. The Upper Tribunal has received the appellant’s Rule 24 reply and associated documents, which have been carefully considered, along with the oral submissions made to me at the remote hearing.

*The Preliminary Issue – Can the appeal be treated as abandoned or withdrawn?*

14. The appellant brought an appeal to the First-tier Tribunal against the respondent’s refusal to issue him with a Permanent Residence Card.

15. It is the case that given that the appellant has been granted Indefinite Leave to Remain, the outcome of the EEA appeal, allowed or dismissed, is immaterial to his immigration status and ability to travel to Germany to exercise contact with his son. I do not accept Ms Joshi's submissions that if the appeal is allowed the appellant will be issued with a Permanent Residence Card and thereby have two separate but contemporaneous rights. In reality, as Mr Bates confirmed, no action would be taken as the appellant already has settled status.
16. For the reasons set out briefly below, I am satisfied that the Upper Tribunal cannot treat the appeal as either abandoned or withdrawn.
17. The Secretary of State declined to withdraw the appeal. Ms Joshi submitted that the Tribunal could treat it as abandoned and referred me to her Rule 24 response and Rule 17A(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended. However, Rule 17A applies only to an asylum or immigration case and does not apply to an appeal under Regulation 36.
18. It is clear from Ammari (EEA appeals -abandonment) [2020] UKUT 124 (IAC), that the Upper Tribunal held that in general terms the grant of Indefinite Leave to Remain will not result in the abandonment of an appeal.
19. In the email of 7.10.20, the respondent conceded that it is for the Upper Tribunal to determine if the appeal is to be treated as abandoned pursuant to s104(4A) of the Nationality, Immigration and Asylum Act 2002 as amended, (the 2002 Act).
20. Section 104 provides:
  - "104. Pending appeal
    - (1) An appeal under section 82(1) is pending during the period –
      - (a) beginning when it is instituted, and
      - (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).
    - [(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while –
      - (a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,
      - (b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or
      - (c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.]
    - (3) .....
    - [(4) .....

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to [subsection (4B)] ).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on [a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection)] where the appellant –

(a) .....

(b) gives notice, in accordance with [Tribunal Procedure Rules] , that he wishes to pursue the appeal in so far as it is brought on that ground.

(4C) .....

(5) .....

21. Although the First-tier Tribunal found in the appellant’s favour by allowing the appeal, s104 provides that appeal “is not finally determined” where permission to appeal to the Upper Tribunal has been granted and that appeal is “awaiting determination”. However, on the face of the Statute, the provisions of s104 only apply to an appeal under section 82(1) which relate to either a protection claim or a human rights claim. A decision in respect of a Permanent Residence Card is a decision made under the Regulations and not a ground listed under s82(1) or s84.
22. Nevertheless, pursuant to Schedule 2 of the Regulations, certain provisions of the 2002 Act have effect in relation to an appeal under Regulation 36 as though the sole permitted grounds of appeal were that the decision breaches the appellant’s rights under the EU Treaties in respect of entry to or residence in the United Kingdom (“an EU ground of appeal”). These include s82 and s84. However, the Schedule does not direct that the provisions of s104 are also to apply in relation to abandonment of appeals.
23. As is clear from the decision in Ammari, previous incarnations of the EEA Regulations did provide for s82(1) appeals to be treated as abandoned where documentation was issued to the appellant confirming a right to reside in the UK. However, that provision was repealed and not replicated or replaced in the 2016 Regulations. As the Upper Tribunal held, “*It follows that a grant of leave to remain following an application under the EU Settlement Scheme does not result in an appeal against an EEA decision brought under the 2016 EEA Regulations being treated as abandoned.*”
24. It follows that there is no basis for the Upper Tribunal to consider the appeal formally abandoned by the grant of Indefinite Leave to Remain to the appellant under the EU Settlement Scheme. Further, as also pointed out in Ammari, “*It should be appreciated, however, that ILR involves a grant of leave under domestic law, whereas an individual may well wish to assert, and have confirmed, rights under EU law; rights which may in certain respects offer additional protective features. In respect of appeals against EEA decisions brought under the 2016 Regulations, an individual is entitled to pursue this course of action.*”

25. Addressing the substantive issues in the appeal, I am satisfied that given that the First-tier Tribunal made a clear finding that the appellant could not meet the requirements of the Regulations for a Permanent Residence Card, an appeal against refusal to issue him with a Permanent Residence Card could not succeed. He simply did not meet the requirements, failing to provide evidence to demonstrate that he did.
26. I am also satisfied that the First-tier Tribunal Judge misconstrued the nature and effect of the Family Court order. There is nothing to demonstrate that the order requires the appellant to be effectively given immigration status in the UK in order to exercise contact with his son. Such an order would be perverse. Neither did the First-tier Tribunal Judge appreciate that the appellant does not need to remain in the UK to be able to have contact with his son; that was not the order of the Family Court, which was clearly aware of his precarious immigration status. He could, for example, apply to the German authorities from Algeria for visiting rights to his son, or alternatively, for his son to be able to visit him in Algeria. The Family Court order cannot be construed as stipulating that contact must only take place either in the UK or Germany. The appellant could also have applied for amendment of the Family Court order, if jurisdiction were to be retained. In any event, it is difficult to see how the Family Court can have jurisdiction over contact in Germany, or otherwise override the provisions of the Regulations.
27. In summary, even though having contact with his son, whether in the UK or Germany, is obviously in the best interests of the child, neither that fact nor the order of the Family Court can be construed as requiring the respondent to grant the appellant a Permanent Residence Card. To do so, would convert the best interests consideration to a 'trump card' outweighing all other considerations.
28. The First-tier Tribunal also failed to recognise that the issue of Permanent Residence Card is not the conferral of a right to reside in the same way as a grant of immigration status, but rather documentary confirmation of a right to reside arising under EU law. It follows that the decision of the First-tier Tribunal was perverse and irrational so that, if pursued, it cannot stand but must be set aside.
29. In the circumstances and for the reasons set out above, I find a material error of law in the decision of the First-tier Tribunal, so that it must be set aside. Mr Bates submitted that at this stage it was open to the appellant to withdraw his appeal. However, Ms Joshi declined to do so, preferring for the matter to be dealt with immediately by the Upper Tribunal. In the premises, I remake the decision in the appeal by dismissing it, on the basis that the appellant cannot qualify for the Permanent Residence Card he sought. The respondent was correct to refuse the application.

## **Decision**

The appeal of the Secretary of State to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside as being in error of law.

I remake the decision in the appeal by dismissing it.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 4 November 2020

### **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 4 November 2020