IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42737/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th August 2014	**On 12th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR ARNAUD JOEL JIONANG NGUEMETSING
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Suri
For the Respondent: Mr Tarlow

DECISION AND REASONS

Introduction

1. The Appellant born on 9th April 1986 is a citizen of the Cameroon. The Appellant who was present was represented by Miss Suri. The Respondent was represented by Mr Tarlow a Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had entered the United Kingdom on a student visa valid from 22nd September 2011 until 1st June 2013. On 20th August 2013 he had sought a residence card as the spouse of an EEA national. That application was refused on 23rd November 2013 and his appeal was dismissed on 27th March 2014.

3. On 23rd July 2014 the Appellant made a second application for a residence card as being the unmarried partner of Miss Kesztyus an EEA national. This application was refused by the Respondent on 9th October 2014 and the Appellant appealed that decision. His appeal was heard by First-tier Tribunal Judge Ross on 15th April 2015 sitting at Richmond. The judge had dismissed the Appellant's appeal under the EEA Regulations and also on human rights grounds.

4. Application for permission to appeal was made and granted by First-tier Tribunal Judge Hollingworth on 8th July 2015. It was said there were arguable errors of law in relation to the extent of the judge's reasoning on the durability of the relationship and arguably that full factors had not been considered in relation to Article 8. Directions were issued, the Upper Tribunal firstly to decide whether an error of law had been made in this case and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellant

5. It was submitted by Miss Suri that the judge had not dealt with the best interests of the child and whilst the judge had said the child could move to Hungary had provided no reason for that. It was further said there was insufficient reasons given for the judge not to accept the durability of the relationship particularly given that witnesses had provided evidence in this case.

Submissions on Behalf of the Respondent

6. It was submitted by Mr Tarlow that the findings made by the judge were entirely open to him when the determination was read as a whole.

7. At the conclusion of the hearing I reserved my decision to consider the documents and submissions raised. I now provide that decision with my reasons.

Decision and Reasons

8. The judge has set out the history of this case. The Appellant had come to the UK on a student visa valid for two years. Postdating the conclusion of that visa and potentially therefore when in the UK unlawfully the Appellant had made application to remain as the spouse of an EEA national, Miss Dago. That application had been refused on 23rd November 2013 but pursued on appeal by the Appellant until dismissed in March 2014.

9. However the relationship with Miss Dago broke down within a short period of time. Although it is said he was married on 20th October 2011 to Miss

Dago and had submitted an application to remain as her spouse in August 2013 contemporaneously he had begun an affair with Miss Kesztyus in July 2013, she becoming pregnant with his child in September 2013 and not unnaturally therefore his marriage breaking down at that time with him moving out of the matrimonial home in April 2014.

10. The judge had concluded the Appellant was not in a durable relationship with Miss Kesztyus and dismissed the appeal under the EEA Regulations.

11. The judge had clearly considered all the evidence in this case including evidence from witnesses, a summary of their evidence being provided within the decision.

12. The judge essentially found that the Appellant had pursued his appeal to remain in the UK as the spouse of Miss Dago at a time when that relationship had broken down and he was already in a relationship with another and she was pregnant. He also concluded that the Appellant had transferred his affections with a swiftness that did not assist the concept of durability and in any event had only been co-habiting with Miss Kesztyus for twelve months at the date of hearing. That was half the two year period that is often used as a useful guideline for durability in such cases. The judge was entitled to reach the conclusions he did based upon those factors and nothing suggests he had not considered all the evidence. He also had the advantage of seeing and hearing the witnesses who gave evidence.

13. In terms of Article 8 of the ECHR the judge had specifically stated at paragraph 16 “In relation to Article 8 no removal directions have been made and I consider therefore that since the Appellant is not to be removed Article 8 does not arise at this stage”. This is a subject matter not without countervailing views but the judge was correct in taking that approach. Article 8 of the ECHR only applies if there is a prospective interference with any alleged family or private life claimed. The Respondent had issued no removal directions and indeed within the refusal letter had specifically stated their decision not to issue a residence card did not require the Appellant to leave the UK and indeed invited him to make an application under any appropriate Immigration Rule if he believed he had a right to remain and at that stage Article 8 of the ECHR would be considered.

14. Accordingly it is plain there was no imminent removal anticipated and therefore no potential interference with either family or private life claimed. Further given the Respondent had made no decision at all on Article 8 of the ECHR the First-tier Tribunal in considering Article 8 would essentially be acting as a first instance decision maker rather than in an Appellate capacity. Thirdly if the Home Office decided to seek to remove the Appellant at some later stage either because he failed to make any further application or an application was refused then Article 8 of the ECHR would be considered at that stage, where circumstances may be somewhat or entirely different. If the application was refused (and it

would be speculative to assume that it would) then at that stage the Appellant would have a right of appeal and all the current circumstances at that time would be considered. Therefore it would render entirely academic any decision made now. Given all of those circumstances the judge was entirely right to state there was no need to deal with Article 8 of the ECHR and any questions therefore of the child's interests were wholly irrelevant.

15. The judge had in paragraph 16 gone on to say "Even if I were to consider the matter under Article 8 …". That was perhaps unnecessary but understandable given the somewhat uncertain legal position and potentially submissions that may have been raised on the Appellant's behalf under Article 8 of the ECHR. The judge had looked correctly through the prism of the Immigration Rules noting that the Appellant did not succeed under Appendix FM or EX.1 for the reasons given. The assessment thereafter at paragraph 19 is less than clear. It may well be that the test for consideration of a case outside of the Rules in these circumstances was compelling rather than "exceptional" as stated by the judge. Further if the judge had decided, which is not clear, that this case needed to be looked at outside of the Rules then additional to consideration of the child's interests under Section 55 of the Borders Act it would have been necessary for the judge to have considered all the ingredients of Section 117B of the 2002 Act. However, as indicated above, any potential error of law that may have arisen in his examination of the case at this late stage of the determination was not material as he had already correctly identified that Article 8 of the ECHR did not need to be considered as there were no proposed interferences with any claimed family or private life by the Respondent at that stage; and in any event not before a fresh decision and potentially therefore a fresh right of appeal.

Decision

16. There was no error of law made by the judge in this case and the decision of the First-tier Tribunal stands.

17. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Lever