Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/03268/2016
EA/03270/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 April 2018	**On 18 April 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

MISS SULIFA KOKOHU (FIRST APPELLANT)
MASTER B W K P (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Unrepresented
For the Respondent: Mr S Kotas

DECISION AND REASONS

1. The first named appellant is a citizen of Tonga born on 18 March 1974. She had been married to an EEA national, a Portuguese citizen between 24 December 1998 and 8 September 2005 – decree absolute was pronounced on that day. There were no children of the marriage but the appellant had a son, the second appellant, who was born on 17 February 2006 and he is a citizen of Nigeria. An application was made in September 2015 for a residence card as the former family member of an EEA national. This application was refused on 25 February 2016. The basis for the refusal

was that while the Secretary of State accepted that the appellant's marriage to her former EEA national husband had been dissolved this had taken place prior to the enactment of the EEA Regulations in 2006. It was submitted that applicants could only retain a right of residence if they divorced after 1 May 2006.

2. It was pointed out to the appellant that she could make a separate application under the Rules in respect of Article 8. No removal directions were issued.

3. The appeal came before a First-tier Judge on 3 October 2017. The appellant was represented on that occasion. The judge summarises the appellants' immigration history as follows:

> "3. The appellant has an extensive immigration history. Although no chronology was provided, it appears from the available documents that she first came to the UK in February 1994 as a visitor, with leave valid for six months. Thereafter she was granted leave as a student until 30 November 1998. She left the UK for six months in the course of that year, returning in September 1998 with Mr Correia. She was refused leave to enter as a visitor but was granted temporary admission.
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> 4. She was granted a residence card based on her marriage to Mr Correia, valid from 16 June 2001 to 16 June 2006.
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> 5. During 2006, two applications for indefinite leave to remain were refused and a further application made in June 2014 was refused. At least one of those applications was based on long residence."

The judge notes that the previous Regulations were the Immigration (European Economic Area) Regulations 2000 and under those Regulations a family member was defined in Regulation 6 as including, inter alia: "(2A) if the other person has divorced his spouse, the person is his divorced spouse provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom."

4. The appellants' residence card had been issued on 16 June 2001 and was valid for five years.

5. The hearing was dealt with on submissions and the appellant was not invited to give evidence. The appellants' representative (Mr Offiah) relied on Directive 2004/38/EC and submitted that the 2006 Regulations were merely a formality and that their implementation was of little consequence. The Presenting Officer argued that the Directive did not confer rights on individuals and the appellant could not benefit from it and she did not meet the requirements of the EEA Regulations. A separate application in respect of the second appellant could be made.

6. The judge's decision concludes as follows:

"20. The purpose of the Immigration (European Economic Area) Regulations 2006, which came into force on 30 April 2006, is to give effect to Directive 2004/38/EC of 29 April 2004. Article 40 the Directive stated that, "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [two years from the date of entry into force of this Directive]." The 2006 Regulations were brought into force on 30 April 2006, within the two year period required under the Directive.

21. I cannot accept Mr Offiah's submission that from 29 April 2004 the Directive conferred direct rights on the appellant. It is plain from the Directive itself that Member States were required to bring into force laws in order to comply with the Directive within a specified timeframe and that is what the 2006 Regulations did.

22. It is accepted that the appellant was granted a residence card which gave her a right to reside (not leave to remain) in the United Kingdom so long as she remained a family member of her husband in the UK. Regulation 14 of the Immigration (European Economic Area) Regulations 2000 stated that a family member of a qualified person is entitled to reside in the United Kingdom for as long as he remains the family member of a qualified person. The 2000 Regulations did not contain a specific Regulation dealing with family members who have retained a right of residence equivalent to Regulation 10 of the 2006 Regulations. They did, however, as I have set out above, make provision for divorced spouses, subject to conditions.

23. The appellant ceased to be a family member of an EEA national on 8 September 2005. There were no children of the family to whom Regulation 6(2A) could apply. She was, therefore, not entitled to reside in the UK pursuant to Regulation 14 because she was no longer a family member of a qualified person.

24. The appellant cannot take advantage of Regulation 10(5) of the 2006 Regulations because by the time they came into force on 30 April 2006, she was no longer a family member of an EEA national. The issue of whether the EEA national was exercising Treaty rights in the UK in accordance with the Regulations becomes academic in the circumstances.

25. It was submitted that the Tribunal should consider the matter under Article 8 and Section 55. I indicated to Mr Offiah the difficulty with that submission in light of the case of **Amirteymour & others [2017] EWCA Civ 353**. The Court of Appeal confirmed the decision of the Upper Tribunal that where no notice under Section 120 of the 2002 Act has been served by the respondent and where no directions to remove have been made, an appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations.

> 26. The appellant had submitted a Statement of Additional Grounds under Section 120, claiming that her removal to Tonga would be in breach of Article 3 or Article 8. However, the respondent had not issues [sic] a Section 120 notice inviting the appellant to put her case in full and there were no removal directions issued. In the circumstances any appeal on human rights grounds cannot succeed."

The judge accordingly dismissed the appeal on all grounds.

7. There was an application for permission to appeal and permission to appeal was granted on 12 February 2018 by the Upper Tribunal in respect of Article 8 issues. Before me the appellants were unrepresented. Mr Kotas helpfully explained the respondent's position. He pointed out that the notice of decision was drafted in the same terms for the second appellant as for the lead appellant, his mother. Reliance had been placed on Regulation 10(5) of the 2006 Regulations. However, while it was accepted that the appellant's marriage to her EEA national husband had been dissolved, as the EEA Regulations had only been enacted in 2006 the appellants could not retain a right of residence if they divorced after they came into effect in May of that year as ha**d** been explained in a previous refusal letter. In relation to Article 8 the judge had referred to **Amirteymour** and the judge had no jurisdiction to go into Article 8 issues. An application under Article 8 could be made. There was the question whether the fee would be waived or not.

8. In response the appellant said that she had applied for a fee waiver which had been refused. She had not been granted indefinite leave to remain. She did not mind making a new application but she had a financial problem. She had tried to get advice for example from the CAB without success. She did not know what else to do.

9. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.

10. It is quite clear that the jurisdiction of the First-tier Tribunal was limited in this case. This is confirmed by the decision of **Amirteymour**. In the absence of service by the Secretary of State of a notice under Section 120, the Tribunal has no power to entertain a case based on Article 8 – see for example paragraph 40 of the judgment of Sales, LJ.

11. The notice of refusal made it clear that if the appellant wished to raise Article 8 then a separate charged application needed to be made.

12. The appellant states she has taken steps to make such an application but has been unable so far to obtain a fee waiver. I am not unsympathetic to her position but the law is quite clear that there is no jurisdiction in this case to go into Article 8 issues for the reasons given by the First-tier Judge.

13. For the reasons I have given the appeals of the appellants are dismissed and the decision of the First-tier Judge is confirmed.

Anonymity Direction

The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date: 17 April 2018

G Warr, Judge of the Upper Tribunal