IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17360/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th April 2015	**On 18th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MUHAMMAD NAEEM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Plowright of Counsel
For the Respondent: Mr P. Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 12th December 1976. He successfully appealed to the First-tier Tribunal (Judge of the First-tier Tribunal Shamash) against a decision of the Respondent dated 9th November 2013 to refuse to issue the Appellant with a residence card as confirmation of a right of residence as the family member of an EEA national. The Home Office appeal with leave against that decision and the

matter therefore comes before me in the first place as an appeal by the Respondent. For the reasons I give below I have set that decision aside and remade the decision in this case. For the sake of convenience I will continue to refer to the parties as they were referred to at first instance.

2. On 27th June 2013 the Appellant's father-in-law, Mr Khalid Parvez (Mr Parvez), an Italian national born on 24th December 1952, the Appellant himself, the Appellant's wife, Bushra Khalid (Ms Khalid), born 14th April 1985 and the couple's son, M, born 13th October 2009 applied for residence cards. This was on the basis that Mr Parvez was an EEA national exercising treaty rights and that the Appellant, Ms Khalid and M were dependents on Mr Parvez. The application was refused by the Respondent on the basis that Mr Parvez had not provided sufficient evidence that he was exercising treaty rights in the United Kingdom. That decision was not appealed.

3. On 11th December 2013 Mr Parvez, the Appellant, the Appellant's wife and M made further applications for residence cards on the same basis that is that Mr Parvez was an EEA national exercising treaty rights and the others were his dependents. Mr Parvez's application and that of Ms Khalid and M were all granted and they were issued with residence cards expiring in 2019.

The Explanation for Refusal

4. The Appellant's application was refused because the Respondent was not satisfied that the Appellant had shown he was living with or financially dependent upon his Mr Parvez. The Appellant had submitted an Islamic marriage certificate to show his marriage to the Ms Khalid but the Respondent did not accept that as a valid form of evidence. The relationship with Ms Khalid was not accepted and thus the Appellant could not show a relationship to Mr Parvez, her father. The Respondent considered the relationship between the Appellant and Ms Khalid as unmarried partners and thus as an extended family member under Regulation 8 of the of Immigration (European Economic Area) Regulations 2006. The Respondent did not accept that the Appellant and Bushra Khalid could show that they were in a durable relationship within Regulation 8(5) of the 2006 Regulations.

5. The Respondent pointed to a number of what were termed significant discrepancies:

   (i) The Appellant had submitted a handful of British Gas bills dated between April and October 2013 that named the Appellant as one of the recipients. These did not confirm any kind of relationship and at most indicated he was a housemate.

   (ii) Although M was said to have been born in 2009 M's birth certificate was dated 13th March 2013 which indicated a possibility that the certificate may have been reprinted and issued with additional information.

(iii) The Appellant had made a previous asylum application in July 2010 but on that occasion he had failed to mention having any dependants here in the United Kingdom nor had he made any reference to a family life.

6. The Respondent required the Appellant to make a separate charged application under Article 8 using the appropriate specified application form. Since the Appellant had not made a valid application for Article 8, consideration had not been given as to whether the Appellant's removal from the United Kingdom would breach Article 8. The decision not to issue a residence card did not require the Appellant to leave the United Kingdom if he could otherwise demonstrate he had a right to reside under the Regulations. As it appeared the Appellant had no alternative basis of stay in the United Kingdom he should now make arrangements to leave. If he failed to do so voluntarily his departure "may be enforced". In that event the Respondent would first contact the Appellant again and he would have a separate opportunity to make representations against the proposed removal. Subsequently the Appellant married Ms Khalid according to United Kingdom law.

The Hearing at First Instance

7. It was conceded at the outset of the hearing that the Appellant could not establish prior dependence on Mr Parvez as an extended family member because the Appellant arrived in the United Kingdom before Mr Parvez and was not dependent on him before his arrival in the United Kingdom. Whilst he was currently dependent on Mr Parvez the Appellant nevertheless fell outside the 2006 Regulations. The issue in the case was whether or not the Appellant should be granted discretionary leave to remain outside the Immigration Rules based on his relationship with his wife, son and his father-in-law.

8. In his determination the Judge noted that although the Respondent had not considered Article 8 the case was put to the Judge as an Article 8 claim. At paragraph 14 of the determination the Judge wrote that he had to decide:

> "Whether taking this case as a whole the Respondent ought to have taken a pragmatic view and considered this application under Article 8 of the ECHR. I was initially minded to make the decision but having looked at the refusal letter again I find that there a number of factors that the Respondent has failed to take into account which ought properly to be taken into account in reaching a decision under Article 8. In particular I note that the Respondent has queried whether or not the Appellant and Ms Khalid are in a durable relationship. I am satisfied that they are married, that their marriage was a civil marriage in the United Kingdom. I am also satisfied from the birth certificate, from the photographs and from the oral evidence that the Appellant and Ms Khalid have a son together [M]. The Appellant made his application with other family members."

