IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45018/2013

THE IMMIGRATION ACTS

Heard in Bradford	**Determination Promulgated**
On 5th March 2015	**On 22nd April 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHALINI DA'SILVA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr P Wilson, Counsel, instructed by Howe & Co Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judges Bartlett and George made following a hearing at Taylor House on 29th October 2014.

Background

2. The claimant is a citizen of India born on 9th May 1985. On 3rd December 2012 she made an application for a derivative residence card in terms of the Immigration (European Economic Area) Regulations 2006 but was refused on 21st October 2013.

3. The judge found that the claimant had established, on a balance of probabilities that she was the primary carer of a British citizen child, but in order to be able to establish a derivative right of residence she was also required to show that the relevant child would be unable to reside in the UK or another EEA state if she were to leave. He was not so satisfied and dismissed the appeal under the EEA Regulations.

4. The judge said that it was clear from the refusal letter that the claimant, in her original application, had made reference to her rights in terms of Article 8 and that the grounds of appeal against the refusal decision raised detailed Article 8 claims.

5. It is right to say that in the original letter written by Howe & Co on 11th October 2011 the representatives state:

> "We submit an application based on her roles as a primary carer for her British daughter Maria Theresa. In the alternative we ask our client application to be considered under Article 8 of the ECHR."

6. The refusal letter acknowledges that the claimant wishes to rely on family or private life in the UK but states:

> "If you wish the Home Office to consider an application on this basis you must make a separate charged application using the appropriate specified application form FLR(M) for the five year partner route or FLR(O) for the five year parent or ten year partner or parent route or FLR(O) for the ten year private life route. Since you have not made a valid application for Article 8 consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR. Additionally it is pointed out that a decision not to issue a derivative residence card does not require you to leave the UK if you can otherwise demonstrate that you have a right to reside under the Regulations."

7. The letter then goes on to say:

> "As you appear to have no alternative basis of stay in the UK you should now make arrangements to leave. If you fail to do so voluntarily your departure may be enforced."

8. The judge recorded the Secretary of State's position as follows:

> "The respondent's approach in this regard is to refer to the refusal letter advising the Appellant that if she wished to raise Article 8 of the 1950 Convention she should do so in the appropriate form of application. It is the respondent's representative's contention at the appeal hearing that as the appellant has been advised that she is entitled to make a further application and as there is no question of removal directions being issued – that whilst Article 8 may be considered at this appeal hearing it should only be

> considered in the limited light of those submissions. Namely that there are not only no removal directions but also that a further application may be made."

9. The judge said that he did not understand the respondent's representative to suggest that it would not be appropriate to consider Article 8 outside the Rules. He relied on the Court of Appeal's decision in JM (Liberia) [2006] EWCA Civ 1402 and allowed the appeal.

The Grounds of Application

10. The grounds make no challenge to the judge's substantive consideration of Article 8 but confine the submission as to whether the judge was entitled to consider Article 8 at all.

11. First, it was said that the judge failed to properly apply binding case law which it is said was misunderstood, but JM (Liberia) should in any event be distinguished on its facts.

12. Second, the judge failed to resolve a conflict in binding case authorities and should have been aware of the decision in Lamachane [2012] EWCA Civ 260 where the Court of Appeal held:

> "I conclude that therefore that the Secretary of State's contentions as to the effect of Section 85(2) are well-founded and an appellant on whom no Section 129 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. The answer to question C above is no."

13. Permission to appeal was granted by Judge P J White on 5th January 2015.

14. The claimant served a detailed Rule 24 response.

15. First, the grounds of challenge now relied upon were not submitted to the judge on the Secretary of State's behalf. It was argued at the hearing that although Article 8 could be considered by the panel, since there was no removal decision, the assessment of proportionality should be limited to whether Article 8 would be breached by the refusal to grant a derivative right of residence.

16. The claimant relies on JM (Liberia) which held that an applicant who has been refused a variation of leave, with the consequence that he would become an overstayer here, is entitled to raise Article 8 grounds an approach consistent with the aims of the appeals legislation confirming that all relevant matters ought to be pursued at one hearing before the appellate court.

