Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11034/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th November 2018	**On 29th November 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

OYINKAN ONYEKA ISIZIX-XSZ-I
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Eldridge promulgated on 19 December 2017, in which the Appellant's appeal against the decision to refuse her application for leave to remain on human rights grounds dated 10 May 2015 was dismissed.

2. The Appellant is a national of Nigeria born on 28 July 1999. She was first granted leave to enter the United Kingdom as a family member of an EEA national from 21 August 2014 to 21 February 2015 and entered the United

Kingdom pursuant to that on 20 September 2014. On 18 February 2015, the Appellant made an application for leave to remain on human rights grounds.

3. The Respondent refused the application on 10 March 2015 on the basis that she could not satisfy the requirements of the Immigration Rules in Appendix FM as a dependent child because neither her father nor her step-mother had the requisite leave to remain in the United Kingdom. The Respondent also decided that the Appellant did not meet any of the requirements for leave to remain on the basis of private life set out in paragraph 276ADE of the Immigration Rules because she had only lived in the United Kingdom for a period of four months at the date of application and there would be no very significant obstacles to her reintegration into Nigeria. Having regard to the Appellant's best interests as a child under section 55 of the Borders, Citizenship and Immigration Act 2009, there were no exceptional circumstances for a grant of leave to remain outside of the Immigration Rules. The Respondent noted at that point that the Appellant may be eligible to apply for an EEA family permit on the basis of being the step-child of an EEA national.

4. Judge Ripley allow the appeal in a decision promulgated on 18 May 2016 on the basis that it was accepted that the Appellant's father was the spouse of a qualified person and that he and the Appellant would therefore have a right to reside pursuant to regulation 14(2) of the Immigration (European Economic Area) Regulations 2006 as at the date of hearing. That was a finding despite the imminent divorce of the Appellant's father and lack of corroborative documents and evidence to show satisfaction of the requirements of that regulation. Those findings combined with an assessment of the Appellant's best interests and her private life in the United Kingdom led to the conclusion that removal would be a disproportionate interference with the Appellant's right to respect for private and family life.

5. The decision of Judge Ripley was set aside by Judge Mahmoud in the Upper Tribunal in a decision promulgated on 12 April 2017, primarily on the basis of findings made by the First-tier Tribunal were speculative. The appeal was remitted to the First-tier Tribunal for a de novo hearing.

6. The appeal then came before Judge Eldridge who in a decision promulgated on 19 December 2017 dismissed the Appellant's appeal. As at the date of that hearing, the Appellant's father's application for an EEA Residence Card in recognition of a permanent right of residence on the basis of his former marriage had recently been refused. Although reference is made to the European aspect of the Appellant's appeal, it was in fact determined on the basis only of Article 8 without any detailed consideration of her claim under EU law. The Appellant's father was noted to have no leave to remain in the United Kingdom and could therefore return to Nigeria with the Appellant with no breach of family life. In relation to private life it was noted that the Appellant's status in the United Kingdom has always been precarious and there was nothing to

demonstrate that she met the requirements of the Immigration Rules for a grant of leave to remain on that basis. Taking into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002, it was found that removal would not be a disproportionate interference with the Appellant's rights under Article 8 of the European Convention on Human Rights. The proportionality assessment did not include any reference to either the Appellant's or her father's possible retained rights of residence under the Immigration (European Economic Area) Regulations 2016.

The appeal

7. The Appellant appeals on the following grounds. First, that the proceedings before the First-tier Tribunal were unfair due to the service during the course of the hearing of the refusal letter in respect of the Appellant's father's application for an EEA Residence Card which had not previously been served. Secondly, that the Appellant's father was lawfully in the United Kingdom pursuant to section 3C of the Immigration Act 1971 as he was within the period for appealing against the refusal of his application for an EEA Residence Card. Finally, the Appellant relied again her circumstances and family life with her father in support of her appeal.

8. Permission to appeal was granted by Judge Plimmer on 27 June 2018 on all grounds, with the reasons given that it is arguable that the key issue for the FTT was the proportionality of removing the appellant if she had her father were entitled to an EEA residence card. It was further considered arguable that the FTT erred in law when finding that they were unable to meet these requirements, in circumstances where the father was refused residence, which was subject to an appeal to the FTT.

9. At the oral hearing, the Appellant sought an adjournment on the basis that her father's appeal before the First-tier Tribunal had been heard on 25 October 2018 and although there was an indication of a positive outcome for him in that, the written decision had not yet been received. The Appellant confirmed that she was not listed as a dependent on her father's application.

10. I refused the application for an adjournment on the basis that the outcome of the Appellant's father's appeal was not relevant to the initial issue to be determined in her appeal as to whether the First-tier Tribunal erred in law.

11. The Appellant confirmed that she had not made any application for an EEA Residence Card whilst in the United Kingdom but had originally entered the United Kingdom with an EEA family permit issued on the basis of her relationship with her step-mother, an EEA national exercising treaty rights in the United Kingdom. The Appellant has now been in the United Kingdom for four years which has had a very positive impact on her life. However, due to her immigration issues, she has not been able to start university and states that she has nowhere to return to in Nigeria and wishes to remain with her father in the United Kingdom.

12. On behalf of the Respondent, Mr Melvin submitted that the First-tier Tribunal was constrained to deal with the facts of the application before them and the fact that the Appellant's father had an outstanding application before the Respondent and/or outstanding appeal before the First-tier Tribunal is not relevant to her appeal on human rights grounds. It was not accepted that the EEA issue was a core issue nor that it needed to be determined before the human rights application could be decided. However, it was suggested that if the Appellant's father's appeal was successful in that he had a retained right of residence, then it remains open to the Appellant to make an application for an EEA Residence Card on the basis of dependency on her father.

