Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35849/2013

THE IMMIGRATION ACTS

Heard at Laganside Courts, Belfast	**Decision & Reasons Promulgated**
On 31/10/2014	**On 14/09/2015**

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FRANKLIN OBEHI ATAMEWAN

Respondent

Representation:

Appellant:	Mr Mills, Senior Home Office Presenting Officer
Respondent:	Mr S McTaggart (of Counsel) instructed by Paul K Nolan and Company Solicitors

DETERMINATION AND REASONS

Introduction

1. This appeal raises certain questions relating to the appeal rights established by regulation 26 of the Immigration (European Economic Area) Regulations 2006 (hereinafter "*the EEA Regulations*"). Regulation 26 of and Schedule 1 to the EEA Regulations operate in tandem. In unison, they create a right of appeal to the First-tier Tribunal, Immigration and Asylum Chamber (the "*FtT*") against an "*EEA decision*", as defined. The question which this determination addresses is whether

the FtT has jurisdiction to determine an appeal based on Convention rights in circumstances where the Secretary of State for the Home Department (the "*Secretary of State*") or an immigration officer has not served on the appellant a notice under section 120(2) of the Nationality, Immigration and Asylum Act 2002.

The Secretary of State's Decision

2. Franklin Obehi Atamewan, the Respondent to this appeal, is a national of Nigeria, aged 33 years. By a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*") dated 16 August 2013, the Respondent's application for a residence card under the EEA Regulations 2006 was refused. The essence of the Secretary of State's decision is discernible from the following passages in the text:

> "Where someone applies on the grounds that they are an extended family member of an EEA national, they must meet the relevant criteria ….
>
> Extended family members encompass those who can show that they are in a 'durable relationship' with an EEA national. Currently, our assessment of a durable relationship is in line to [sic] those specific criteria as set out in Immigration Rules ….. we would expect you to demonstrate that you have been living together with your EEA national sponsor for at least two years. Equally, it is reasonable to expect that you both intend to live together permanently, that any previous relationship/marriage each of you may have had has broken down and that the parties are not related by birth."

The decision maker then adverted to a birth certificate confirming that the Respondent is the father of a child born on 01 December 2011, continuing:

> "Whilst this [is] an indicator of a durable relationship, you have submitted no other documents to confirm that your relationship is continuing. In relation to the documentation that you have supplied in the form of three birth certificates, personal cover letters, Sky and BT utility bills for the period 25 January to 18 May 2012, this Department deems this evidence as insufficient as it does not meet the above criteria and as stipulated in the Regulations as reasonable evidence of a durable and subsisting relationship."

In brief compass, the Secretary of State's assessment was that the Respondent had failed to provide sufficient evidence of a durable relationship with an EEA national and, thus, could not be considered an extended family member of such person. The application for a residence card was refused accordingly.

3. There is a self-contained passage in the decision which confirms that, in his application for a residence card, the Respondent had made the case that a refusal would infringe rights under Article 8 ECHR. This was addressed by the decision maker in these terms:

> "You have stated that you also wish to rely on private or family life established in the UK under article 8 of the ECHR. The Immigration Rules now include provisions for applicants wishing to remain in the United Kingdom on the basis of their family or private life ... [in] Appendix FM and paragraph 274ADE respectively. If you wish the

> UK Border Agency to consider an application on this basis you must make a separate charged application using the appropriate specified application form ...
>
> **Since you have not made a valid application for Article 8 consideration, consideration has not been given to whether your removal from the UK would breach Article 8 of the ECHR.**"
>
> [Emphasis added.]

In the events which have occurred, this discrete refusal by the Secretary of State to consider the Respondent's Article 8 ECHR claim and the treatment of this issue at first instance have evolved into an issue of central importance.

The decision at first instance

4. The Respondent appealed to the First tier Tribunal ("*the FtT*"). In the Notice of Appeal, the first ground was formulated in the following terms:

> "UKBA have not given full consideration to the Appellant's Article 8 ECHR rights as the father of an EEA national child, as well as a partner of his sponsor ...
>
> [Followed by] ...
>
> Furthermore, the UKBA decision that the Appellant's sponsor is not a temporarily ceased worker is arbitrary and not based on the Appellant's submissions."

