Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: EA/02506/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated:**
On 20 September 2018	**On 5 October 2018**

Before

Upper Tribunal Judge Kekić

Between

FO
(anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant:	Ms S Bassiri-Dezfouli, of Counsel, instructed by SLA Solicitors
For the Respondent:	Ms A Everett, Senior Home Office Presenting Officer

Determination and Reasons

Background

1. The appellant is a national of Burkina Faso born on 4 November 1983. She challenges the decision of First-tier Tribunal Judge Rayner to dismiss her appeal against the refusal of the respondent to grant her a permanent residence card on the basis of retained rights of residence following her divorce from an EEA national on the 19 December 2014. There are three children of the marriage born in the UK in November 2005, March 2011 and March 2013; the older two are autistic. The eldest appears to be a British national. There is no evidence or information in respect of the others. The respondent was not satisfied that the appellant had retained rights of residence following the divorce because she had not shown that she had exercised treaty rights as if she were an EEA national. Accordingly, the application was refused on 21 February 2017.

2. The appeal came before First-tier Tribunal Judge Rayner at Taylor House on 21 May 2018. The judge heard oral evidence from the appellant who claimed to have last worked in 2007. She maintained that she had back problems but that it was mainly her need to care for her children that prevented her from working. The judge found that the appellant had failed to demonstrate that she was a worker within the meaning of reg 6(1)(b) and 10(6). The appeal was dismissed.

3. Permission to appeal was granted by Judge Hollingworth on 1 August 2018.

4. The matter then came before me.

The hearing

5. I heard submissions from both parties in the presence of the appellant.

6. For the appellant, it was argued that the judge had applied the wrong test. He should have considered whether the appellant was temporarily or permanently out of work due to her back pain which was confirmed by a doctor in March 2016. Reliance was placed on FMB (EEA reg 6(2)(a) - temporarily unable to work) Uganda [2010] UKUT 447 (IAC). It was argued that the appellant had an illness and was therefore unable to work. She had not worked since the divorce and, indeed, had last worked in early 2008. On being referred to the appellant's witness statement where she claimed she was unable to work because she was a lone parent, Ms Bassiri-Dezfouli submitted that she was also prevented from taking employment due to her back condition and this was referred to in her statement. Ms Bassiri-Dezfouli submitted that many women developed back problems after childbirth and the appellant's complaints of pain in 2013 coincided with the birth of her third child. The appellant received

carer's allowance in respect of her children. Ms Bassiri-Dezfouli submitted that the judge's reasoning had been short and insensitive. She submitted that being a carer amounted to employment in the same way as motherhood generally and housework were jobs. The decision should be set aside, and the appeal should be allowed.

7. Ms Everett responded. She maintained that the case was being re-argued and no error of law had been shown. The judge properly found that the appellant had not worked after 2007. He accepted that her former husband had worked. There may be article 8 issues but that was not a reason to find an error of law as this was not a human rights application. The appellant could make a fresh application on the basis of looking after her British children. The appellant had given conflicting evidence as to why she could not work. The doctor's letter was inadequate. There may be types of employment the appellant could undertake. Whilst Ms Everett expressed sympathy for the arguments made about carers, she maintained that there was no error of law.

8. In response, Ms Bassiri-Dezfouli stated the children were French and not British. She relied on Teixeira [2010] ECJ C-480/2008 and Ibrahim [2010] ECJ C310/2008. She submitted that if there were other Regulations the appellant could succeed under, she should not have to make another application. She conceded that the argument about being a carer had not been made to the judge. She submitted that the appellant could not work because of back pain and because of her children.

9. That completed submissions. I then reserved my determination which I now give with reasons.

Findings and conclusions

10. I have carefully considered all the evidence before me and the submissions that have been made by both parties.

11. It is accepted that the appellant's former husband exercised treaty rights until the commencement of the divorce proceedings. In order to succeed before the First-tier Tribunal the appellant, therefore, had to show that since her divorce she had been exercising treaty rights as though she were an EEA national (reg 15(1)(f) and 10(6)). Her case as argued before the judge was that she should be categorised as a worker because she had worked in 2007 and because she was temporarily unable to work due to illness. This was the submission of her representative even though her own oral evidence had been that she was primarily unable to work because she had to care for her children.

12. The judge took account of FB but found that it had not been established that the appellant was unable to work due to illness or accident and noted that she was plainly able to function as a carer for her children and to obtain carer's allowance. Whilst he is criticized for being insensitive in making that finding, it was one which was open to him on the evidence. The appellant ceased working in 2007. It is not suggested that she had back trouble then and, as the judge noted, no reason was given for why she stopped working. The doctor's letter on which reliance was placed pre-dated the hearing by more than two years and does not amount to evidence that the appellant continued to be unable to work. Indeed, it only confirms that the appellant had complained to the surgery about back pain. There is no diagnosis or prognosis and certainly nothing to suggest there was any problem related to childbirth. The appointment letter for an assessment at the musculoskeletal assessment clinic is dated 18 April 2016 and there is no evidence of whether the appointment was kept, what transpired at that appointment or what the assessment was. Nor is there any follow up to the letter of 11 April 2016 inviting the appellant to contact the Physiotherapy department and no information as to whether she did so or whether she received any treatment. In any event, as I suggested to Counsel, the claim to be prevented from taking employment because of illness is irrelevant given the fact that the appellant would not be able to work even if she was fully fit. Whilst I accept she mentions back pain as one reason for not working, all her evidence makes it quite clear that she cannot work because she is a lone parent with three children and that that is the primary reason for her lack of employment.

13. I have considered the judgments referred to. Texeira and Ibrahim concern applications for housing assistance by parents who were the primary carers of settled children and entirely dependent on social assistance. The court found that the children were entitled to reside in the member state in order to attend educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents had divorced and the fact that the parent who exercised rights of residence as a migrant worker was no longer economically active in the host Member State was irrelevant in this regard. Article 12 provides:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

Whilst the appellant may well have a case under Article 12, such an application has not been made and Article 12 was not argued before the First- tier Tribunal.

14. In the context of all the evidence, therefore, it was open to the judge to find that the appellant was not a worker and that she was not exercising treaty rights since her divorce as if she were an EEA national. It follows that she failed to make out her case and the judge did not err in dismissing her appeal.

15. The appellant may well have a good article 8 case or even an argument on derivative rights but those were not live issues before the judge. As conceded by Counsel the argument about whether a carer is a worker was never previously made nor is there any suggestion that the appellant argued that she had rights as the primary carer of her children. The judge cannot be criticized for failing to consider an argument that was never put to him. It may be that the appellant should have made a more appropriate application instead of pursuing these proceedings. Of course, it is still open to her to do so.

Decision

16. There are no errors of law in the determination of the First-tier Tribunal Judge. The decision to dismiss the appeal stands.

Anonymity order

17. There has been no request for an anonymity order at any stage but as there are children involved I have made one.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

1 October 2018