Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/00223/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 5 January 2016	**On : 26 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS NAOMI MUTHONI GITHAIGA

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondents: Mr D Sellwood, Counsel, instructed by Rotherham & Co Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeal of Ms Githaiga against the respondent's decision to refuse her application for a residence card under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations).

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Ms Githaiga as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Kenya born on 15 December 1975. The appellant appealed to the First-tier Tribunal against a decision of the Secretary of State, dated 10 December 2014 to refuse her application for a derivative residence card under Regulation 15(A) of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations).

4. First-tier Tribunal Judge Lagunju dismissed the appeal under the EEA Regulations. The Judge then went on to allow the appeal under Article 8 of the European Convention on Human Rights (ECHR) on the basis that the appellant enjoyed family and private life in the UK and the decision was not proportionate to the respondent's aims of maintaining the economic well-being of the country.

5. The grounds of appeal to the Upper Tribunal contend that the decision showed a material misdirection in law; given that it was conceded that the appellant did not have an EEA identity document the First-tier Tribunal judge erred as under Regulation 26 there was no right of appeal. The second ground argued alternatively that the First-tier Tribunal was not entitled to conduct a substantive Article 8 assessment; removal was not imminent or likely and Article 8 was not arguable. In the third alternate it was argued that removal would not be a disproportionate interference with the appellant's Article 8 rights.

6. In the Rule 24 Response and before me, Mr Sellwood referred to the Upper Tribunal decision in Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00455 (IAC) which considered the issue of whether Article 8 can be relied upon in an appeal against a refusal to issue an EEA residence card and concluded as follows:

> "74. Drawing these observations together, we conclude that not only is the claimants' case possible only on a contorted reading of the statutory provisions and the decision letters, there is no need for it to be. If they believe that they are entitled under EU law to confirmation of that, the EEA appeal allows them to say so. If they are not so entitled, they are no different from anyone else in the same position – an overstayer who can make a human rights application which may or may not be successful. The making of an unsuccessful EEA application cannot rationally put them in a different position. The refusal of the application leaves them in the same position as before the application, that is, an overstayer. The removal, if it occurs, is not in consequence of the decision: it is as a result of overstaying.
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> 75. For these reasons, we conclude 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 in an appeal under the EEA Regulations bring a Human Rights challenge to removal."

7. It was Mr Sellwood's contention however that the position is yet to be definitively settled and he noted that permission to appeal to the Court of Appeal has been granted in Amirteymour. Mr Sellwood invited me therefore to stay the proceedings pending the outcome of the Court of Appeal consideration. I indicated to Mr Sellwood that my preliminary view was that I was not minded to adjourn. I reserved my decision.

8. Although not raised before me I indicated to the parties that I considered the Court of Appeal decision in of TY (Sri Lanka) [2015] EWCA Civ 1233 to have resolved this matter. I remain of that view.

9. Lord Justice Jackson in TY (Sri Lanka) found as follows:

> "35. It is impossible to say that the Secretary of State's decision to withhold a residence card (a decision which is correct under the EEA Regulations) will or could cause the UK to be in breach of the Refugee Convention or ECHR. The UK will only be in breach of those Conventions if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or the tribunals incorrectly reject.
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> 36. In the result therefore I reach a similar decision on the issues before us to the decision reached by **the Upper Tribunal in *Amirteymour v Secretary of State for the Home Department* [2015] UKUT 00466 (IAC).** The Upper Tribunal in *Amirteymour* distinguished *JM (Liberia)* on a different basis from that which I have identified. See *Amirteymour* at [50]. Nevertheless in the end the Upper Tribunal has come to the same decision as myself. The Upper Tribunal in *Amirteymour* has analysed the statutory provisions and the authorities in formidable detail. I shall not seek to traverse all that material. Nor will I seek to plant yet more trees in the impenetrable jungle referred to by Lord Carnwath in the first paragraph of *Patel*. I reach my decision by the simple route set out in paragraphs 27 to 35 above."

10. Although Mr Sellwood sought to distinguish TY (Sri Lanka) and Amirteymour that is misconceived. The Court of Appeal could not have been clearer: it is impossible to say a correct decision to withhold a residence card (which is the position in the appeal before me) 'will or could cause the UK to be in breach of the Refugee Convention or ECHR.'

11. In the appeal before me, as in TY (Sri Lanka) and Amirteymour the Secretary of State refused to issue documentation to confirm a derivative right of residence under the EEA Regulations. No removal action has been taken and the refusal letter notes that such a decision does not require the appellant to leave the UK if she can otherwise demonstrate that she has a right to reside under the Regulations. No notice has been issued under section 120 of the Nationality, Immigration and Asylum Ace 2002. The respondent has also indicated (with almost identical wording to that used in the refusal letter in TY (Sri Lanka)):

> 'Please note that your entitlement to remain in the UK has solely been assessed on the basis of the immigration (European Economic Area) Regulations 2006. If you consider that you are entitled to remain in the UK on the basis of other Immigration legislation then please visit the Home Office website at www.gov.uk/uk-visas-immigration and submit an appropriate application.'

12. It is evident therefore from the relevant legislative provisions and the decision of the Court of Appeal in TY (Sri Lanka) that the Tribunal does not have jurisdiction to consider a claim for leave to remain on human rights grounds (or a claim for asylum although that was not in issue in this appeal). The First-tier

Tribunal Judge in the case before me did not have jurisdiction to consider whether the respondent's decision was contrary to the appellant's human rights. Any error in relation to jurisdiction in respect of Regulation 26 and the Judge's consideration of Article 8 is not material.

13. I am satisfied therefore that the First-tier Tribunal Judge made a material error of law in allowing the appeal on Article 8 grounds and I set it aside. There was no challenge to the Judge's decision in relation to the appeal under the EEA Regulations and that stands. I remake the decision on human rights grounds by dismissing it for lack of jurisdiction for the reasons set out above.

DECISION

14. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Ms Githaiga's appeal.

Anonymity

The First-tier Tribunal did not make an anonymity order but although the appellant has children there is nothing in this decision that might require anonymity, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed: Dated: 22 January 2016

Deputy Judge of the Upper Tribunal Hutchinson