9. The difficulty for the Appellant under the 2006 Regulations was that he was in effect a dependent on his wife who in turn was a dependent of the

EEA national. Case law established that sub-dependency was not permitted. There were no removal directions but the Appellant had raised Article 8. He was living in the United Kingdom illegally and had lived here illegally for many years. The Appellant's wife, Ms Khalid was not prepared to return to Pakistan as she had not lived there since she was 15. The Appellant could not go to Italy without his wife and they had a child in full-time education. The Judge found that the failure of the Respondent to consider Article 8 meant that the decision was unlawful and remained outstanding before the Respondent to take. The appeal was allowed to that extent.

The Onward Appeal

10. The Respondent appealed against that decision arguing that there was no requirement for the Respondent in deciding an EEA application to consider Article 8. The Appellant had not submitted a valid application for Article 8 on the appropriate application form. Whilst that might be seen as a bureaucratic approach it was a lawful one. In the case of **Weiss [2010] EWCA Civ 803** the Court of Appeal had said that it was a bureaucratic approach but it was impossible to say that it was an unlawful approach.

11. The duty under Section 55 of the Borders and Citizenship Act only arose when the Respondent knew that the decision to be taken would affect a child in the United Kingdom. Given that the Respondent had disputed the relationship between the Appellant and Ms Khalid the Section 55 duty was not triggered at the time of decision. If the submissions made to the Respondent were not of a nature to establish that Section 55 was engaged there was no requirement to consider it.

12. The application for permission to appeal came on the papers before Designated Judge Coates on 16th February 2015. In granting permission to appeal he was satisfied that the grounds were arguable. The Judge had referred to Section 55 of the UK Borders Act although that was the incorrect statute.

The Hearing Before Me

13. The Presenting Officer indicated that he and Counsel for the Appellant had had a useful discussion before the hearing to narrow the issues. The Appellant had been unable to satisfy Appendix FM and the Home Office grounds were relied upon. For the Appellant Counsel acknowledged that the significant issue in the case was whether the Judge had jurisdiction to hear the Article 8 argument. Counsel relied on his response under Rule 24 of the Upper Tribunal Procedure Rules. Counsel distinguished the case of **Weiss** on the facts. The issue before the Court of Appeal was whether or not the claimant in that case ought to have been granted indefinite leave to remain under the long residence provisions of the Immigration Rules or merely discretionary leave to remain. It was not suggested by the Court of Appeal that the Immigration Judge in that case had been wrong to allow the appeal under Article 8.

14. In a more recent case of Ahmed **(**reported as **NA [2013] UKUT 00089)** the Tribunal were prepared to consider Article 8 in an EEA case on the basis that refusal of a residence card would result in the Respondent going on to direct the Appellant's removal to Pakistan. Furthermore, Schedule 1 to the 2006 Regulations gave an Appellant the right to appeal a decision to refuse to issue a residence card on human rights grounds. Section 84(1) of the Nationality, Asylum and Immigration Act 2002 permitted an appeal to be brought on human rights grounds. The Schedule specified that Section 84 had effect in relation to an appeal under the 2006 Regulations.

15. In the current case it was clear that the decision maker was aware that the Appellant's wife, father-in-law and son were all granted residence cards pursuant to the application on 11th December 2013. The Respondent must therefore have been aware that issues relating to Article 8 and Section 55 of the Citizens, Immigration and Borders Act 2009 would arise when it was only the Appellant's application that would be refused. In circumstances where it was obvious to the decision maker that this would be an issue it was incumbent upon the Respondent to go on to consider the potential consequences of the removal of the Appellant from the United Kingdom.

16. Counsel conceded in oral submissions that there had been no Section 120 notice but the issue of Article 8 had been raised in the Grounds of Appeal and was therefore a matter for the Tribunal to consider. I queried when Article 8 had first been raised with the Respondent since if it had been raised for the first time in the Grounds of Appeal against the Respondent's decision then it would not be possible to argue it on appeal before the Tribunal. Counsel replied that whilst there appeared to be no covering letter with the original applications that had been lodged (which would otherwise be an opportunity to raise Article 8) the fact of the matter was there were three to four applicants who had been granted residence cards, the Respondent should therefore have adopted a cumulative approach to that many applications all going in together. The Judge by contrast had looked at all matters in the round.

17. In response the Presenting Officer indicated that there was no definitive case law on whether Article 8 could be raised in an EEA case when there were no removal directions. There was some suggestion that the Upper Tribunal might be issuing guidance on the point in the near future but that had not yet been given (as of the date of this determination it has still not been issued).