17. Second, there was no failure to resolve a conflict in opinion and in any event Lamachane is distinguishable on the facts. In that case the appellant had been give leave to enter as a student and remained in the UK with periods of extended leave. He applied for indefinite leave to remain on

the grounds that he had at least ten years' continuous lawful residence in the UK. The Secretary of State's refusal did not include a notice under Section 120 of the 2002 Act. In his appeal to the First-tier Tribunal the appellant in that case set out additional grounds making a formal request to remain in the UK as a student under the Tier 4 points-based system. Lamachane related to a specific submission as to whether a Tier 4 application could be made in a case where no Section 120 notice had been served and the principle does not extend to a blanket submission that human rights grounds would always be excluded.

Submissions

18. Mr Diwnycz accepted that no specific mention of Lamachane had been made by the Presenting Officer, since there was nothing in the note of the hearing which referred to it. It was clear that the position taken by the Presenting Officer was that there was no Article 8 interference since the decision under appeal was simply the refusal of a residence card.

19. Mr Wilson relied on his Rule 24 response and his skeleton argument provided for this hearing and submitted that there was no error of law in the judge's decision.

20. The court in JM (Liberia) held that in interpreting Section 84(1)(g) namely

> "… that removal of the Appellant from the UK in consequence of the immigration decision ... would be unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the Appellant's Convention rights"

should be given a wider interpretation so as to include circumstances where removal may at least be an indirect consequence of the refusal to vary, not the narrower sense so that it referred only to an imminent removal. There was a direct reference in the refusal letter to the requirement that the claimant should now make arrangements to leave.

21. In his submission Lamachane had no bearing on the facts of this appeal because it was concerned with the issue of whether the First-tier Tribunal was bound to consider entirely new grounds i.e. those raised for the first time at the appeal stage where there had been no determination by the Secretary of State. In this case the claimant raised her rights in terms of Article 8 in the first instance upon her application to vary her leave to remain in the UK.

Findings and Conclusions

22. Neither of the arguments put forward in the grounds were made to the Immigration Judge. The judge's attention was clearly not drawn to Lamachane.

23. In the event of an alleged conflict of authority, it is difficult to see how it could be an error of law for the judge to rely on one line, to which he was referred, rather than that of another to which he was not.

24. In any event there would have been good reasons for him to distinguish Lamachane on its facts since in this case it is absolutely clear that Article 8 was raised at the first available stage.

25. The question of whether JM (Liberia) properly applies to EEA cases has yet to be resolved by the Upper Tribunal. My understanding is that there is to be a Presidential decision shortly.

26. On the one hand JM predates the coming into force of Appendix FM. There is now the ability to make a specific application for Article 8 consideration.

27. Moreover there is no question that a refusal to issue a residence card, in itself, puts an applicant at risk of remaining in the UK unlawfully. Indeed the claimant was invited to submit a further application if she considered that she had a right to reside in the UK as a matter of European law.

28. On the other, the existence of a procedure which enables a human rights claim to be made, and which requires payment of a fee, does not absolve the Tribunal from its duty to consider whether there could be a breach of its obligations under the Human Rights Act.

29. Furthermore, the claimant was told that she should make arrangements to leave. Removal could properly therefore be said to be an indirect consequence of the decision.

30. She could therefore argue that her hypothetical removal could breach her Article 8 human rights. In JM (Liberia) the court said

> "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 consistent 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."

31. In the absence of clear guidance from the Upper Tribunal I conclude that it was open to the judge to apply JM (Liberia) to the facts of this case and to rely upon Section 84(1)(g) of the 2002 Act.

32. On that basis the Secretary of State has not established that the judge erred in law and his decision shall stand.

Decision

33. The Secretary of State's appeal is dismissed. The original judge's decision shall stand.

No anonymity direction is made.

Signed Date **10th March 2015**

Upper Tribunal Judge Taylor