Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23154/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14 May 2015	**On 22 May 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Marcelle Scrivener
[No anonymity direction made]

Claimant

Representation:

For the claimant: Ms A Davies, instructed by Matrix Law
For the appellant: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Butler promulgated 26.1.15, allowing on human rights grounds the claimant's appeal against the decision of the Secretary of State to refuse her application for an EEA derivative residence card, pursuant to regulation 15A of the Immigration (EEA) Regulations 2006. The Judge heard the appeal on 12.1.15.

2. First-tier Tribunal Judge Chambers granted permission to appeal on 19.3.15.

3. Thus the matter came before me on 14.5.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out herein, I found that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Butler should be set aside and remade.

5. At §42 of the decision of the First-tier Tribunal the judge found that the appellant and her daughter did not have derivative rights of residence in the UK. The judge found that the appellant and her husband were not credible witnesses and their accounts were inconsistent. The judge also concluded that if the appellant left, the whole family would leave with her. Although there is no compulsion for them to do so, that would be the choice of the family members. The appeal thus fell to be dismissed in relation to the Regulations. There has been no appeal or cross-appeal in relation to that part of the decision and it must stand.

6. The grounds of application for permission to appeal assert that the judge gave weight to immaterial matters, the hypothetical separation of the family; failed to give adequate weight to the fact that the family would leave together with the children's best interests being to leave with their parents; failed to apply section 117B of the 2002 Act; and failed to provide adequate reasons for accepting the claimed lack of contact between child and father in the light of serious issues as to the credibility of the appellant and her husband.

7. In granting permission to appeal, Judge Chambers considered that the First-tier Tribunal Judge considered the best interests of the children at §47, deciding at §48 that there was a genuine and subsisting relationship with both parents, "but it is not shown on a fair reading of the decision that the judge gave weight to the countervailing factors argued in the grounds. Permission is granted."

8. In essence, the issue in the error of law hearing is whether the judge should have gone on to consider the appellant's case outside the Regulations on the basis of family life pursuant to article 8 ECHR, and whether that assessment, resulting the appeal being allowed on that ground only, was adequate.

9. I find that having found that the claimant did not meet the requirements of the Regulations, and there being no removal decision, there was no basis for the judge to go on to consider article 8 ECHR. An application for a derivative residence card is an application for recognition of a status, a right to reside, it is not an application for leave to remain or a change in immigration status. The refusal decision did not require the claimant to leave the UK and explained that there had been no consideration as to whether her removal would breach article 8 ECHR; if she wanted the Secretary of State to consider an application leave to remain on the basis of private or family life she should make a separate charged application on the appropriate specified form. A decision to refuse to issue the residence card requested cannot in the circumstances be a disproportionate interference with the appellant's article 8 rights. Article 8 is not a proper basis for allowing the claimant's appeal if she fails on the residence card point. The claimant did not make an article 8 application

for leave to remain on the basis of private or family life rights when she made the EEA application. She could have made such an application, and was not obliged to await a removal decision to do so, but did not. The two routes are quite distinct and involve separate and different considerations. If an article 8 application is not made to the Secretary of State it is not properly before the Tribunal and has, for understandable reasons, not been considered by the Secretary of State. It would be wrong in principle for the First-tier Tribunal to make the one and only determination of a substantive human rights claim that has not been considered by the Secretary of State, though there was a mechanism available to the claimant to seek such a consideration.

10. The claimant may seek to rely on JM (Liberia) [2006] EWCA Civ 1402, which concerned a person who simultaneously claimed asylum and made an article 8 ECHR claim. The Court of Appeal considered whether a human rights claim could be considered in the absence of an imminent threat of removal from the UK. The case was solely about the jurisdiction of a Tribunal hear and determine an article 8 claim raised before it and turned on the particular construction of section 84(1)(g) of the 2002 Act. It is not authority for the proposition that a decision to refuse a residence card will automatically raise human rights issues. JM (Liberia) was decided long before the Immigration Rules incorporated, in 2012, article 8 family and private life claims, so as to render decisions of the Secretary of State article 8 compliant. It has been pointed out elsewhere that if the First-tier Tribunal was obliged to consider an article 8 claim on an EEA application, where it has never been considered by the Secretary of State, it would be tantamount to granting carte blanche to avoid making an proper application on the correct form and accompanied by the correct fee rather than the non-chargeable EEA application process.