There are, altogether, five members of the Respondent's family unit and thus, potentially, multiple Article 8 rights. The person described as the "*sponsor*" is the Respondent's EEA spouse. It is not disputed that they are a married couple. The Appellant is the biological father of one of the three children (*infra*}. The second issue raised in the grounds of appeal related to the Secretary of State's response to the representation made in the Respondent's application that, while his wife was unemployed, she was desirous of resuming her employment as soon as possible. In the event, this ground was not pursued.

5. The contours of the hearing before the FtT can be traced from the following passage, in [3] of the determination:

> "In this appeal no substantive challenge was made to the Secretary of State's decision under the Regulations. The basis of his challenge now is that his Article 8 ECHR family rights and those of his family members will be breached if his status in the United Kingdom is not secured and he is ultimately required to return to Nigeria."

The Judge then rehearsed the basic particulars of the family unit. The Respondent is married to the EEA national concerned, a local mother who had two children, aged 12 and nine years respectively, before she met the Respondent. As noted above, they are the parents of a child now aged almost three years. The Judge also summarised certain evidence bearing on the family circumstances, relating particularly to the social, emotional and behavioural difficulties pertaining to the oldest child. Next, the Judge made reference to the Immigration Rules and the decisions in Izuazu [2013] UKUT 45 (IAC), Shahzad [2014] UKUT 85 (IAC) and Gulshan [2013] UKUT 00640 (IAC). The Judge made no finding that the Respondent's case satisfied any of the

routes available under the Immigration Rules. It is tolerably clear by implication, that the Judge found that the Rules were not satisfied, as the following passage indicates:

> "In this case, it is apparent that sufficiently compelling circumstances not recognised under the Rules arise …"

The Judge, having summarised certain factors relating to the Respondent and the other members of the family, continued:

> "… I am satisfied that the Appellant's right to respect for his family outweighs the Respondent's economic interest in maintaining immigration control and find **the decision to remove him** which in the first instance has taken the form of a request that he leave the jurisdiction would be disproportionate."
>
> [Emphasis added.]

The impugned decision of the Secretary of State was not, of course, a decision to remove the Respondent from the United Kingdom. It was, rather, a refusal of his application for a residence card under the EEA Regulations.

6. The Secretary of State's application for permission to appeal to this Tribunal raised two issues. The first was formulated thus:

> "The Secretary of State made it clear in the refusal letter that any claim in respect of Article 8 should be made in a separate application and the appropriate fee should be paid. It is submitted that the Immigration Judge erred in law by making himself the primary decision maker in respect of what should have been a fresh application under Appendix FM or outside the Rules."

The second ground of appeal was couched in the form of an alternative:

> "Alternatively, it is submitted that the Immigration Judge erred in law by failing to give proper consideration and adequate reasons in respect of 'exceptional circumstances'. It is submitted that the application of this test was also confused by reference and application of the case of Razgar."

Permission to appeal was granted on the basis that both grounds were considered arguable.

The Legislative Framework

7. It is appropriate to begin with the relevant provisions of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"), in particular those arranged in Part V, wherein "*the Tribunal*" denotes the First-tier Tribunal ("*FtT*"). Section 82(1) provides that a person may appeal to the FtT against an "*immigration decision*", as defined. The definition of "*immigration decision*" does not embrace any of the decisions made under the EEA Regulations. Section 84(1) prescribes the permitted grounds of appeal:

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

a. that the decision is not in accordance with immigration rules;

b. that the decision is unlawful by virtue of … Article 20A of the Race Relations (NI) Order 1976;

c. that the decision is unlawful under section 6 of the Human Rights Act 1998 …

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 or residence in the United Kingdom;

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

f. that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

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."

Section 86, under the rubric "Determination of Appeal", provides:

"(1) This section applies on an appeal under section 82(1), 83 or 83A.

(2) The Tribunal must determine –

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)) and

(b) any matter which section 85 requires it to consider."

8. At this juncture, it is appropriate to interpose section 120 of the 2002 Act:

"(1) This section applies to a person if –

(a) he has made an application to enter or remain in the United Kingdom, or

(b) an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him.

(2) The Secretary of State or an immigration officer may by notice in writing, require the person to state -

(a) his reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which he should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in –

(a) The application mentioned in subsection (1)(a), or

(b) An application to which the immigration decision mentioned in subsection (1)(b) relates."

Sections 85 and 120 of the 2002 Act are inter-related. Section 85 provides:

"(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced."