Findings

18. The issue in this case is whether the Judge had jurisdiction to consider Article 8 at all given that the decision under appeal was a refusal to issue a residence card. It is common ground in this case that the Appellant cannot succeed under the 2006 Regulations because he is the dependent of a dependent. He cannot establish a direct dependency upon an EEA national who is exercising treaty rights. There had been no Section 120 notice with the Respondent's decision and there were no removal

directions. What there was was an indication from the Respondent in the refusal letter that the Appellant should make arrangements to leave and if he did not do so voluntarily his departure may be enforced. I consider below whether that is sufficient to trigger a human rights consideration.

19. The argument that Article 8 cannot be relevant and thus form the basis of a valid appeal in an EEA case is premised on the submission that an EEA decision is merely declaratory of the existing position, it does not affect the individual's rights e.g. to remain. The applicant was either always entitled to a residence card or was not and the decision of the Respondent is merely declaratory of that position. Thus any private or family life which an applicant may have established at the time of the residence card decision is not affected or interfered with by the Respondent's decision.

20. The Appellant has an established family life with his wife and son and if he were to be removed from the United Kingdom it is plain that that family life would be interfered with. The Judge was concerned that the Respondent's decision might disproportionately interfere with the family life and therefore the basis of the Article 8 claim which had not been considered up until that point by the Respondent should be looked at before a final decision was made. That was the basis on which the Judge found that the Respondent's decision was not in accordance with the law such that it remained outstanding to take.

21. If I find that the Judge had jurisdiction to hear the Article 8 aspect of the appeal then his decision will stand and the decision will remain before the Respondent. The Respondent will need to consider the situation in the light of the findings of fact made by the Judge (which are not challenged). On the other hand if I find that the Judge was not entitled to consider Article 8 then his decision indicates an error of law and must be set aside. In those circumstances I can proceed to remake the decision to dismiss the Appellant's appeal against the Respondent's decision since it is conceded that the Appellant cannot succeed under the 2006 Regulations and Article 8 would then not apply.

22. As was briefly canvassed at the hearing before me guidance from the Upper Tribunal was awaited on the thorny issue of whether Article 8 could be raised in an EEA appeal where there were no removal directions or a Section 120 notice. If the Appellant did not raise Article 8 before the notice of decision it would not be open to him to argue Article 8 at his appeal. I do not accept the argument that the Respondent should have looked at the applications cumulatively because the Appellant was making an application with other family members. The Respondent did not accept the family connections between the Appellant and the others and therefore there was no reason why the Respondent would have considered the matter under Article 8. The Respondent was not prepared to consider the issue under Section 55 because not accepting the relationship meant that the Respondent did not consider that the duty under Section 55 arose. In hindsight in the light of the Judge's findings it is clear that there are a number of Article 8 issues in this case but before they can be

considered the Appellant has to establish that the Tribunal is obliged to consider them. That takes us back to the issue in dispute in this case.

23. Is the wording of the refusal letter couched in such terms that in effect it is similar to a removal decision such that the Appellant should be entitled to raise Article 8? I have quoted the relevant section (see paragraph 6 above) and there is no doubt that the refusal decision makes it clear that if the Appellant fails to voluntarily leave his departure may be enforced. Importantly the letter goes on to say that before the Respondent removes the Appellant, the Appellant will be given an opportunity to make further representations. In those circumstances it does not seem to me that there is such an indication in the refusal letter that the Appellant should be entitled to raise Article 8 as if he had been served with a removal decision. Even if the Appellant cannot argue Article 8 at this stage he has not been deprived of his remedy under Article 8 as that will come later with a subsequent removal decision.

24. Counsel relied on two matters for his argument that the Judge was entitled to consider Article 8. The first was the Upper Tribunal authority of **Ahmed**. **Ahmed** was a decision on a third country national's application for rights of residence following a divorce from an EEA national. The applicant in that case had children who were themselves EEA nationals and one of the questions for the court to answer was whether the fact that the applicant's children were EEA nationals meant that the decision refusing to grant the applicant a residence card violated the right to respect for family life under Article 8. In the Upper Tribunal the Presenting Officer conceded that although the decision in the case (refusal of a permanent residence card) was not a removal decision it would appear on the Court of Appeal authority of **JM Liberia** principles that the Tribunal should consider the case on the basis that a putative consequence of the Respondent's decision was that the Respondent would proceed to direct the Appellant's removal to Pakistan. The Tribunal considered (at paragraph 79 of their determination) that they were entitled to deal with Article 8 "in this type of appeal". They also cited **JM Liberia**.

25. The difficulty for the Appellant in **Ahmed** was that because of the domestic violence inflicted upon her by her EEA national husband she was unable to obtain the necessary information to show that he had been exercising treaty rights at the relevant time. In consequence she could not show that she had a retained right of residence. The Tribunal allowed her appeal on Article 8 grounds but not on EEA grounds (which potentially would have given her a better immigration status).

26. The decision was appealed to the Court of Appeal (reported as **NA Pakistan [2015] EWCA Civ 140)** but as paragraph 2 of the judgment in that case makes clear "the Respondent did not appeal against the decision of the Upper Tribunal to allow the Appellant's appeal on Article 8 grounds". The Court of Appeal was thus concerned with a purely EEA matter whether the Directive on which the 2006 Regulations were based did not in fact require an Appellant in the position of the applicant in that case to have to

show that she had retained rights of residence. That issue was referred to the Court of Justice of the European Union but no reply has as yet had been provided.

27. It seems clear therefore that both the concession made by the Respondent in the case of **Ahmed** and the decision of the Upper Tribunal itself indicated that it was permissible for the Upper Tribunal to consider Article 8 grounds provided Article 8 had been validly raised.

28. The Respondent did not consider Article 8 in this case because the Appellant had not made a proper application on the appropriate form. I interpret the case of **Weiss** as an indication that the approach is lawful. There is therefore nothing to stop the Appellant from making an application under Article 8 if he so chooses even if it may be that the Appellant cannot succeed under Appendix FM.

29. Can the Appellant raise Article 8 for the first time in his notice of appeal? The Appellant can raise Article 8 if he has made representations to the Respondent under the Article before the Respondent's decision. However where the Appellant has not done that but has only sought to raise Article 8 after the decision is made (for example in his grounds) Article 8 cannot be argued, see the case of **Nirula** **[2011] EWHC 3336** approved in the Court of Appeal **(**reported **[2012] EWCA Civ 1436**).

30. There is no indication in the determination that the original application to the Respondent was made under Article 8. The evidence on the file was that the application was made on form EEA1 (registration certificate for Mr Parvez) and EEA2 residence card (for the Appellant). The Respondent's discussion of Article 8 in the refusal letter appears to be premised on the obvious point that the EEA application was made on the basis of a family connection, it could not be made otherwise. However that is not the same as saying that Article 8 had been raised by the Appellant before the decision was taken. There was no covering letter taking the point. The Respondent was thinking ahead that if an Article 8 claim was to be made it should be done in the authorised way.

31. The Appellant also relies on Schedule 1 of the 2006 Regulations which brings in Section 84 of the 2002 Act. The difficulty with that argument is that the ground permitted by the section (that the immigration decision would breach the United Kingdom's obligations under the Human Rights Convention) only applies where it is the removal of the Appellant in consequence of the immigration decision which would breach those rights. In this case there is no removal decision and I do not accept the wording of the refusal letter as equating with a removal decision. The Tribunal would have had jurisdiction to consider Article 8 if it had been validly raised before the notice of decision but as it was not there was no jurisdiction for the Tribunal to hear the Article 8 argument.

32. It follows from what I have said above that the Judge was in error in considering that Article 8 and the duty under Section 55 arose in this case.

In fact if the Judge considered that Article 8 did arise there was no reason why the Judge could not have gone on to make an Article 8 decision himself. It is not entirely clear why the Judge wanted to leave the matter outstanding before the Respondent since this was not a decision under Regulation 8 that would require the Respondent's consideration before a final decision could be made. An appeal under Article 8 would be at large and it would be open to the trial Judge who had heard the witnesses and had seen the evidence to make his or her own findings under Article 8. If the Judge was satisfied that there was family life and it would be interfered with (as apparently he was) the only issue would be the proportionality of interference taking into account section 117 of the Nationality, Immigration and Asylum Act 2002 and existing case law).

33. Be that as it may the Judge was not prepared to consider Article 8 because it had not been considered by the Respondent. That was an error. The Judge should not have been prepared to consider Article 8 because he had no jurisdiction to hear it as it had been raised for the first time in the grounds of appeal. He should have followed **Nirula** and cases going back to **SS Turkey**. There was therefore a material error of law in the Judge's decision and I set it aside.

34. As the issue was a narrow one as to whether there was an Article 8 jurisdiction in this case and I have found that there was not, I can go on to remake the decision by dismissing the Appellant's appeal. This does not prevent the Appellant from making a further application in the correct format. The Respondent will then have to consider that application in the light of the First-tier Tribunal's findings as to relationship etc. which are preserved for that purpose. In the meantime however as I have set aside the decision of the First-tier Tribunal I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it side. I have remade the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to issue a residence card.

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 16th day of June 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE ORDER

No fee award was made in this case and I do not disturb the Judge's decision in that respect.

Signed this 16th day of June 2015

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Deputy Upper Tribunal Judge Woodcraft