Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36375/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 19 February 2016

Decision & Reasons Promulgated
On 20 May 2016

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR EBHODAGHE GODDY EDOGUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Wilding, Home Office Presenting Officer
For the Respondent: Mr R Solomon, Counsel, instructed by MA Solicitors

DECISION AND REASONS

1. The appellant (hereafter the Secretary of State or SSHD) brings this appeal against the decision of First-tier Tribunal (FtT) Judge R A Cox dated 20 August 2015. In that decision Judge Cox allowed the appeal of the respondent (hereafter the claimant) against a decision of 2 September 2014 to refuse to issue a permanent residence card pursuant to Regulations 10 and 15 of the Immigration (European Economic Area) Regulations 2006 (hereafter the 2006 Regulations). The claimant had applied for permanent residence at an earlier period in time, on 18 August 2008 and this had been refused by the SSHD in a letter of 8 October 2009, which included a S120 Notice. Against that decision the claimant was appeal rights exhausted long ago.

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2. In his grounds of appeal the claimant in addition to challenging the SSHD's decision under the Regulations, had raised Article 8 ECHR in connection with his relationship with his four children in the UK. The judge noted that:

> "In accordance with what appears to be [the SSHD's] usual practice in EEA cases of this nature she has made no decision to remove the [claimant] and has specifically not addressed any Article 8 or Section 55 [of the 2009 Act] issues in the refusal letter indicating that if the [claimant] wished to pursue these matters he should make a separate application".

3. At [3]-]5] the judge stated:

> 3. Therein lay the problem for me, which I discussed with the representatives, who were both helpful. In a nutshell, if I were to deal with the Article 8 issue myself I would need, as a primary consideration, to have regard to the children's best interests. In all such cases it is desirable that the Secretary of State considers them first (having greater resources at her disposal) and of course there is in any event a statutory duty upon her so to do. That is not to say that the Tribunal is precluded from being the decision maker but it needs to be "satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child" – see MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC). Here, there were four children to consider – two by the Appellant's ex-wife and two by his present partner – and I was far from satisfied that I had before me any sufficiency of material upon which to make the necessary assessments.
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> 4. Both representatives understood and agreed with my position. Ms Knight helpfully suggested that, as long as it was clear that I had made no findings on the issue under the Regulations, then there would be no problem in my remitting the whole case to the Secretary of State in order that she might consider the Section 55 best interests of the children in the context of the Article 8 Ground of Appeal. Miss Brankovic, having consulted with the Appellant, readily concurred in that suggestion. It was one which also commended itself to me, and seemed consistent with the guidance given at points (iv) and (v) of the explanatory head note in MK.
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> 5. I therefore allow the appeal on the basis that the Respondent's decision proves not to have been in accordance with the law, without making any other findings on the matter, and to the extent of remitting the case to the Secretary of State for reconsideration and a fresh decision which takes account of the Section 55 best interests of the Appellant's four children. I record that the Appellant has been advised, and has agreed, to cooperate in this matter and in particular to provide through his representatives any necessary further information to assist the Secretary of State to perform her duty.

4. The SSHD's grounds were concise and to the point. She accepted that the Presenting Officer at the hearing had been in agreement with the judge's decision to remit the

decision to the SSHD. However, such an agreement could have no effect where the issue was a matter of law and in Amirteymour and Others (EEA appeals, human rights) [2015] (IAC) the Upper Tribunal had held that where no notice under Section 120 of the Nationality, Immigration and Asylum Act 2002 has been served and where no EEA decision to remove has been made an appellant cannot bring a human rights challenge in an appeal under the EEA Regulations. The refusal of the claimant's application under the EEA Regulations had not been accompanied by a decision to remove or a notice under Section 120 and therefore it was wrong in law for the judge to find that the decision was not in accordance with the law.

5.In amplifying these grounds Mr Wilding submitted that the position taken by the Upper Tribunal in Amirteymour had now been confirmed by the Court of Appeal in TY (Sri Lanka) [2015] EWCA Civ 1233. In TY Jackson LJ addressed the argument raised by Counsel Ms Jegarajah that Amirteymour was contrary to the ratio of JM v SSHD [2006] EWCA Civ 1402. In JM the appellant had sought to rely upon an additional Article 8 ground in an appeal against a refusal to vary leave to remain. The Asylum and Immigration Tribunal had refused to deal with the Article 8 ground because there had not been a decision to remove and M was not in imminent danger of removal. Allowing M's appeal, the Court of Appeal held that the AIT had construed S84(1)(g) of the 2002 Act too narrowly. Jackson LJ rejected Ms Jegarajah's submission, seeking to rely on JM, pointing out that "The crucial feature of JM was that the Secretary of State served a S120 One-Stop Notice" ([34]). It followed that:

> "… that the Secretary of State's decision to withhold a residence card under the EEA Regulations would only breach the [Refugee Convention, or] ECHR if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or Tribunals incorrectly reject" ([35]).

6. Jackson LJ added at [36] that:

> "In the result I reach a similar decision on the issues before us to the decision reached by the Upper Tribunal in Amirteymour. 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."

7. Mr Solomon's rejoinder to Mr Wilding's submission was very detailed but was in summary that neither Amirteymour nor TY applied to the claimant's case because unlike the appellants in those cases there was a valid S120 notice.