13. In relation to the human rights appeal specifically, it was submitted that there was no reason why the Appellant and her father could not return to Nigeria together to continue their family life there and for the Appellant to pursue further education there.

Findings and reasons

14. As confirmed most recently by the Court of Appeal in TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109, where a person satisfies the requirements of the Immigration Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed. I would add the obvious reason for this is that there can be little, if any, public interest in removing a person who meets the requirements of the Immigration Rules.

15. By analogy the same must be the case for a person who satisfies the requirements of the Immigration (European Economic Area) Regulations 2016 for the recognition of a right of residence on one of the grounds set out therein, that there would be little or no public interest in their removal and provided article 8(1) is engaged, that would be positively determinative of that person's article 8 appeal.

16. For these reasons I find an error of law in the First-tier Tribunal is decision for the failure to consider whether or not the Appellant had a retained right of residence under the Immigration (European Economic Area) Regulations 2016, as a matter which was relevant to the assessment required following the five stage approach to Article 8, including the final balancing exercise. However, there remains an issue in the present case as to whether the error was material.

17. The Appellant has claimed consistently throughout her appeal that she was originally badly advised to put in the application for leave to remain on human rights grounds as opposed to making an application for an EEA Residence Card. The Respondent's refusal of her application expressly notes that she may be able to apply for an EEA family permit, but no such application has been made to the Respondent and the Appellant has not

been included as a dependent in her father's application for an EEA Residence Card. It would appear that that is still the most appropriate course of action for the Appellant to follow and may possibly have different consequences for her, on the assumption that she could meet those requirements, for her immigration status.

18. In the course of her appeal, the Appellant has maintained that both she and her father have a right to reside in the United Kingdom, initially as family members of an EEA national (the Appellant's step-mother) exercising treaty rights in the United Kingdom and subsequently, in respect specifically of the Appellant's father, with a retained right of residence following divorce from the EEA national and a permanent right of residence given the length of his residence in the United Kingdom in accordance with the relevant regulations. The Appellant has not specifically identified the basis upon which she claims a right to reside in the United Kingdom under EU law, but this would have to be on the basis of a retained right of residence following her father's divorce from the EEA national, her step-mother.

19. The Appellant would have therefore needed to have established before the First-tier Tribunal firstly that she falls within one of the requirements of Regulation 10 of the Immigration (European Economic Area) Regulations 2016 (the most recent Regulations being applicable given the repeal of the 2006 Regulations under which no application was made for an EEA Residence Card by the Appellant) and secondly that on the evidence she meets the criteria set out therein. This could potentially only be on the basis of Regulation 10(5) for a retained right of residence following termination of a marriage, albeit this provision itself is only expressly directed to a spouse (or civil partner in the cases of a civil partnership) rather than a family member. It is at least arguable that it should be read to include the latter by reference to the text of Article 13 of Directive 2004/38 which refers to the retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership and not expressly restricted only to a spouse. It would also be illogical for a retained right of residence to be available to a spouse but not his or her children.

20. In any event, the Appellant would also need to establish on the evidence that she met the requirements for a retained right of residence and it is not possible to see how she could have done so on the basis of the evidence before the First-tier Tribunal even if she fell within regulation 10(5). Although there was evidence before the First-tier Tribunal of the Appellant's father's marriage to the EEA national and subsequent divorce, the marriage having lasted for more than three years with residence in the United Kingdom for more than a year during its duration (such that Regulation 10(5)(d)(i) may be satisfied) and evidence of the Appellant studying prior to and after that the date of divorce; there is a lack of evidence of the EEA sponsor's exercise of treaty rights to show that the Appellant was residing in the United Kingdom in accordance with regulations at the date of termination of the marriage (for the purposes of

Regulation 10(5)(b)) and that either she was, if an EEA national, exercising treaty rights is a qualified person under regulation 6 or that she is a family member of such a person (for the purposes of Regulation 10(6)).

21. In the circumstances, I do not find that the Appellant would have been able to establish, on the evidence before the First-tier Tribunal (although there is a legal issue to be determined as well as to whether Regulation 10(5) includes family members other than spouses/civil partners), a right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 such that the she could then show that there would be no public interest in her removal from the United Kingdom. For this reason, I do not find the error of law by the First-tier Tribunal to be material, as even if the EU law issue was considered in detail as part of the Article 8 assessment, the outcome of the appeal could not have been any different.

22. As at the date of hearing before the First-tier Tribunal, although the Appellant's father was within the time for appealing the refusal of his application for an EEA Residence Card, the situation was that he had been refused this and there was no application for an adjournment pending that appeal and no indication in any event as to the relevance of a successful outcome in such a case would assist the Appellant. At its highest, if successful and the Appellant's father had a right to reside in the United Kingdom, that would slightly alter the factual matrix considered for the purposes of Article 8 but the findings that there is no reason why the Appellant's father could not return with her to Nigeria would in any event stand such that there would be no possible difference to the outcome of the appeal.

23. There is nothing in the other grounds of appeal submitted by the Appellant as to the service of the refusal letter in respect of her father during the course of the hearing before the First-tier Tribunal and section 3C of the Immigration Act 1971 does not apply in these circumstances. The First-tier Tribunal's assessment of the Appellant's human rights in accordance with Article 8 of the European Convention on Human Rights does not (save for the EU law point which is not material for the reasons set out above) disclose any error of law. The appeal is therefore dismissed on all grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed  Date 23rd November 2018

Upper Tribunal Judge Jackson