



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/08425/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
on 7th January 2015**

**Determination
Promulgated
on 9th January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MARIA MAGDALENA UMANA ROMERO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms N Loughran, of Loughran & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a determination by First-tier Tribunal Judge Handley, dismissing her appeal against refusal of a residence card under the Immigration (European Economic Area) Regulations 2006.
2. The first ground of appeal is that the judge indicated at the hearing that he did not require to consider the grounds of appeal raised under Article 8 of the ECHR, and barred the appellant's representative from making submissions thereon, but in the determination said that he could consider it, and then went on to find such grounds "not engaged".

3. The second ground is that the judge erred by failing to consider the best interests of the appellant's UK citizen grandchildren, for whom she has been caring, and did not explain what weight he gave to an expert report on this issue.
4. I indicated at the hearing that in my opinion the first Ground of Appeal was well taken, but that on substantive remaking the appeal would again fail, for the reasons which follow. Ms Loughran declined the opportunity of an adjournment to prepare any further submissions.
5. The decision under appeal explains at pages 1 to 4 why the evidence was insufficient to satisfy the criteria for a derivative right of residence. It goes on to say that if the appellant wishes to rely on Article 8 of the ECHR she is required to make a separate valid application; that the appellant is not required to leave the UK if she can otherwise demonstrate that she has a right to reside under the Regulations; and that the interests of the children have been considered on the basis of the information provided. Although the appellant is told that having no alternative basis of stay in the UK she should arrange to leave, and that if she does not do so her departure may be enforced, she is also advised that in that event she would be contacted again and given a separate opportunity to make representations against removal.
6. In those circumstances I consider that while a right of appeal under Article 8 of the ECHR is procedurally available, it is of no assistance to the appellant, because the threat of removal is wholly insubstantial.
7. *JM v SSHD* [2006] EWCA Civ 1402, [2007] Imm AR 293 held in an appeal against a decision to refuse to vary leave that a removal decision is not required before substantive Article 8 issues may be considered. That is a different situation from an appeal under the Regulations. A refusal to vary leave puts an appellant in the potential position of committing a criminal offence when an appeal is dismissed. That does not presently apply. In this case the respondent specifically offers to look at any further application either under the Regulations or under Article 8 in terms of the Rules. A removal decision can be made in consequence of refusal to vary leave, but not in consequence of refusal of a card under the Regulations. I do not think that *JM* is an authority for looking at the present case on the assumption that removal will follow on the failure of the appeal.
8. I am fortified in that view by the following consideration. At least since the July 2012 amendments to the Rules, any consideration of Article 8 must begin by addressing the family and private life provisions in the Rules. An appeal under the Regulations cannot succeed on the basis that the decision is not in accordance with the Immigration Rules. Regulation 26 and Schedule 1, paragraph 1, excepts the grounds of appeal in the 2002 Act at section 84(1)(a) and (f). Substantive consideration of family and private life issues would inevitably involve looking at the Rules, a strange route to take in an appeal which could not be allowed under those Rules.

It would be illogical to allow an appeal on human rights grounds outside the Rules where it might succeed under the Rules.

9. The only interference with Article 8 rights of which the appellant can presently complain is the requirement to make an application to the respondent. That cannot constitute disproportionate interference.
10. The determination of the First-tier Tribunal is set aside. However, for the above reasons the same result is reached: the appeal, as brought to the First-tier Tribunal, is **dismissed** on all available grounds.
11. No anonymity direction has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

7th January 2015
Upper Tribunal Judge Macleman