11. In any event, JM (Liberia) is rather put in doubt by 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 it happens, in that case the appellant had asked the Immigration Judge to consider the Article 8 issue and Lord Justice Sullivan said that "the appellant can hardly complain now that that is what the Immigration Judge proceeded to do," the appellant appealing the decision.

13. It is arguable that in line with the cases of Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260 and Jaff (s.120 notice; statement of "additional grounds") [2012] UKUT 00396(IAC), in the absence of a section 120 notice, there is no jurisdiction for the Tribunal to consider any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against. An appellant on whom no section 120 notice has been served may not raise before the Tribunal any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against. However, section 120 relates to an application to enter or remain in the UK, or an immigration decision under section 82 is made against him. In the circumstances, it is doubtful that section 120 applies to an EEA case.

14. In Ahmed [2013] UKUT 0089, the case now the subject of a reference to the CJEU as NA, the issue was conceded by the respondent. There the court consider the question, 'Does the fact that her children are EEA nationals mean that the decision refusing to grant her a residence card violates her right to respect for family life under Article 8 ECHR?' It was submitted that although the decision at issue in the 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." The Tribunal proceeded on that basis.

15. However, the decision by the Upper Tribunal in Ahmed to consider the article 8 arguments when urged to do so by both parties in the peculiar circumstances of that case, is not authority for the proposition that the Upper Tribunal is obliged to determine a putative human rights claim in the context of an appeal relating to the EEA Regulations, especially when it has not been addressed in the original decision of the Secretary of State. The Upper Tribunal in Ahmed considered the argument in respect of article 8 only because it was invited to, and nobody suggested that it would be inappropriate for it to do so.

16. To the extent that article 8 considerations arise on the facts of the present case, they do so purely by virtue of article 8 being raised in the grounds of appeal. It follows that article 8 can only be considered on the same basis as suggested by Sullivan LJ in FK (Kenya), namely, whether the refusal of a residence card amounts to a disproportionate interference with the claimant's right to family life. It is not a question whether her enforced removal would amount to such a disproportionate interference. On the facts of this case, the decision to refuse to grant an EEA residence card cannot be regarded as a sufficiently interference with the claimant's private and family life rights so as to engage article 8 at all.

17. In any event, the article 8 assessment of Judge Butler was flawed for a number of reasons. First, the judge launched straight into article 8 ECHR without ever considering Appendix FM or paragraph 276ADE. If the judge was entitled to consider private and family life at all, he should have done so first through the prism of Appendix FM and paragraph 276ADE. There was no such consideration. Neither

did the judge consider in the proportionality assessment, as he was required to do so, the public interest considerations under section 117B of the 2002 Act. Neither did the judge make any proper consideration in the assessment of the best interests of the child apply the correct legal principles from Zoumbas and EV (Philippines). I reject Ms Davies submissions that these matters could all be somehow divined from the decision read as a whole.

18. It follows that the decision cannot stand and must be set aside and remade, preserving the finding that the claimant does not meet the requirements of the Regulations for the derivative residence card sought.

19. In remaking the decision, taking account of the fact that the appeal fails under the Regulations, I find, for the reasons set out above that even though article 8 is raised in the grounds of appeal to the First-tier Tribunal, there is no basis or need to consider article 8 private and family life. I find that the decision of the Secretary of State to refuse to issue the residence card sought does not amount to such grave interference with the claimant's or her child's private and family life rights so as to even begin to engage article 8 ECHR at all. In the circumstances, I consider that issue no further.

Conclusions:

20. 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.

I set aside the decision.

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

Signed

Deputy Upper Tribunal Judge Pickup

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.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

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

Signed

Deputy Upper Tribunal Judge Pickup