Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA226312015
IA226342015
IA226402015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 May 2017	**On 30 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

ESTHER UCHE OARE (FIRST APPELLANT)
[E O] (SECOND APPELLANT)
[V O] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W Evans, Legal Representative, Templeton Legal Services
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellants are all citizens of Nigeria. The first appellant is the mother of the second and third appellants, who are minors. The appellants brought appeals against decisions of the Secretary of State for the Home

Department to refuse to issue them residence cards acknowledging a permanent right of residence in the UK under the Immigration (European Economic Area) Regulations 2006.

2. The first appellant argued she is the family member of an EEA national and that she had resided in the UK in accordance with the Regulations for a continuous period of five years so as to qualify under Regulation 15(1)(b). However, her application was treated as one as having been made under Regulation 15(1)(f) by reference to Regulation 10 and considered as to whether she had a retained right of residence. The reasons for refusal letter which accompanied the decisions explained that the appellants had not provided any evidence to show how the first appellant's former spouse exercised his Treaty rights at the date of divorce. Nor had the first appellant provided evidence that she was a worker, a self-employed person or a self-sufficient person for the period 1 November 2010 until 1 November 2013.

3. I was not asked and saw no reason to make an anonymity direction.

4. The appeal was heard in the First-tier Tribunal at the Hatton Cross Hearing Centre on 10 October 2016. The First-tier Tribunal identified the issues in the following way:

> "19. The [first] appellant's appeal can succeed either if she can show that she has retained rights following the termination of her marriage of if she can show that she is the family member of an EEA national who has been exercising Treaty rights for more than five years."

5. The First-tier Tribunal found there was no evidence to show the first appellant was divorced, a finding which she agrees with, and therefore proceeded on the basis that she was still a family member of her husband. The First-tier Tribunal found the evidence given by the first appellant regarding her employment between 2010 and 2013 was "very tentative". The First-tier Tribunal also rejected the claim that the first appellant had been a victim of domestic violence. Save for the oral evidence of the first appellant the judge found there was no evidence she was subjected to domestic violence in 2008 or at any other time. The First-tier Tribunal concluded that the first appellant had failed to provide sufficient evidence that her husband had been exercising Treaty rights for at least five years and the appeal failed under Regulation 15(1)(b).

6. The grounds seeking permission to appeal argued in summary:

   (1) That the First-tier Tribunal had erred in law by inferring that the reason the first appellant's application for leave to remain on the basis of domestic violence had failed in 2009 was that there had been insufficient evidence. The First-tier Tribunal did not have sight of the reasons for refusal or the notice of decision;

(2) The First-tier Tribunal applied too high a standard of proof in relation to the finding on domestic violence; and

(3) The First-tier Tribunal erred by failing to decide whether removing the appellants would breach their human rights with specific reference to Article 7 of the Charter of Fundamental Rights of the European Union.

7. Permission to appeal was granted by the First-tier Tribunal because it appeared to the Judge that the decision and reasons was silent as to the standard of proof which had been employed by the First-tier Tribunal in making its findings. This was considered an arguable error of law. Permission to appeal was granted on all grounds.

8. The respondent filed a Rule 24 response opposing the appeal.

9. At the beginning of the hearing, I heard an application from Mr Evans seeking to widen the grounds. He sought to include an argument that the First-tier Tribunal failed to determine one of the grounds of appeal before it, namely whether the two minor appellants were entitled to Austrian citizenship so as to engage Regulation 15(a) of the EEA Regulations. I refused the application and gave oral reasons for my decision. In essence, whilst this had been raised in the notice of appeal to the First-tier Tribunal and Mr Evans informed me he had asked the Judge to consider the point, it had not been raised in the application to the Home Office and there was insufficient evidence to enable the Judge to make an informed decision on the point. No explanation was provided as to why the point had not been included in the application for permission to appeal. It appeared to be an after-thought. If the second and third appellants can show they are Austrian citizens they can re-apply on that basis. Having regard to the overriding objective, it was not in the interests of justice to allow the appellants to expand their grounds.

10. I then heard oral submissions as to whether the decision of the First-tier Tribunal was vitiated by a material error of law.

11. Mr Evans argued the case somewhat differently to how it is set out in the grounds. His first point was that the judge should have remitted the case to the Home Office to apply its “pragmatic approach” to the evidence of domestic violence. The pragmatic approach is a reference to the document issued by the Home Office’s European Operational Policy Team dated 4 August 2011 issue number 10/2011 (revised).

12. Mr Evans argued it was an error for the First-tier Tribunal Judge to have rejected the available evidence of domestic violence including unchallenged oral evidence from the first appellant and the First-tier Tribunal Judge must have applied too high a standard of proof.

13. Secondly he argued that the point about human rights was that the Charter of Fundamental Rights should have been applied. He relied on

the case of the *Queen on the Application of AB v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin). He referred me to the judgment by Mr Mostyn J, particularly paragraph 14. He argued that it did not matter there were no removal directions because there had been a change in the statutory landscape since the Upper Tribunal had ruled that Article 8 of the Human Rights Convention could not be raised in an appeal brought under the European Regulations.

14. Mr Kandola argued that the Judge's decision did not contain any material error of law.

15. Having considered the respective submissions of the representatives I have concluded that the appellants' appeal must be dismissed because the decision of the First-tier Tribunal does not contain a material error of law.

16. The point that the judge should have remitted the case to the Home Office is not in the grounds seeking permission to appeal and is not therefore before the Upper Tribunal now. In any event, I find there is nothing in the decision to suggest that the First-tier Tribunal Judge applied anything other than the balance of probabilities. In *Piglowska v Piglowski* [1999] UKHL 27 Lord Hoffman, allowing an appeal from the Court of Appeal, and restoring the decision of the lower courts stated that:

> "These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well-known… . An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

17. By parity of reasoning I regard it as hopeless to pursue an argument that the First-tier Tribunal did not direct itself correctly as to the standard of proof simply because it is not stated anywhere in the decision. Nothing in the decision indicates a higher standard was employed. The Judge was entitled to infer that the domestic violence application previously made had failed due to lack of evidence given the inability of the appellants to provide more cogent evidence to him.

18. Even if the argument had merit that the Judge should have considered other evidence falling short of that described in the bullet points in paragraph 8 of the internal instruction, any error would be immaterial because the Judge noted at paragraph 26 of his decision that it appeared from the refusal letter that the respondent had made allowances for the difficulties which the first appellant might have had in providing information and as she had not provided sufficient details to enable the Home Office to make their enquiries.

19. With regard to the point about human rights, I consider the First-tier Tribunal was correct not to consider the ground for the reasons given. As the First-tier Tribunal noted, no removal directions had been set and there was nothing to prevent the appellants from making an application on Article 8 grounds.

20. I see no material distinction in cases where the Charter is raised in the alternative.

21. In sum, the First-tier Tribunal was correct to apply *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC). The Court of Appeal subsequently made it clear in *TY (Sri Lanka)* [2015] EWCA Civ 1233 that where no removal directions have been made Article 8 cannot be raised.

Notice of Decision

The First-tier Tribunal's decision does not contain a material error of law and shall stand.

No anonymity direction has been made.

Signed Date 15 May 2017

Deputy Upper Tribunal Judge Froom

TO THE RESPONDENT
FEE AWARD

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

Signed Date 15 May 2017

Deputy Upper Tribunal Judge Froom