Upper Tribunal
(Immigration and Asylum Chamber)

Appeal No's: IA/11271/2014
& IA/12115/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 2nd September 2015	
Further submissions completed	**On 13th April 2016**
on 29th January 2016	

Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT
and UPPER TRIBUNAL JUDGE MACLEMAN

Between

MUHAMMAD JAMIL AHMAD
& LAKHWINDER KAUR SANDHU

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the first appellant: Mr A Caskie, Advocate, instructed by Latta & Co., Solicitors

For the second appellant: Miss L Irvine, Advocate, instructed by Quinn, Martin & Langan, Solicitors

For the Respondent: Mrs S Saddiq, Presenting Officer

DETERMINATION AND REASONS

The First Appellant

1. The first Appellant is Muhammad Jamil Ahmad, a citizen of Pakistan born on 8th December 1960. He entered the United Kingdom in 2006 as a visitor. He applied unsuccessfully for leave to remain under Article 8 ECHR in 2010 and again in 2012.

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On 17th April 2013 he applied under the Immigration (European Economic Area) Regulations 2006 ("the Regulations") for a derivative residence card as the primary carer of a UK citizen. The Secretary of State for the Home Department ("the Respondent") issued a decision dated 13th February 2014 stating that this Appellant failed to show that he met the conditions of the Regulations.

2. The Respondent's letter also stated that if the first Appellant wished to apply on the basis of family and private life in the UK he would have to make a separate charged application under the Immigration Rules HC395, as amended ("the Rules"), using the specified form. In the absence of such an application it had not been considered whether removal would breach Article 8 ECHR. Continuing, it was suggested that if he thought that he had a right to reside in the UK as a matter of European law, and was in a position to submit the necessary information to support an application for a derivative residence card as recognition of that right, he might alternatively wish to submit a further application.

3. The first Appellant elected to appeal to the First-tier Tribunal (the "FtT"), which dismissed his appeal by a determination promulgated on 12th May 2014. The FtT found that he does not meet the requirements of the Regulations, which he does not dispute. It further found that while the Appellant played an important role in family life he was not the subject of removal directions and, therefore, any Article 8 consideration was academic, adding "The Appellant has already been advised of the appropriate route … for his claim to be considered on the basis of family and private life."

4. The first Appellant sought permission to appeal to the Upper Tribunal, citing *JM* [2006] EWCA Civ 1402, [2007] Imm AR 293 as authority that the absence of removal directions ought not to have precluded substantive consideration of his claim under Article 8 ECHR. Permission was granted on 17th June 2014.

The Second Appellant

5. The second Appellant is Lakhwinder Kaur Sandhu, a citizen of India born on 11th April 1979. She entered the UK lawfully as a spouse in 2003 or 2004 on a visa valid for one year, but remained thereafter without permission until 11th March 2013, when she applied for a derivative residence card under the Regulations as the primary carer of her husband and minor child, who are both UK citizens.

6. The Respondent refused this Appellant's application on 17th February 2014, in the following terms. *Zambrano* C-C4/09 did not extend a right to remain to this Appellant. She did not meet the terms of Regulation 18A. Not having provided a valid passport, she had no right to appeal under the Regulations. In any event, the evidence did not show that she was the primary carer either of her husband or of her daughter and her case would fail under Regulation 15A(4A)(a)(c) accordingly. If she did not choose to leave, the Respondent might enforce removal, but would first give her the opportunity to make representations. The best interests of her child had been considered. If she wished to apply for consideration under the private and family life provisions of the Rules, she should do so separately. The decision not to issue a

derivative residence card did not require her to leave the UK and if she could otherwise demonstrate her right to reside under the Regulations, she should apply.

7. The second Appellant did not pursue any of the alternatives suggested. Rather, she appealed to the FtT. In her grounds she contended that (a) the requirement to produce a valid passport had been put beyond her control by the Respondent and so should be waived [an issue which does not seem to have been pursued further by either party]; (b) she was in fact the primary carer of her husband and daughter; and (c) her removal would be contrary to Article 8 ECHR. The FtT dismissed this Appellant's appeal by its determination promulgated on 28th May 2014.

8. Like the first Appellant, the second Appellant does not seek to argue her case further under the Regulations. In her grounds of appeal to the UT she contends that the FtT should not have considered the prospect of removal to be theoretical and speculative, which was contrary to *JM;* that the FtT formed the view that she would succeed in an application [under the Rules] from abroad and, therefore, should have allowed the appeal on the principles of *Chikwamba* [2008] UKHL 40, 2008 Imm AR 700; and, finally, that the FtT should have found nothing to outweigh the best interests of the child, and should not have taken account of the possibility of maintaining contact from India.