9. Taking into account the central issue to be determined in this appeal, it is also necessary to consider those provisions of the Immigration Rules relating to specified forms and procedures for applications and claims. The relevant provisions are contained in Part 1. At the material time, paragraph A34 provided:

> "An application for leave to remain in the United Kingdom under these Rules must be made either by completing the relevant online application process in accordance with paragraph A34(iii) or by using the specified application form in accordance with paragraphs 34A to 34D."

Thus there are two prescribed mechanisms for making an application for leave to remain in the United Kingdom. Whichever mechanism is selected by the applicant, any specified fee in connection with the application must be paid in accordance with the method prescribed: per paragraph A34(iii)(a) and paragraph 34A(ii). In short, these two paragraphs of the Rules establish a series of requirements, formal and procedural in nature, governing applications for leave to remain in the United Kingdom under the Rules. The consequences of non-compliance with any specified requirement are addressed, firstly, in paragraph A34(iv):

> "Where an application for leave to remain in the United Kingdom is made by completing the relevant online application process, the application will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered."

To like effect is paragraph 34C:

> "Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, such application or claim will be invalid and will not be considered. Notice of invalidity will be given in writing and deemed to be

received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day."

While paragraph 34c survives, paragraph A34(iv) was deleted with effect from 06 November 2014, but continues to apply to preceding undetermined applications.

10. This survey of the legislative superstructure continues with section 6 of the Human Rights Act 1998 (the "*1998 Act*"), which provides, in material part:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention Right.
>
> (2) Subsection (1) does not apply to an act if -
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (c) In this section 'public authority' includes –
>
> (a) a court or tribunal …"

There are associated provisions in sections 7 and 8 of the 1998 Act governing the bringing of a human rights claim and the grant of judicial remedies.

11. The Secretary of State's decision to refuse the Respondent's application for a residence card was made under the Immigration (European Economic Area) Regulations 2006 (the "*EEA Regulations*"). It is necessary to identify the underlying purpose of this measure of domestic law. The EEA Regulations implement Directive 2004/38/EC, the so-called "Citizens Directive", which regulates the rights of EU citizens and their family members to move and reside freely within the territory of the Member States, operative from 30 April 2006. It extended the scope of the pre-existing law which was based on a series of Directives (which it repealed) and decisions of the CJEU. It enlarged the pool of those previously able to assert, or benefit from, the free movement provisions of EU law.

12. The framework of this statutory regime is such that a broad spectrum of decisions may be made thereunder. By regulation 2(1), "*EEA decision*" is defined as:

> "A decision under these Regulations that concerns a person's –
>
> (a) entitlement to be admitted to the United Kingdom;
>
> (b) entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card; or
>
> (c) removal from the United Kingdom."

This regime also establishes, via regulations 7 and 8, the separate categories of "*family member*" and "*extended family member*". Regulation 7 prescribes the conditions to be satisfied in order to qualify for the status of "*family member*". Regulation 8 does likewise in respect of the status of "*extended family member*". Regulations 9 and 10 make further provision for family members. Part 2 of the Regulations creates a series of "*EEA rights*": admission, residence and the right to an EEA family permit in certain circumstances. In passing, as appears from the terms of the Secretary of State's decision, rehearsed in [2] above, the Respondent's application for a residence card failed under the "*durable relationship*" requirement of regulation 8(5).

13. The subject matter of Part 6 of the 2006 Regulations is "Appeals Under These Regulations". Regulation 26 provides, in material part:

> "(1) Subject to the following paragraphs of this regulation, a person may appeal under these regulations against an EEA decision …
>
> (6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the First-tier Tribunal.
>
> (7) The provisions of or made under the 2006 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that schedule."

Paragraph [1] of Schedule 1 provides:

> "The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal or Upper Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:
>
> Section 84(1) except paragraphs (a) and (f);
>
> Sections 85 to 87."

Thus the appeals regime of the EEA Regulations imports certain provisions of the corresponding regime in Part V of the 2002 Act. As regards section 84(1), five of the seven specified grounds of appeal are imported in this way. These are, in shorthand, breach of the race relations legislation; breach of section 6 of the Human Rights Act 1998; breach of certain appellants' rights of entry or residence under the Community Treaties; otherwise not in accordance with the law; and breach of the United Kingdom's obligations under the Refugee Convention.

Discussion

14. The argument which this Tribunal received on behalf of the Secretary of State relating to what emerged as the central issue in the appeal was relatively limited. There was no skeleton argument and, indeed, the relevant provisions of the Immigration Rules (*supra*) were not cited. Nor was reference made to any of the provisions of the 2002 Act, with the exception of section 120. In addition, no reference was made to any of the provisions of the EEA Regulations.

15. Taking into account the foregoing, my understanding of the basic argument advanced on behalf of the Secretary of State is based on the first of the two grounds of appeal rehearsed in [6] above. It seems to me that the substance of this argument is that the FtT did not have jurisdiction to consider and determine the Respondent's appeal based on Article 8 ECHR and committed a fundamental error of law accordingly. The grounds of appeal further indicate that the Secretary of State relies on the decision in Lamichhane – v – Secretary of State for the Home Department [2012] EWCA Civ 260 (to which I shall refer *infra*). When I drew attention to the relevant provisions of the 2002 Act, the submission was formulated that section 120(1)(b) of the 2002 Act applies to the Respondent, since an immigration decision "*may be taken in respect of him*". It was further submitted that since no notice under section 120(2) had been served on the Respondent, he was not entitled to rely on Article 8 ECHR as a ground of appeal before the FtT.

16. The somewhat fuller submissions on behalf of the Respondent drew attention to the appeal provisions of the EEA Regulations mentioned above, together with sections 82, 84 and 86 of the 2002 Act and section 6 of the Human Rights Act 1998. It was submitted in particular by Mr McTaggart that an appeal under regulation 26 of the EEA regulations is limited only by Schedule 1 thereto, considered in tandem with section 84 of the 2002 Act. It was further argued that, by virtue of section 86(2), the FtT was obliged to determine the Article 8 ground of appeal. The absence of any notice served under section 120 did not relieve the FtT of this duty. Mr McTaggart also relied on the decision in JM Liberia – v – SSHD [2006] EWCA Civ 1402, which I shall consider *infra*.

17. I turn to consider the decision in Lamichhane [*supra*]. The issue considered by the Court of Appeal related to the jurisdiction of the FtT to consider matters raised by an appellant not previously advanced in circumstances where no notice had been served under section 120 of the 2002 Act. It was common ground that the notice of an immigration decision need not include a section 120 notice, which may be served subsequently. In his notice of appeal to the FtT, the Appellant raised an issue which had not formed part of his unsuccessful application to the Secretary of State, by asserting leave to remain on a new basis. The FtT considered that it was both empowered and obliged to consider this further claim and determined the appeal by remitting this discrete claim for consideration by the Secretary of State. The Court of Appeal disagreed, holding as follows:

    (i) Under section 120, the Secretary of State is empowered, but not obliged, to serve a notice on the person concerned.

    (ii) There are no time constraints governing the service of a section 120 notice.

    (iii) The failure by the Secretary of State to serve a section 120 notice does not render an immigration decision unlawful.

    (iv) The word "*matter*", which appears in sections 85, 96(1) and 96(2), has the same meaning. It includes "*a new matter*". This construction, the Court reasoned, is dictated by the imperative of giving practical effect to section 96.

(v) By virtue of section 85(2), in the absence of a section 120 notice the FtT is not empowered to consider and determine any "new" case advanced on behalf of an appellant.

This latter conclusion, the key one, is expressed in [41] of the judgment in the following terms:

> "… 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."

Finally, in an illuminating formulation, Stanley Burnton LJ described section 85(2) as "*a statutory extension of the jurisdiction of the Tribunal in cases in which there has been a statement made by the appellant under section 120*": see [43]. This was the unanimous decision of the Court.

18. The Appellant in Lamichhane was seeking to advance before the FtT, in an appeal against an immigration decision, a new basis for leave to remain which had not formed part of his application to the Secretary of State and, in consequence, was not addressed in the impugned decision. The present case is quite different. The Respondent, in making his application the Secretary of State for a residence card under the 2006 Regulations, explicitly made the case that a refusal would infringe his rights under Article 8 ECHR. It follows that the parallel with Lamichhane is misconceived. The second point of distinction between the two decisions is relatively obvious. The statutory regimes for appeals against immigration decisions and appeals against EEA decisions are different. The EEA regime provides that the grounds of appeal to the FtT against an EEA decision include a complaint of a breach of one of the protected Convention Rights. The conferral of a right of appeal on this discrete ground is not qualified or limited in any way. The appeal regime in Part V of the 2002 Act includes section 120. However, neither this provision nor anything equivalent thereto has been incorporated, by reference or otherwise, within the appeals scheme of the 2006 Regulations.

19. In JM – v – Secretary of State for the Home Department [2006] EWCA Civ 1402, the decision under appeal was that of the Asylum and Immigration Tribunal (the "*AIT*"). The Appellant was, initially, the beneficiary of a grant of six months leave to enter and remain in the United Kingdom as a visitor. He applied subsequently for asylum and also asserted his rights under Article 8 ECHR. The Secretary of State refused his application for a variation of his leave. There was no removal decision and no removal directions had been issued. Laws LJ, delivering the judgment of the Court of Appeal, formulated the question of law to be determined as follows, in [9]:

> "… whether the ECHR claim could lawfully be determined by the adjudicator in the absence of an imminent threat of removal from the United Kingdom."

The AIT had decided that a human rights claim was not justiciable on an appeal against a refusal of variation of leave on the ground that the Appellant's removal was not imminent, with the result that the statutory ground of appeal enshrined in section 84(1)(g) ("*that removal of the appellant from the United Kingdom in consequence of*

the immigration decision … would be unlawful under section 6 of the Human Rights Act 1998") was not engaged. The key words to be construed by the court were "*in consequence of*". The Court held that these words should be construed expansively and should not be confined to the concept of "*immediate consequence*": see [16]. It concluded that the AIT had erred in law in its construction of section 84(1)(g). In thus concluding, it reasoned that once a person's appeal against a refusal to vary his leave is dismissed, he commits a criminal offence if he does not leave the United Kingdom, his entitlement to state benefits is affected and any employer of the appellant is guilty of a crime. Laws LJ observed, at [18]:

> "It seems to me to be wrong in principle that the price of getting before an independent tribunal for a judicial decision on a human rights claim should be the commission of a criminal offence and other associated legal prohibitions."

The Court reasoned, secondly, that to conclude otherwise would be to distort and stultify the Secretary of State's power of certification under section 94 of the 2002 Act. The third consideration supporting its conclusion was the "*one stop appeals*" legislative policy. The fourth supporting factor concerned the contrasting terms of section 84(1)(c) and section 84(1)(g), which supported a construction of the latter contemplating "*a broader or more remote contingency*".

20. I have reflected on whether the decisions in Lamichhane, and JM are in point, taking into account the quite different statutory contexts. In JM, the Court was concerned with the specific statutory context of section 84(1)(g) of the 2002 Act and its task was to construe this discrete provision. An orthodox exercise in statutory construction ensued and the outcome of the appeal was dictated accordingly. JM and the present case have in common the factor of a statutory right of appeal. The statutory provisions lying at the heart of this appeal are regulation 26 of and Schedule 1 to the EEA Regulations and sections 84(1)(c) and 86 of the 2002 Act.

21. In my estimation there are no ambiguities or obscurities in any of the statutory provisions under scrutiny. Regulation 26 of and Schedule 1 to the EEA Regulations, in tandem, provide that one of the grounds of appeal to the FtT is that the EEA decision under challenge is unlawful under section 6 of the Human Rights Act 1998. I observe, firstly, that this discrete ground of appeal is not diluted or qualified either by the statutory language or by reference to anything else. Secondly, where an appeal is pursued on this ground, the FtT is obliged by section 86(2) of the 2002 Act, again without qualification, to determine it. Section 120 of the 2002 Act is not engaged, either expressly or by implication. It follows in my judgment that section 85(2) and (3) have no application to such an appeal.

22. Furthermore, none of the statutory provisions under consideration makes any reference, express or implied, to the leave to remain application provisions enshrined in Part 1 of the Immigration Rules (considered in [9] above). I have also considered the elementary principle that, by virtue of their hierarchical inferiority, the Immigration Rules cannot defeat, dilute or emasculate the operation of primary legislation, in this instance the relevant provisions of the 2002 Act, or subordinate legislation, in this context the relevant provisions of the EEA Regulations or supreme

EU law, which is the genesis of the latter. It is also appropriate to recall that the instrument of the EEA Regulations transposes a measure of supreme European Union Law. I remind myself of the central issue raised by this appeal, namely whether the FtT had jurisdiction to entertain and determine the Article 8 ground of appeal.

23. I do not doubt that the regime established by Part 1 of the Immigration Rules promotes the virtues of coherence, structure and formality in decision making processes determining applications for leave to remain in the United Kingdom. This regime also has the not important effect of swelling the Treasury coffers, as every application must be accompanied by the prescribed fee. However, in the context under consideration in the present appeal, namely a statutory appeal to the FtT against an EEA decision of the Secretary of State on the ground of a human rights contravention, I consider that the relevant provisions of the Immigration Rules have no application. They are confined to a separate compartment of the legal system which is not engaged in these circumstances.

