



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

THE IMMIGRATION ACTS

**Heard at Field House
On 27 March 2014**

**Determination Promulgated
On 11th April 2014**

Before

**The Hon Mr Justice Jeremy Baker
Upper Tribunal Judge Warr**

Between

GRACE CHEIEL MMBAGA

Appellant

and

SECRETARY OF STATE

Respondent

Representation:

For the Appellant: Ms S Pararajasingam instructed by Freedman Alexander LLP
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Tanzania born on 9 January, 1974. She entered this country on 28 May, 2006 and was granted leave to remain as a domestic worker until 18 November, 2012. She made an application for indefinite leave to remain on 16 October, 2012. On 7 June 2013 the respondent refused this application.

2. The appellant appealed the decision and her appeal came before a First-tier Judge on 18 November, 2013. The grounds before the First-tier Judge were to the effect that the respondent had been wrong to refuse the application under the immigration rules. There was another ground which was not pursued at the hearing in relation to removal directions.
3. The application had been refused under the rules because the appellant had only been working 16 hours per week whereas it was a requirement of paragraph 159 A (vi) of HC 395 that the appellant be employed as a domestic worker full-time throughout the five year qualifying period.
4. Although Article 8 was not raised before the First-tier Judge in the grounds of appeal there was evidence that the appellant was pregnant and some e-mail communications between the appellant and a Polish National. It was said the appellant was tenant of the property occupied by the Polish National.
5. The appellant was called and gave evidence and it was not until after the respondent had made submissions that Ms Pararajasingam (who represented the appellant before the First-tier Tribunal as she does before us) sought to raise issues under Article 8 and the Immigration (European Economic Area) Regulations 2006.
6. The First-tier Judge stated:

"At that point I advised her that my view was that there was no Article 8 appeal before me as the grounds of appeal did not refer to Article 8 and nor did they refer to the Immigration (European Economic Area) Regulations 2006 which it seemed to me might have been relevant given that the appellant's witness statement is to the effect that she has been living with ...a Polish citizen since 2011 and is due to give birth to their child on 8 December, 2013."

7. Ms Pararajasingam applied to amend the grounds of appeal which the judge refused for the following reasons. First, the application should have been made before the hearing rather than during submissions and the representatives had had more than adequate time to make an application to vary the grounds if they had thought that to have been appropriate. Moreover the points had not been raised pursuant to the section 120 notice that had been served. The judge referred to *Lamichhane v Secretary of State* [2012] EWCA Civ 260 and *Jaff* [2012] UKUT 00396.
8. The judge went on to dismiss the appeal under the immigration rules noting that it always had been a requirement of the relevant rules that the proposed employment be full-time and the appellant had not been prejudiced by any relevant change in the rules. It was for the appellant to make a fresh application under the 2006 regulations if she was so advised.
9. Permission to appeal was granted on 17 December 2013 on the basis that it was arguable the Article 8 point was Robinson obvious (*R v Secretary of State ex parte Robinson* [1997] Imm. A.R. 568) and that it was arguable that the failure to mention a ground in response to a section 120 notice did not preclude the Tribunal from considering that ground. The judge referred to *MB (Pakistan)* [2010] UKUT 282 (IAC). In that case there had been nothing before the First-tier Tribunal judge to

indicate that the article 8 point was obvious whereas in the instant case in contrast "there was a witness statement from the appellant specifically referring to her pregnancy and the fact that the father of her unborn child was an EEA national with whom she proposed to enjoy a family life are some point in the UK."

10. Since the hearing before the First-tier tribunal the appellant has had a child and there is a letter from the Polish national stating that the appellant (his fiancée) is living in his apartment and looking after his daughter and that he is at present in prison in Poland. He intends to return to the United Kingdom as soon as practicable.
11. Mr Duffy acknowledged that there was an error of law in the decision of the First-tier Judge. However, he submitted that the error was not material in that it was clear from the case of *Lamichhane v Secretary of State* that grounds could not be varied to take in a point under the Immigration (European Economic Area) Regulations 2006 and the Article 8 issues were inextricably linked and dependent on the arguments under the regulations. The argument would depend on *Zambrano v Office National de l'emploi* (c-34/09) [2011] INLR 481 CJEU, the principle now reflected in Regulation 15A. The appellant's remedy was to make a fresh application under the Regulations.
12. Ms Pararajasingam submitted that the Article 8 point was arguable independently of the Regulations and invited us to remit the appeal as it had been conceded that there had been an error of law.
13. Decision
14. It having been properly conceded by Mr Duffy that the determination was flawed in law, we cannot say that the failure to consider Article 8 was not a material error. Although as he says the Article issues may be bound up with the issues under the regulations it does not follow that the Article 8 arguments have no merit or are bound to fail.
15. In the particular circumstances of this case we feel that the appeal should be remitted for hearing afresh before the First-tier Tribunal since there has been no consideration of the Article 8 issues.
16. In addition, the appellant may consider lodging an application under the Regulations as Mr Duffy suggested. That is of course a matter for the appellant and her advisers.
17. The appeal will be allowed and remitted for hearing before the First-tier Tribunal to consider Article 8.

Signed

Upper Tribunal Judge Warr

31 March 2014