Appeals to the Upper Tribunal

9. Permission to appeal to the Upper Tribunal was granted on 17th June 2014, with the comment that there was an interesting question about the extent to which Article 8 issues might be argued in appeals from EEA decisions. Similar issues were current in a number of appeals in which permission was granted around the same time. The present cases were listed to be heard together because of these connected issues. The parties are not otherwise linked.

10. On 24th August 2015 the Upper Tribunal promulgated its decision in *Amirteymour and Others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC), holding 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 Regulations. It was further held that neither the factual matrix nor the reasoning in *JM* has any application.

11. The Appellants' submissions (heard orally on 2nd September 2015) were designed, firstly, to show that *Amirteymour* was wrongly decided and that the principle drawn from *JM* did apply. Miss Irvine also made a novel submission, with which Mr Caskie associated himself, based on the Charter of Fundamental Rights of the European Union ("the Charter"). She pointed out that such an argument was recorded at paragraph 20 of *Amirteymour,* but was not resolved.

12. As Mrs Saddiq, representing the Respondent, had not had the opportunity to prepare a reply on this point we fixed a timetable for the exchange of written submissions.

In light of the grant of permission to appeal to the Court of Appeal in *Amirteymour* we issued a further direction, dated 6th November 2015, staying proceedings in the present appeals and advising that further directions would follow in due course.

13. The decision of the Court of Appeal in *TY (Sri Lanka)* [2015] EWCA Civ 1233 was published on 1st December 2015. In brief compass, the Court of Appeal agreed with *Amirteymour*: see [36] especially. Jackson LJ expressed the crucial distinction thus. In *JM* the Respondent served a section 120 notice, which the consequences, firstly, that if the Tribunal appeal failed removal might follow without the opportunity to raise human rights arguments and, secondly, that the notice enabled the appellant to advance all his ECHR arguments for the tribunal's consideration. *TY* differed from *JM* in that there had been no one-stop notice under section 120. We observe here that a section 120 notice and a decision to remove under the Regulations are absent in both the present appeals. Jackson LJ went on to say:

> "35. It is impossible to say that the Secretary of State's decision to withhold the 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 these 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.
>
> 36. In the result therefore I reach a similar decision … to … *Amirteymour* …
>
> 37. For completeness, I should add that in her skeleton argument Miss Jegarajah [counsel for the appellant] raised a number of points concerning the EU Charter. These could not affect the outcome of the appeal and, very sensibly, Miss Jegarajah did not press them in oral argument."

14. By our written direction on 29th December 2015 we drew attention to *TY* and invited final written submissions. In summary, the further submissions subsequently received are as follows.

The Appellants' Submissions

15. First, the Charter is primary EU law, with the same legal value as the Treaties from which the right to free movement is drawn. Insofar as it contains rights which correspond to those guaranteed by ECHR, the meaning and scope of these rights are to be the same. Thus, family life guaranteed by Article 7 of the Charter has the same meaning and scope as that guaranteed by Article 8 of the ECHR. The regulations are the implementation of EU law for the purposes of Article 51 of the Charter.

16. Second, by way of rights to effective remedy and good administration, an individual must be able to raise a human rights argument at the same time as appealing an EEA decision, notwithstanding that no section 120 notice has been issued and that the decision at issue is not one to remove the individual from the UK.

17. Third, Article 41(1) of the Charter provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Article 47 provides the rights to an effective remedy and a fair trial. The realisation of rights conferred by EU law should not be rendered practically impossible or excessively difficult. All the rights underpinning the relevant EEA decisions have their origins in EU law, such that the Charter is engaged and that tribunal jurisdiction extends to the determination of human rights issues. Once that jurisdiction is found to be engaged, it is argued the answer is obvious (here we quote from counsel's submissions):

> The Secretary of State's approach requires an appellant to not only submit two separate applications rather than one, but to do so consecutively, with the Article 7/8 application coming second; to require payment for the second application of over £600, as compared with £55 for the first; and to potentially require an individual to render themselves in breach of immigration law if the first application is refused, and prior to the second application being submitted. … the requirements of effectiveness and good administration (in particular the requirement for fairness) … mandate that human rights arguments … be allowed to be made in the manner proposed.

18. The final limb of the Appellants' submissions is that there is no statutory language which requires the narrow approach taken by the FtT, and no basis in EU law to interpret the Regulations and the 2002 Act as limiting the grounds of appeal. On the contrary, it is argued, the interpretation advanced by the Appellant serves to vindicate the fundamental rights protected by the EU legal order and is the only interpretation which EU law permits.

