Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35508/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 31 March 2016	**On 14 April 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELZA MARIA BALINO

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr W Rees instructed by Hoole & Co, Solicitors

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Y J Jones) allowing the appeal of Elza Balbino (hereafter the "claimant") on Art 8 grounds.

2. The claimant is a citizen of Brazil who was born on 1 October 1956. On 11 March 2004, she married a Polish national in Brazil. Most recently, the claimant, her husband and daughter came to the UK on 17 October 2005.

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The claimant was granted leave to remain in the UK as the spouse of an EEA national valid until 21 June 2007. On 25 October 2007, the claimant was granted a residence card as the spouse of an EEA national valid until 25 October 2012.

3. The claimant's marriage broke down due to domestic violence. On 22 October 2012, an application was made on her behalf for a permanent residence card based upon her marriage and residence in the UK with her EEA husband. On 10 September 2013, the Secretary of State refused that application and on 24 September 2013, the claimant appealed the decision. On 2 April 2014, at the appeal hearing, the Secretary of State withdrew her original refusal of a permanent residence card. Thereafter, the Secretary of State reconsidered the claimant's application based upon a retained right of residence following the claimant's divorce on 1 May 2014. In a decision dated 24 August 2014, the Secretary of State refused the claimant's application for a permanent residence card. The Secretary of State was not satisfied that the claimant met the requirements of Reg 15(1)(f) with reference to Reg 10(5).

The Appeal

4. The claimant appealed to the First-tier Tribunal. Before Judge Jones the claimant argued that she was entitled to a permanent residence card based upon Reg 15 read with Reg 10(5). Judge Jones dismissed the claimant's appeal on that ground as she was not satisfied that the claimant had established five years continuous period of residence in accordance with the Regulations or that she had a retained right of residence as a former family member of an EEA national. In particular, Judge Jones was not satisfied that the claimant's husband was exercising treaty rights at the date of divorce.

5. Before Judge Jones, the claimant also relied upon Art 8. Judge Jones concluded that she was required to consider the claimant's Art 8 ground by virtue of s.86 of the Nationality, Immigration and Asylum Act 2002. Having considered all the claimant's circumstances, Judge Jones concluded that the claimant's removal would be a disproportionate interference with her private life in the UK and consequently a breach of Art 8.

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge had erred in considering Art 8 since no enforcement decision had been taken against the claimant. Permission was initially refused by the First-tier Tribunal on 22 April 2015, but on 5 June 2015 the Upper Tribunal (UTJ Jordan) granted the Secretary of State permission to appeal.

7. Thus, the appeal came before me.

The Submissions

8. On behalf of the Secretary of State, Mr Richards submitted that the decision of the Upper Tribunal in Amirteymour and Others (EEA appeals; human rights) [2015] UKUT 466 (IAC) held that, in the absence of an s.120 notice and a response raising rt 8, a Tribunal could not consider an individual's Art 8 claim when the decision appealed against was a decision to refuse a residence card under the EEA Regulations. He submitted that, therefore, Judge Jones had erred in law in considering and thereafter allowing the claimant's appeal under Art 8.

9. Mr Rees, who represented the claimant, sought to distinguish Amirteymour on the basis that the claimant's removal was "imminent". He referred me to para 58 of Judge Jones' determination where she had said:

> "... taking into account all the matters above I find that the appellant's removal, although not a subject of enforcement at present, would be a breach of her established private life under Article 8. Her removal from the UK will be disproportionate."

Discussion

10. I reject Mr Rees' submissions which are inconsistent with the binding case law of the Court of Appeal and its approval of the decision of the Upper Tribunal in Amirteymour.

11. Even if the claimant's removal was imminent, and in the absence of any removal directions there is no evidence to support such a position, the case law is entirely clear. Without a decision to remove an individual, the First-tier Tribunal cannot, in an appeal against the refusal of a residence card under the EEA Regulations, consider the Art 8 rights of the individual unless in response to a s.120 notice Art 8 is raised.

12. That is clear from the Upper Tribunal's decision in Amirteymour where the head note reads as follows:

> "Where no notice under Section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations."

13. Amirteymour was approved by the Court of Appeal in TY (Sri Lanka) v SSHD [2015] EWCA Civ 1233. At [35], Jackson LJ (with whom Black and Briggs LJJ agreed) said this:

> "It is impossible to say that the Secretary of State's decision to withhold a residence card (a decision which is correct under the EEA Regulations) will or could cause the UK to be in breach of the Refugee Convention or ECHR. The UK will only be in breach of those Conventions if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or the Tribunals incorrectly reject."

14. At [36], Jackson LJ specifically approved the UT's decision in Amirteymour. The Court of Appeal upheld the Upper Tribunal's decision that the appellant, in an appeal under the EEA Regulations, could not raise a claim

for asylum or based upon human rights (in particular Art 8) and the First-tier Tribunal had no jurisdiction to consider those claims.

15. It does not appear that Judge Jones' attention was referred to the relevant authorities. Nevertheless, the Court of Appeal's decision is binding upon both the First-tier tribunal and the Upper Tribunal and, in line with the decision in Amirteymour, means that Judge Jones had no jurisdiction to consider the claimant's Art 8 rights where she was considering an appeal against a refusal to grant a residence card under the EEA Regulations where no removal decision had been made and no s.120 notice had been served on the claimant.

Decision and Disposal

16. For these reasons, therefore, the First-tier Tribunal erred in law in allowing the claimant's appeal under Art 8. It had no jurisdiction to consider Art 8. I set aside that decision.

17. Mr Rees invited me to remit the appeal to the First-tier Tribunal to consider up-to-date evidence in relation to the claimant's case under the EEA Regulations. However, the First-tier Tribunal's decision to dismiss the claimant's appeal under the EEA Regulations and, indeed, the Immigration Rules has not been challenged by the claimant either by seeking permission to appeal against those decisions or by raising the issue in a Rule 24 Notice.

18. Therefore, the First-tier Tribunal's decision to dismiss the claimant's appeal under the EEA Regulations and the Immigration Rules stands and there is no basis for remitting this appeal.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As the claimant's appeal has been dismissed on all relevant grounds, no fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal