Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/25802/2015**

THE IMMIGRATION ACTS

Heard at Glasgow
On 15 February 2018

Decision & Reasons Promulgated
On 8 March 2018

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

JUMOKE [E]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, advocate, instructed by P G Farrell, solicitors
For the Respondent: Ms M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

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2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge D C Clapham promulgated on 24 November 2016, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on [ ] 1972 and is a national of Nigeria. On 1 July 2015 the Secretary of State refused the Appellant's application for a residence card as confirmation of a right to reside in the UK. The appellant claims that she qualifies for a retained right of residence following divorce from an EEA national in accordance with regulation 10 (5) of the Immigration (EEA) Regulations 2006. The appellant was married to Czech national. During the currency of that marriage the appellant delivered a child by a previous partner, who is not an EEA national. The marriage between the appellant and the EEA national broke down. Decree of divorce was granted on 27 November 2014. The divorce proceedings were commenced after the EEA national had left the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge D C Clapham ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 23 October 2017 Upper Tribunal Judge Rimmington gave permission to appeal stating

> A Union Citizen must reside in the host member state in accordance with article 7 (1) until the date of the commencement of divorce proceedings if a third country national was to be entitled to rely on article 13(2)(c) of the Directive. As the Judge found the divorce proceedings commenced after the EU citizen had departed and the main applicant could not succeed.
>
> However although the child, born in September 2010, was not the child of the EU national it is arguable she was previously a family member and there is no requirement, as per SSHD v NA C-115/15, that the child had commenced school prior to the EU national's departure from the union.
>
> The grounds are arguable

The Hearing

6. (a) Mr Caskie, for the appellant, reminded us that the appellant married a Czech national when she was six months pregnant with another man's child. The father of the child is a Nigerian citizen. The appellant's child was born with Nigerian nationality. He told us that the appellant's marriage to the Czech national ended in divorce and that the appellant and the Nigerian father of her child are now reconciled. The appellant lives with her child and the child's father.

(b) The appellant and her partner are Nigerian nationals, but the appellant's Nigerian partner has been granted indefinite leave to remain in the UK. He was granted indefinite

leave to remain before this case was heard in the First-tier Tribunal. Before this case was heard in the First-tier Tribunal, the appellant's child made an application to register as a British citizen. That application was pending at the date of the hearing before the First-tier Tribunal, and was granted in the few days between the date of hearing and the date the Judge's decision was promulgated.

(c) Ms O'Brien told us that she did not dispute the facts outlined by Mr Caskie. The appellant's child was issued with a British passport in November 2016.

(d) Mr Caskie told us that the decision contains a clear error of law. He argued that the Judge applied regulation 10 (5) & 10(6) of the 2006 Regulations, when he should have considered regulation 10 (3) and 10 (4) instead. Mr Caskie then addressed us at length on the definition of "parent" in the 2006 Regulations and in European law. He urged us to apply a liberal definition of the word, encompassing various degrees of relationship. We listen carefully to what Mr Caskie had to say, but his argument about the interrelationship between parental rights and responsibilities, as created by the Children (Scotland) Act 1995, and the definition of "parent" in 2006 Regulations is not something which we need to consider. We see no reason to suppose that the relationship set out in the Regulations and the Citizen's Directive 2004/38/EC are to be extended beyond those arising from blood or from an adoption recognised by law. In particular, the implicit incorporation of step-parentage is in our judgment ruled out by the separate listing of descendants of the propositus and of the propositus' spouse.

7. For the appellant, Ms O'Brien reminded us that the appellant's child is a British citizen. The child was granted citizenship on 19 November 2016. The Judge's decision was promulgated on 24 November 2016. Ms O'Brien succinctly questioned the relevance of a number of submissions made for the appellant, and agreed that the focus in this case is that the appellant's child was granted British citizenship before the decision was promulgated.

<u>Analysis</u>

8. The Judge heard this case on 7 November 2016. We are satisfied that the Judge was told that the appellant child's application for British citizenship was outstanding at the date of the hearing. In the 14 days between the date of hearing the promulgation of the decision there was a material change in circumstances because the appellant's child was granted British citizenship.

9. In <u>E and R</u> (2004) EWCA Civ 49 the Court of Appeal said that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area." The Court of Appeal set out the ordinary requirements for a finding of unfairness as follows:

> i) There must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular fact;

ii) The fact or evidence must have been established, in the sense that it was uncontentious and objectively verifiable;

iii) The appellant (or his advisors) must not have been responsible for the mistake; and

iv) The mistake must have played a material (not necessarily decisive) part in the Adjudicator's reasoning.

10. The Judge's decision is based on a mistake of fact. The decision relies on a finding of fact that the appellant's child is a Nigerian national, when, at the date of decision, the appellant's child is a British Citizen. The mistake relates to a fundamental fact which almost certainly would have resulted in a different outcome. We have to find that the decision is tainted by material error of law. We set the decision aside.

11. In Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC) it was held that neither section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in DR (Morocco)* [2005] UKAIT 38 regarding a previous version of section 85(5) of that Act has any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal, a tribunal has power to consider any evidence which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

12. We consider whether or not we can substitute our own decision but find that we cannot do so because of the extent of the fact-finding exercise necessary.

Remittal to First-Tier Tribunal

13. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

14. In this case we have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

15. We remit this case to the First-tier Tribunal sitting at Glasgow to be heard before any First-tier Judge other than Judge D C Clapham.

16. The appellant and the child's Nigerian father have made an application to marry, which the Secretary of State has decided to investigate. The appellant was not allowed to attend an appointment for interview at the respondent's premises in Brand Street, Glasgow, because she could not show a passport at the front door of the building, and so was denied entry to the building. She could not show a passport because the respondent

holds her passport (which has now expired). She cannot renew her passport because the Nigerian consulate will not renew a passport for a person who does not have leave to remain in the UK.

17. The marriage interview is still outstanding. The respondent acknowledges that there is a practical difficulty with conducting the interview. We express the hope that the marriage interview will be re-arranged and the respondent will ensure that the appellant is granted access to the venue for the interview.

Decision

18. The decision of the First-tier Tribunal is tainted by material errors of law.

19. We set aside the Judge's decision promulgated on 24 November 2016. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 7 March 2018

Deputy Upper Tribunal Judge Doyle