24. In my outline of the statutory superstructure in [7]-[12] above, I included section 6 of the Human Rights Act 1998. Neither party devised any argument based on this provision. I have included it for completeness, mainly for the purpose of considering whether the Secretary of State's argument is flawed on the discrete ground that it would involve the tribunal acting in a manner incompatible with its duty as a public authority under section 6. However, I have concluded that the answer to this rhetorical question is in the negative. The first reason is that the tribunal does not owe any duty to an Appellant under Article 8 ECHR. The second is that the Appellant would be entitled to advance his Article 8 case via a different mechanism in any event and to do so vis-à-vis the relevant public authority. To accede to the Secretary of State's submission would not thwart the Appellant's rights under Article 8. Rather, it would simply redirect, and confine, the Appellant to a specific mechanism for the prosecution and determination of an Article 8 claim. Thus I consider that, viewed from the perspective of the tribunal, section 6 does not illuminate the correct answer to the jurisdictional argument canvassed by the Secretary of State.

25. Finally, it is of note that Article 8 ECHR featured in the decision of the CJEU in Dereci (Case C-256/11). There, the Grand Chamber decided as follows:

> "European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union …"

En route to this conclusion, the Court adverted to the right to respect for private and family life guaranteed by Article 7 of the Charter of Fundamental Rights and Article

8 ECHR. If the dispute before the national court relates to the implementation of EU law, per Article 51(1) of the Charter –

> "… [the court] **must** examine whether the refusal of the right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter."

Having noted that all EU Member States are parties to the ECHR, the Court added the following:

> "On the other hand, if [the national court] takes the view that the situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR."

Taking into account the supremacy of EU law, I consider that this passage lends weight to the view that the Respondent was entitled to invoke Article 8 ECHR in his appeal to the FtT and the latter, in turn, was obliged to determine this issue.

26. In R (Quintavalle) – v – Secretary of State for Health [2003] UKHL 13, Lord Bingham of Cornhill stated, at [8]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment."

This is orthodox dogma. True it is that in some litigation contexts a court or tribunal wrestling with the task of construing statutory provisions must pray in aid some of the more esoteric principles of statutory construction. Neither party formulated any argument to this effect. I am satisfied that the exercise of statutory construction to be performed in this appeal is a relatively straightforward one, as appears from the analysis above.

Conclusion

27. This decision was prepared, incomplete and in draft, immediately following the hearing of the appeal herein (on 31 October 2014). I refrained from completing the decision when it became apparent that steps were being taken to convene a senior panel of judges to consider and determine the central issues raised in a series of other conjoined appeals. Regrettably, this resulted in some delay. In due course, the Upper Tribunal promulgated its decision in Amirteymour and Others (EEA Appeals: Human Rights) [2015] UKUT 00466 (IAC), in July 2015. Its decision was that 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. It was further held that the decision in JM does not apply to appeals of this nature.

28. Following promulgation of the aforementioned decision, a notice was served on the Respondent's representatives, inviting them to provide such further submissions as they wished. This elicited the following response (dated 28 August 2015):

> "The Appellant has no further submissions to make following the receipt of the promulgated decision of Amirteymour … and would rely on the submissions already made orally and in writing on this point previously …
>
> However, irrespective of the above, the Appellant would ask that the factual finding in regard to Article 8 ECHR … as set out at paragraphs 22 – 24 of the [FtT] decision of 29/05/2015 be maintained."

There is no rule or principle of precedent whereby I am bound to follow the decision in Amirteymour. However, I observe that in those conjoined appeals the Upper Tribunal had the benefit of extensive and considered argument from several representatives and then provided a decision which was designed to apply to all comparable cases. I have concluded that, in the present appeal, no feature or argument has been raised sufficient to warrant the conclusion that the decision in Amirteymour should not be applied.

Decision

29. I decided as follows:

(a) The Secretary of State's appeal is allowed.

(b) I consider that I have no jurisdiction to accede to the Appellant's request that certain findings be maintained. However, I would add that there is no apparent reason why effect should not be given to these findings in future decision making contexts, subject of course to the usual provisos relating to new circumstances, new facts, new evidence and so forth.

Edmund McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 10 September 2015