The Respondent's Submissions

19. On behalf of the Respondent it is argued first, that the Appellants' argument combines claims under Article 8 ECHR and Article 7 of the Charter as if they are coterminous. However, Article 7 does not provide a freestanding right to protection of family life of non-EU citizens. Where a situation falls outwith the scope of provisions securing freedom of movement to EU citizens, it has no application. Conversely, the argument runs, a right to reside under EU law need not and cannot rely on Article 8 ECHR. One cannot simply recast an Article 8 ECHR claim as a claim under Article 7 of the Charter. They are different in scope. The meaning of family life might be the same in both guarantees, but the circumstances in which they can be invoked are distinct.

20. Second, it is argued that Article 41 of the Charter applies to institutions and bodies of the European Union, not to the Secretary of State and the FtT, which are institutions of the UK, not of the European Union. Article 47 of the Charter, it is said, applies to rights and freedoms guaranteed under the law of the EU, not to rights and freedoms guaranteed by the ECHR.

21. Third, it is argued that, in any event, if Article 47 of the Charter is engaged, it is not infringed by virtue of the decision in *Amirteymour*. An appellant is not required to

render himself in breach of immigration law if the first application [under the Regulations] is refused, because there is nothing to prevent a contemporaneous or subsequent application under the Rules.

22. It is further argued that an appellant does not have to render himself in breach of immigration law. That breach, the argument runs, has already occurred. Thus the appellant is not required to prolong it. Payment of a fee makes a remedy ineffective only where an applicant cannot realistically afford to pay it. There are regulations which provide that no fee is payable where that would be incompatible with an applicant's human rights. A challenge to the legality of fees is not within tribunal jurisdiction. The Charter is irrelevant in domestic law to whether an appellant can rely in a tribunal appeal on matters arising solely under the ECHR.

23. Finally, it is submitted that the relevant passage in *TY* is clearly unfavourable and an indication that the point was unlikely to be successful if developed in oral argument. There is no good reason not to follow *Amirteymour* and *TY*. It is not clear where the Appellants seek ought to identify any conflict between UK domestic law and EU law. Article 7 of the Charter, it is argued, does not provide a freestanding right to protection of family life of non-EU citizens. Where an appellant seeks to advance Article 8 arguments wholly detached from the EEA issues under appeal, the Charter is not engaged. There are separate legal regimes governing the application of the Charter (on the one hand) and that of the ECHR (on the other). The Appellants argument based on Article 47 of the Charter is dismissed as misconceived.

The Appellants' Rejoinder

24. First, it is argued that it is not clear whether arguments related to the Charter were considered in *TY* but even if they were the outcome is not binding, being a matter of EU law, and the Appellants' appeal should still succeed, on the arguments previously advanced. Second, it is argued that the law of the EU has long been held to include the right to respect for family life as guaranteed by Article 8 ECHR. Third, it is argued that the right to an effective remedy and good administration, although addressed to the institutions of the EU, is of general application.

Our decision

25. Although *TY* is perhaps not formally binding upon us when the UT is sitting in Scotland, there is no Scottish authority to contrary effect. We find that *TY* is clear, decisive and ought to be applied. Given the history of the case, running in parallel with emerging case law, and with no disrespect to submissions made on points which we now regard as settled, we need only briefly resolve those submissions which invited us to depart from *Amirteymour* and *TY* on the basis of the EU Charter.

26. We find no authority for extending the Charter to either the SSHD's or a tribunal's consideration of private and family life matters which do not depend on EU law. The Charter does not requires the SSHD or a tribunal to consider such matters where appellants seek to raise them outside the terms of the scheme established in UK law for implementing EU rights.

27. The UK operates a scheme in terms of the Regulations, the Rules and appeal rights governing various rights of residence. Although regularly modified in its details, the overall scheme has had the same shape for many years. For the present Appellants that scheme is not practically impossible, excessively difficult, unfair, or otherwise in conflict with any general rights under the Charter, even if applicable. They have always been in a position to make any application which might be justified by their circumstances, and to have it fairly adjudicated upon. In order to vindicate any rights they may have, they have not been required to expose themselves to any legal risks. The mechanism of levying fees for applications based on human rights grounds breaches no legal rights and, in this context, we note that exemptions from charging fees for applications are available.

28. We consider that any considerations arising from the Charter must be resolved in exactly the same way as considerations arising from the ECHR. While the United Kingdom might, in theory, lapse into breach of the Charter if the SSHD, a tribunal or a court were incorrectly to reject some rights-based claim this issue does not fall to be determined in these appeals. It seems likely that this is why the Court in *TY* considered that such a line of argument would not have prospered.

29. We think it unlikely that similar principles, derived from another source, and applied to the same facts, would result in a different outcome.

30. Accordingly, our overarching conclusion is that these appeals are dismissed and the determinations of the FtT in respect of both Appellants shall stand.

31. We acknowledge the assistance provided by the diligent arguments, oral and written, of the parties' representatives.

32. No anonymity directions have been requested or made.

7 April 2016
Upper Tribunal Judge Macleman