Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21162/2014

THE IMMIGRATION ACTS

Heard at Bradford UT	**Decision & Reasons Promulgated**
On 24 March 2015	**On 31 March 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

HERBERT AYOOLA CAXTON-MARTINS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not present or represented
For the Respondent: Mrs R Pettersen, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant Herbert Ayoola Caxton-Martins was born on 8 October 1986 and is a male citizen of Nigeria. In a decision promulgated 19 January 2015, I find that the

First-tier Tribunal had erred in law such that its determination had to be set aside. My decision was as follows:

2. The appellant, Herbert Caxton-Martins, is a citizen of Nigeria who was born on 8 October 1986. He had applied for a residence card under Regulation 18A of the Immigration (European Economic Area) Regulations 2006 (hereafter referred to as "the 2006 Regulations"). His application was refused by the respondent by way of a notice dated 22 April 2014. The appellant appealed to the First-tier Tribunal (Judge Thorne) which, in a determination promulgated on 8 August 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

3. Granting permission, Judge Gibb wrote at [30]:

> As the appellant is not represented I have looked at the determination with care. I can see little point in the complaints as to the outcome under the derivative residence point, but there is an arguable legal error in relation to Article 8. The judge did not consider this because there was no removal decision, but this was an arguable legal error in view of *Ahmed* [2013] UKUT 89 (IAC) and the fact that it was raised in the grounds of appeal (even noting that the Secretary of State had not considered Article 8 in the refusal).

4. Before the First-tier Tribunal, the appellant claimed that he was the primary carer of N (who is now aged 1 year). The mother of N is a naturalised British citizen who came to the United Kingdom from Zimbabwe in 2002. The respondent considered that the appellant was not entitled to a Derivative Residence Card on the basis of the judgment in *Zambrano* (C-34/09). The respondent considered that the appellant was not the primary carer of N and, if the appellant had to leave the United Kingdom, then the mother of N would be able to care for her and N would be able to remain in the United Kingdom. In his grounds of appeal, the appellant disputes the findings made by the judge, namely that the appellant had failed to establish that, if he had to leave the United Kingdom, N would be unable to reside here. The judge found [28] that the appellant had failed to establish that he was the primary carer of N; he found that the care of the child "is shared between the appellant and his wife." The grounds of appeal as drafted by the appellant and the representations he made to me at the initial hearing amount to no more than a disagreement with conclusions which were open to the judge on the evidence before him.

5. The only matter which remains before the Upper Tribunal is, therefore, that of Article 8 ECHR, as identified by Judge Gibb in the grant of permission. Judge Gibb dealt briefly with Article 8 at [32]:

> The appellant has not been issued with removal directions. Therefore the only decision under appeal relates to the refusal to grant him a Derivative Residence Card. In my judgment the respondent's decision to refuse the appellant a residence card to which (as I have found) he is not entitled does not interfere with any right protected under Article 8 of the ECHR.

6. Appeals to the First-tier Tribunal under the 2006 Regulations are subject to the provisions of Regulation 26:

> **26.**—(1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State.
(3) If a person claims to be the family member or relative of an EEA national he may not appeal under these Regulations unless he produces—
(a) an EEA family permit; or
(b) other proof that he is related as claimed to an EEA national.
(4) A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations.
(5) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act.
(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the Asylum and Immigration Tribunal.
(7) The provisions of or made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the Asylum and Immigration Tribunal in accordance with that Schedule.

7. Schedule 1 of the 2006 Regulations provides as follows:

The following provisions of, or made under, the 2002 Act have effect in relation to an appeal
under these Regulations to the Asylum and Immigration Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:
section 84(1)(**a**), except paragraphs (a) and (f);
sections 85 to 87;
sections 103A to 103E;
section 105 and any regulations made under that section; and section 106 and any rules made under that section(**b**).

8. Schedule 1 provides, therefore, that the First-tier Tribunal should treat an appeal brought under the 2006 Regulations in the same way as an appeal against an immigration decision under Section 82(1) of the 2002 Act. The provisions of Section 84(1) (except sub-paragraphs (a) and (f)) shall have effect. Section 84 (having removed sub-paragraphs (a) and (f)) provides as follows:

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a)…

(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities)

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f)…..

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) "EEA national" means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as it has effect from time to time).

(3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

(4) An appeal under section 83A must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

It follows, therefore, that an appeal to the First-tier Tribunal under the 2006 Regulations is capable, by the operation of Section 84(c) of the 2002 Act, of engaging Article 8 ECHR.

9. The Court of Appeal in *JM* [2006] EWCA Civ 1402 settled the question as to whether, in the absence of decision to remove, the First-tier Tribunal (then in its previous manifestation as the AIT) was obliged to determine on Article 8 ECHR grounds an appeal against an immigration decision under Section 82(1). At [14-15] Laws LJ observed;

> 14. It is of course elementary that the AIT is a creature of statute and thus possesses only the jurisdiction which statute has conferred upon it. In this case, the most pertinent provisions are contained in sections 82 and 84 of the 2002 Act. First, section 82(1):
>
> "(1) Where an immigration decision is made in respect of a person, he may appeal [to the Tribunal]. [I interpolate, the statute has been amended, it previously referred to an adjudicator].
>
> "(2): In this part 'immigration decision' means …
>
> "(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no need to enter or remain …

"(g) a decision that a person is to be removed from the United Kingdom by way of directions under [section 10(1)(a), (b) or (c) of the Immigrations and Asylum Act 1999 (removal of person unlawfully in United Kingdom)."

15. I may go to section 84(1):

"An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds …

"(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights …

"(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

Laws LJ at [28] concluded:

The short, but important, position is that once a human rights point is properly before the AIT, they are obliged to deal with it. That is consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act and seems to me to be the proper result of the construction of the relevant provisions. I should add that the AIT referred to Strasbourg authority, they said at paragraph 33:

"We are aware that it has sometimes been said that, in dealing with a refusal to vary leave to enter or remain, the appellant authorities should deal also with human rights on removal on the basis that removal is imminent: but it is not imminent in any legal sense because of the need for a further decision. So much is clear from the European Court of Human Rights decision in Vijayanathan and Pusparajar v France (1992) 15 EHRR 62."

10. The Upper Tribunal considered Article 8 in appeals under the 2006 Regulations in *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* [2013] UKUT 00089 (IAC). Both parties agreed that Article 8 grounds could be raised:

Mr Deller [the Senior Home Office Presenting Officer] submitted that although the decision at issue in this case – refusal of a permanent residence card – was not a removal decision, it would appear, on **JM (Liberia) [2006] EWCA Civ 1402** principles, that the Tribunal should consider the case on the basis that a putative consequence of the refusal decision is that the respondent would proceed to direct her removal to Pakistan. That said, the appellant's Article 8 circumstances now were stronger than they were when the refusal decision was made over two years ago. Among the factors in her favour were that she had been accepted in the past as having an EU right of residence as a family member; she would appear to meet the requirements of Appendix FM of the new Immigration Rules, had she made her application on July 9 2012 or thereafter; her children are Union citizens; it has been accepted that she has been a victim of domestic violence. Whilst he would leave the matter for the Tribunal, he accepted the appellant's Article 8 case was a strong one.

The Tribunal agreed [79]:

Even if we are wrong in the conclusion to which we have come on the application of **Zambrano** principles and Article 12 of Regulation 1612/68, we would still allow the appeal on Article 8 ECHR grounds. As regards jurisdiction, we have already noted we are entitled to deal with Article 8 in this type of appeal: see **JM (Liberia**). As regards merits, however, we must make it clear that we do not allow it because we think she satisfies all the requirements of the new Immigration Rules. She does not quite.

11. In the present appeal, Judge Thorne engaged with Article 8 but only in order to refuse to determine the appeal on that ground. It follows that he was wrong in law to do so. I say that because (i) the 2006 Regulations make provision for appeals to be brought on human rights grounds and (ii) I cannot identify any reason to conclude that the reasoning of *JM* should not apply to appeals brought in respect of the Regulations; the "human rights point was properly before" the First-tier Tribunal which was "obliged to deal with it." The absence of a removal decision was of no greater relevance to the obligation of the Tribunal to address Article 8 ECHR in this 2006 Regulations appeal than it was in the Immigration Rules appeal in *JM*. I set aside the determination accordingly. The appeal is dismissed under the 2006 Regulations. The Upper Tribunal will determine the appeal on Article 8 ECHR grounds following a resumed hearing before me at Bradford.

12. At the resumed hearing at Bradford on 24 March 2015, the appellant did not attend. Mrs Pettersen, for the respondent, told me that the appellant had made a subsequent application to remain under HC 395 (as amended) D-LTRP1.2 and had been granted leave to remain for 30 months expiring 13 September 2017. Although it was not clear whether an EEA appeal should be treated as an appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 for the purposes of Section 104 of that Act (whereby a grant of leave to the appellant will lead to the appeal being treated as abandoned) I am satisfied, in any event, by reference the failure of the appellant to attend today's hearing (he was duly served with a notice of hearing on 17 February 2015) and the fact that he has now been granted leave to remain in the United Kingdom that he no longer wishes to proceed with the appeal. I have therefore dismissed the appeal.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date: 30 March 2015

Upper Tribunal Judge Clive Lane