Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20106/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 August 2015	**On 2 September 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Igor Ulitin
[No anonymity direction made]

Claimant

Representation:
For the claimant: Ms D Revill, instructed by Yemets Solicitors
For the appellant: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Igor Ulitin, date of birth 29.9.50, is a citizen of Russia.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Afako promulgated 29.1.15, allowing, on human rights grounds only, his appeal against the decision of the Secretary of State to refuse his application for an EEA Permanent Residence Card based on a derivative right of residence pursuant to regulation 15A. The Judge heard the appeal on 2.1.15.

3. First-tier Tribunal Judge Colyer granted permission to appeal on 5.3.15.

4. Thus the matter came before me on 4.8.15 as an appeal in the Upper Tribunal.

Error of Law

5. The grant of permission to appeal was made on the basis that it was arguable that the First-tier Tribunal Judge erred in law in considering Article 8 ECHR when the Secretary of State had not issued removal directions.

6. For the reasons set out herein, I find that there was such error of law in the making of the decision of the First-tier Tribunal that the decision of Judge Afako must be set aside. As both parties agreed that there was no need for further evidence the decision could be remade by the Upper Tribunal without further hearing, consistent with the standard directions issued by the Principle Resident Judge.

7. The relevant background can be briefly summarised as follows. The claimant is married to Ljudmilla Ulitma, an Estonian citizen. They came to live in the UK in 2000. Their child, born in 1989, is a British citizen, naturalised in 2012. The sponsor does not work but spends her time looking after their child, who has a range of significant health and developmental conditions, and is in receipt of carer's allowance.

8. Judge Afako found that the claimant is not entitled to a permanent residence card, because the sponsor is not exercising Treaty rights in the UK, as accepted by the claimant's representative at the hearing. However, Judge Afako found that the claimant met the requirements of regulation 15A(4A), because he played a primary care role in the life of his dependent child and that without the claimant, his wife and son would not be able to cope and thus necessitate their departure from the UK in order to continue to enjoy family life. That decision was flawed; the judge did not address the correct question. The test is not whether they would be able to continue to enjoy family life, but whether the child would be unable to reside in the UK or in another EEA State if the claimant were required to leave the UK. The child would have been able to continue to live in the UK as his mother is not required to leave. Further, they will also be able to live in Estonia, an EEA state. It follows that the judge was in error to conclude at §13 that the claimant had established a derivative right of residence in the UK on the basis of the Zambrano principle.

9. However, this error is not material to the outcome of the appeal, as the judge went on to find that the claimant is not entitled to a permanent residence card, as a person with a derivative right of residence cannot acquire such status in the UK.

10. However, the judge was in error both in stating at §16 that the part of the decision stating that the claimant must make arrangements to leave the UK must be set aside, as the claimant is not in fact entitled to a derivative right of residence. Further, the judge was also in error to go on to consider Article 8 ECHR, when there was no section 120 statement and no removal decision. As recently held in Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC), "*Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in IM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.*"

11. Similarly, in the Court of Appeal in FK (Kenya) v SSHD [2010] EWCA Civ 1302, Lord Justice Sullivan observed,

> "Question (iii): family life. Before dealing with this question I would observe that it is very doubtful whether it was appropriate for the Article 8 issues raised by the appellant to have been resolved at this stage when there had been no removal decision. If and when a removal decision is made the appellant will be able to appeal against that decision and as part of that appeal he will be able to include Article 8 grounds in his appeal. It will of course be for the Secretary of State to decide whether to deport the appellant as a person who has committed criminal offences or whether he should be removed under the Immigration Rules. It will be for the Tribunal at the stage of any appeal against such a decision to weigh the relevant factors as they exist at that time. It seems to me therefore that it was at best premature for the Tribunal to be asked to consider the Article 8 issue in this appeal."

12. As at the date of the hearing before the First-tier Tribunal the claimant was not compelled to leave the UK and thus the Convention should not have been a consideration. The application for a residence card is in effect a request to recognise an existing right. The decision does not in fact change the claimant's status at all. Article 8 does not arise in these circumstances.

13. It follows that Judge Afako was in error of law in considering and allowing the appeal on Article 8 ECHR.

14. It further follows from the above that the claimant's appeal could never have succeeded and should have been dismissed.

15. In passing I note that §1 of the decision is in error in stating that there is no appeal under section 82 of the Immigration and Asylum Act 2002, as no immigration decision has been made. However, the regulations apply section 82 as if the decision were an immigration decision.

Conclusions & Decision:

16. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade by dismissing the appeal.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The appeal of the claimant has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated