
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/37199/2013

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Determination promulgated** |
|---|---|
| **on 23 May 2014** | **On 28th May 2014** |

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**CARLY JOHANNA MAKRIDAKIS**

Respondent

For the Appellant: Mr A Mullen, Senior Home Office Presenting Officer
For the Respondent: Mr H Ndubuisi, of Drummond Miller, Solicitors

No anonymity order requested or made.

## DETERMINATION AND REASONS

1) This determination refers to parties as they were in the First-tier Tribunal.

2) The appellant is a citizen of Australia, born on 2 June 1977. She was issued with a residence card on 29 January 2008 as a spouse of an EEA national. Through her solicitors she applied on 26 April 2013 for a permanent residence card as confirmation of her retained right of residence in the UK following her divorce, in terms of the Immigration (European Economic Area) Regulations 2006.

3) The SSHD refused the application by letter dated 27 August 2013, because her former spouse was not a qualified person in the UK at the time of the divorce and she was therefore not residing in the UK in accordance with the Regulations at the date of termination of the marriage (as required by Regulation 10(5)(b)). The application was considered also under Regulation 15 but there was no evidence that the appellant's spouse was a qualified person for a continuous 5 year period during the marriage. The letter then tells the appellant that as she appeared to have no alternative basis of stay in the UK, she should make arrangements to leave. However, page 4 of the letter then refers her to "changes to the Immigration Rules to unify consideration under the Rules and Article 8 of the ECHR" and advises that if she wishes to be considered under those provisions, she should make a separate application. Since she had not made such an application, the letter declines to consider whether her removal would breach Article 8.

4) The appellant appealed to the FtT on these grounds:

> Decision is not in accordance with Immigration (European Economic Area) Regulations 2006.
> Decision is contrary to law.
> Decision is inconsistent with Article 8 ECHR.

5) Judge Agnew heard the appellant's appeal to the First-tier Tribunal on 27 January 2014, and allowed it by determination promulgated on 28 January 2014. Mr Ndubuisi firstly sought to persuade the judge that the marriage terminated when the parties decided to separate and not at the date of divorce, but that argument was rejected at paragraph 4. Nor was there a continuous period of 5 years so as to qualify under Regulation 15. Mr Ndubuisi next relied on a letter sent to the Tribunal on 15 January 2014 requesting leave to amend the grounds on the basis that the appellant was an unmarried partner of a British citizen and so met the terms of Appendix FM of the Rules (paragraph 7). The respondent's Presenting Officer argued that the appellant could not rely on Article 8 in absence of a removal decision, which the judge declined to accept. She went on to find that the appellant met the requirements of the Immigration Rules (paragraph 14) and would in the alternative have allowed the appeal under Article 8 (paragraph 15). Finally, she said that the appeal was "dismissed under the Immigration (European Economic Area) Regulations 2006, and allowed under the Immigration Rules".

6) These are the grounds on which the SSHD sought leave to appeal to the Upper Tribunal:

> The judge erred in law by failing to give adequate reasons why this appeal should be allowed under the Immigration Rules and Article 8.
>
> It is noted at paragraph 7 of the determination that the appellant's representatives wrote to the Tribunal on 15 January 2014 to amend their grounds to reflect that the appellant is now an unmarried partner of a British citizen. This information has never been before the respondent and no decision has been made. The judge erred in failing to provide reasons why when the appellant submitted an EEA application on 25 April 2013 and following the refusal completely changes the basis of the application in January 2014 … the

determination does not give adequate reasons why the appellant meets the Immigration Rules. The findings are limited to paragraphs 14 and 15. For example how does the judge reason why the appellant meets the requirements of S-LTR.1 or R-LTRP.

At paragraph 15 the judge continues to consider Article 8 and finds that there are compelling features and unjustifiably hard for the appellant to return to Australia … the determination does not include the reasons and what evidence was before the judge to reach that conclusion.

7) On 17 February 2014 Judge Pooler granted permission, saying:

…

2. The [grounds] submit that the judge erred by failing to give adequate reasons for allowing the appeal; but in substance the grounds also appear to submit that the judge made a material misdirection of law.

3. It is arguable that the judge failed to give adequate reasons for finding at [14] that the requirements of App FM were met or, alternatively, at [15] that the appeal should succeed by reference to Article 8.

4. It is also arguable that the judge erred by allowing an appeal against an EEA decision, made on EEA grounds, on the ground that the decision was not in accordance with the Immigration Rules.

8) Mr Mullen submitted as follows. Jurisdiction in an appeal under the Regulations excludes consideration under the Immigration Rules. The judge was technically entitled to consider Article 8 so far as it falls outside the Rules, but Article 8 now falls almost entirely within the Rules. The point is somewhat circular, because a consideration of the terms of the Rules would be essential to any Article 8 decision. In any event, the judge failed to explain how the appellant's circumstances could meet the terms of the Rules, and on reference to the evidence, they plainly did not. The appellant said that she and her partner started living together in April 2012. If the judge had gone through requirements of the Rules, as she claimed to have done, it would have been evident that she could not meet the 2 year period of cohabitation. The appellant might now be in a position to apply under the Immigration Rules as an unmarried partner, which would be considered by the respondent on an application made in the UK. It was not unreasonable to expect her so to apply. The judge had said that in the alternative she would have allowed the appeal under Article 8 outside the Rules, but again that was unreasoned. The circumstances did not disclose any undue harshness or exceptionality. The appellant would not have to return to Australia to make her application. There were no sound reasons in the FtT determination for allowing the appeal.

9) Mr Ndubuisi said that the appellant and her partner started living together in January 2012 and so by the date of the hearing met the two year requirement. In view of the differing statements by representatives of what the basic facts had been, I asked Mr Ndubuisi to refer me to the evidence which was before the First-tier Tribunal. The appellant's statement was eventually located. She says:

13. … I met my partner … in January 2012, while we were working together with the Scottish under 16 rugby team … our initial meeting was on a professional level. We were in camp with the team at the time.

14. … our friendship developed into a personal relationship … some time in February 2012. This was when we entered into a relationship. We were together in the camp until the camp was disbanded in April 2012.

15. When we left the camp, [my partner] moved in with me [in] April 2012 …

10) Mr Ndubuisi submitted that even if the appellant's circumstances could not properly have been found to meet the terms of the Immigration Rules, her appeal would have succeeded under Article 8 outwith the Rules because of the exceptional and compassionate circumstances of her case. These included the effect on the appellant's partner and business customers if she had to leave the country. He said that if she were to make a further application, she would have no right of appeal in the event of refusal. The Upper Tribunal should not put her in the position of having to make that application, but should substitute a decision based on her circumstances now, on the basis that she has now completed 2 years cohabitation and meets all other requirements of the Rules (*although, once again, there was no concrete attempt to demonstrate that proposition*) and that there is no public interest in expecting the appellant to make an application.

11) Mr Ndubuisi accepted my observations that if matters proceeded to a removal decision the appellant would have a right of appeal, and that the respondent has a policy of making removal decisions under certain circumstances, if asked to do so.

12) I reserved my determination.

13) The case had to fail under the Immigration (European Economic Area) Regulations 2006. The facts could not meet the requirements of Regulation 10 or Regulation 15.

14) The submission by Mr Mullen on the jurisdiction of the FtT in an appeal under the Regulations is well founded. The right to appeal arises from Regulation 26. Schedule 1, paragraph 1 of the Regulations provides that certain provisions of the 2002 Act have effect in relation to an appeal under the Regulations as if it were an appeal against an immigration decision under section 82(1) of that Act, but excepting section 84(1)(a) and (f). Section 84(1)(a) is the ground "*that the decision is not in accordance with Immigration Rules*."

15) The judge was thus unfortunately misled about the extent of her jurisdiction.

16) On the evidence, the appellant's circumstances could not meet the substantive requirements of the Immigration Rules. By her own account she had not started living together with her partner until a date less than 2 years before the hearing in the First-tier Tribunal.

17) The respondent's Presenting Officer sought to argue in the FtT that the appellant could not rely on Article 8 in the absence of a removal decision, which the judge declined to accept. The judge did not have the assistance she should have had on this point either. Article 8 of the ECHR is not excluded in such a case as a matter of jurisdiction. However, there is force in the argument as put in the Upper Tribunal, namely that there is no meaningful interference where an appellant is invited to submit any application open to her under the Immigration Rules. There can be no right under Article 8 of the ECHR to be excused from making an application. The result may be in her favour, and if so, well and good. If not, and if she is not simultaneously served with a removal decision, she can request one, enabling her to exercise her statutory right of appeal.

18) The proposition that the alternative of the appellant returning to Australia carries unjustifiably harsh consequences for herself, her partner and her clients is misconceived, when the respondent invites the appellant to make an application without returning to Australia.

19) The determination of the First-tier Tribunal is **set aside**. The appeal, as originally brought to the First-tier Tribunal, is **dismissed on all available grounds**.

Hugh Macleman

27 May 2014
Judge of the Upper Tribunal