Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/38279/2014**
IA/41624/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2015	**On 12 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between
MS ADETOLA MORAYO ODUFARASIN
MISS FATHIA TEMITOPE FATEGBE
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Canter of counsel
For the Respondent: Mr N Bramble a Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. In this appeal, the appellants appeal against a decision of the First-tier Tribunal dismissing their appeals against decisions taken on 13 September 2014 to refuse to issue residence cards as confirmation of a right of residence as the family member of an European Economic Area ('EEA') national who is exercising treaty rights.

Background Facts

2. The appellants are citizens of Nigeria. Mrs Odufarasin ('the first appellant') was born on 2 October 1972 and Miss Fategbe ('the second appellant') was born on 24 December 2000. The appellants applied for residence cards as confirmation of a right of residence as the family member of an EEA national who is exercising treaty rights. The Secretary of State refused their applications. In relation to the first appellant the reasons for refusal were that the Secretary of State was not satisfied that the first appellant and the sponsor were in a valid marriage or that they were in a durable relationship. In relation to the second appellant the Secretary of State was not satisfied that she had produced sufficient evidence to show she was related to the sponsor.

The Appeal

3. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 22 December 2014, Judge Grimmett dismissed the appellants' appeals. The First-tier Tribunal found that the first appellant had not shown that she was lawfully married in Nigeria and that there was no evidence to show that the marriage was valid in Portugal (the member state of the sponsor). The judge was not satisfied that the first appellant and the sponsor were in a durable relationship or any kind of relationship.

4. The judge then went on to consider Article 8 finding that the appellants could not succeed under Article 8 of the European Convention on Human Rights.

The Appeal to the Upper Tribunal

5. The appellants sought permission to appeal to the Upper Tribunal. On 16 February 2015 Upper Tribunal Judge Martin (sitting as a First-tier Tribunal Judge) refused permission to appeal. On 11 March 2015 the appellants applied to the Upper Tribunal. On 1 June 2015 Upper Tribunal Judge Mandalia granted the appellants permission to appeal. Thus, the appeal came before me.

Summary of the Submissions

6. The grounds of appeal are concerned solely with Article 8. No appeal was made against the First-tier Tribunal findings that the marriage was not valid nor the finding that the first appellant and the sponsor were not in a durable relationship.

7. At the hearing Mr Canter made a number of submissions asserting that the First-tier Tribunal had erred in law in the approach and findings on Article 8. I do not propose to set out those submissions given my findings on the jurisdiction of the First-tier Tribunal, set out below.

8. I asked both Mr Canter and Mr Bramble to address me on the case of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC).

9. I asked for confirmation that there had not been any EEA removal decisions. It was confirmed that there had been no such removal decisions. Mr Canter raised the issue that the Secretary of State had not raised the Amirteymour case in a cross appeal. However, it was agreed that, as permission to appeal was granted on 1st June 2015 and the case was not decided until sometime after that (now confirmed as promulgated on 4 August 2015), the Secretary of State was not in a position at that time to have raised the case.

10. Mr Canter submitted that a section 120 of the Nationality, Immigration and Asylum Act 2002 notice had been served in this case. He referred to the original application – EEA2 – of 6/2/14 at page 31 where questions are asked about ties to family and connections in the country of nationality. He submitted that the words in the application echo the old paragraph 276 of the Immigration Rules HC395 (as amended) which gave people leave to remain on Human Rights grounds if there were no ties to the country of origin. This section of the application form was in effect a s120 Notice. Mr Canter referred me to the text of s120. He submitted that the statutory regime was designed to facilitate one stop appeals. There was no point in asking for the information in the application form if it was not to facilitate a complete assessment. He submitted that on that basis the case of Amirteymour does not apply.

11. Mr Bramble submitted that the starting point was that this is an appeal concerning refusal of an EEA application. The refusal letter of 16 September 2014 states if the applicant wishes the Secretary of State to consider any Article 8 application then a separate application must be made. There was no s120 notice and he submitted no merit in Mr Canter's arguments that the question in the application form infers that a s120 Notice has been served. He submitted that the Upper Tribunal decision in Amirteymour was now good law. When no s120 notice has been served or EEA removal decision has been made an appellant cannot bring a Human Rights claim before a First-tier Tribunal.

12. He referred to the specific decisions in the Amirteymour case in Izvira (at page 27 of the decision) and HF & AN (at page 28). Mr Bramble submitted that these decisions were similar to the instant case. The First-tier Tribunal judge had gone on to consider Article 8 in both appeals. The Upper Tribunal held that the First-tier Tribunal had erred in law by going on to consider Article 8.

Discussion

13. I do not accept Mr Canter's submission that the questions on page 31 of the application form EEA2 amount to a s120 Notice or that such Notice can be inferred from the inclusion of questions concerning ties to the country of origin. The application made by the appellants was for confirmatory documents. They were not applications for leave to remain in the UK. As set out in paragraph 26 of the decision in Amirteymour those having a right to enter or reside under European Community Law do not require

leave to enter or remain in the UK. A decision to refuse a confirmatory document is conceptually different to a decision to refuse or grant leave under the Immigration Rules. At paragraph 31 in Amirteymour the Upper Tribunal held:

> 'Rights granted under EU law and leave granted under the Rules or Immigration Acts are conceptually and legally distinct. Any assertion of a right to leave to remain or under the Human Rights Act is thus made on a different judicial basis…'

14. As a request for a document that provides confirmation of a right to reside in the UK the application for a confirmatory document is not concerned with permission to enter or remain in the UK as no such permission is required. Section 120 applies to a person who has made an application to enter or remain or where a decision within the meaning of s82 of the Immigration Acts has been made. As set out in paragraph 36 of Amirteymour Schedule 1 paragraph 1 of the EEA Regulations do not provide that an EEA decision is an immigration decision under the 2002 Act. Despite Mr Canter's valiant attempt to distinguish the appellants' case the questions on page 31 of the application form EEA2 do not amount to a s120 Notice.

15. As no s120 notice was served and no EEA removal decision has been made the First-tier Tribunal erred in law in considering whether the decision amounted to a disproportionate interference with the appellants' Article 8 rights as it had no jurisdiction to consider a ground which was different from the subject of the decision under appeal. The grounds of appeal to the Upper Tribunal did not challenge the findings made in respect of the EEA Regulations. It follows that the error in the First-tier Tribunal judge's consideration of Article 8 could not be material to the outcome of the appeal. On that basis I consider that the decision of the First-tier Tribunal did not involve the making of a material error of law and is therefore upheld.

16. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

17. The decision of the First-tier Tribunal did not involve the making of a material error of law such that the decision should be set aside.

Signed P M Ramshaw Date 9 October 2015

Deputy Upper Tribunal Judge Ramshaw