8. Mr Solomon accepted that the decision under challenge had not been accompanied by a S120 notice but relied on the fact that one had been served on the claimant previously. This had been served in the context of a decision made by the SSHD on 8 October 2009 refusing the claimant's (earlier) application for a permanent residence card on the basis of a retained right of residence. The notice in question stated that if the claimant wished to remain in the UK "you must now make a formal statement about any reasons why you

think you should be allowed to stay here, and any grounds why you should not be removed or required to leave …"

9. In seeking to make out his argument Mr Solomon relied on the following propositions:-

1. The "historic" S120 notice was still extant, as no time limit was attached to such a notice and so it imposed a continuing obligation;

2. That no time limit was attached to a S120 notice had been confirmed by leading cases;

3. The continuing effect of a S120 notice was confirmed by S96(2) of the 2002 Act;

4. The ability of a claimant to raise Article 8 issues in an EEA appeal was consistent with Regulation 4(8) of Schedule 2 to the 2006 Regulations.

10. Mr Wilding's submission in response was that whilst there was no time limit to a S120 notice it was served in respect of an appealable decision and once that appeal was finally determined, it no longer had any existence. The claimant's historic S120 notice had been served in respect of a decision on a previous application made by the claimant and against that decision the claimant was appeal rights exhausted. In the decision under challenge in this appeal there had been no S120 notice and the SSHD had been under no obligation to serve one. The whole purpose and philosophy behind S120 notice was a "one-stop shop", the regime designed to "flush out" all claims an appellant might wish to make; Mr Solomon's reading of the legislation would extend the language of the Act way too far. The historic S120 notice was some seven years old. There had been two subsequent appeals. In relation to the historic S120 notice, it had been served in very different circumstances. If Mr Solomon was right an appellant would not need to make an application for anything.

Analysis and legal framework

11. It is pertinent to recall the precise provisions of Sections 82, 85,120 and 96 of the 2002 Act as applicable to this case:-

> **82 Right of appeal: general**
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
> (2) In this Part "immigration decision" means—
> (a) refusal of leave to enter the United Kingdom,
> (b) refusal of entry clearance,
> (c) refusal of a certificate of entitlement under section 10 of this Act,
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,
> (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,
> (f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under [section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33)] 2 (removal of person unlawfully in United Kingdom),
(h) ….
(3) ….
(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

85 Matters to be considered
(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.
(4) On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

120 Requirement to state additional grounds for application
(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."

96[since 2004] **Earlier rights of appeal**
"(1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies–
(a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),
(b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and
(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.

> (2) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies–
> (a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,
> (b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and
> (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice.

12. Also relevant is regulation 4(8) of Schedule 2 of the 2006 EEA Regulations which provides that:

> Section 120 of the 2002 Act shall apply to a person if an EEA decision has been taken or may be taken in respect of him and, accordingly, the Secretary of State or an immigration officer may by notice require a statement from that person under subsection (2) of that section and that notice shall have effect for the purpose of section 96(2) of the 2002 Act.

13. In AS (Afghanistan) [2009] EWCA Civ 1076 the Court of Appeal by a majority considered that the language of the Act, in particular Sections 85(2), 96(2) and 120, demonstrated that they were intended to form constituent parts of a coherent procedure, designed to avoid a multiplicity of applications and appeals. He went on to consider S120 and S96(2), viewing them as a procedural scheme under which the appellant was required to put forward all his grounds for challenging the decision against him for determination in one set of proceedings. AS (Afghanistan) was upheld by the Supreme Court in Patel v Secretary of State for the Home Department [2013] UKSC 72.

14.It is entirely clear from the above statutory scheme and leading decisions relating to it that the procedural scheme established by S120 is to allow and encourage an applicant to provide all the reasons he or she has for appealing against a particular decision. Whilst S120 does not specify a time limit for replying, the life of a S120 notice cannot survive beyond final determination of any appeal against that decision. That is demonstrated by the wording of S85(2) which provides that if an appellant under S82(1) makes a statement under S120, "the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 *against the decision appealed against*" (emphasis added). By S85(3) such a statement can be made "before or after the appeal was commenced" but not beyond final determination of the appeal. Similarly, the language of S120 provides for the Secretary of State or an immigration officer to issue a notice in writing in respect of a person who has either made an application to enter or remain in the United Kingdom [the pre-decision stage] or where "(b) *an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him*." (emphasis added) Where the decision has been taken, then the notice is limited to setting out reasons or grounds relating to that decision. Section 120(3)(b) makes clear that such a statement need not repeat reasons or grounds set out in "*an application to which the immigration decision mentioned in subsection 1(b) relates*" (emphasis added).

15.As regards S.96(2), I see nothing in its wording to support Mr Solomon's thesis that a S120 notice has a continuing effect beyond final determination of any appeal against a decision made on a previous application. According to Mr Solomon, this provision established that it could only be by application of S96 in the form of a positive act of certifying that the Secretary of State could prevent an old S120 notice from having continuing effect. He pointed out that the Secretary of State had not chosen to certify the claimant's current appeal. However, whilst as Burnton LJ said in Lamichane v Secretary of State for the Home Department [2012] EWCA Civ 2 at [35], S120 does not contain any time limits and "[t]he primary consequence of the service of a section 120 notice is to be found in section 96", S96 provides a discretionary mechanism that enables the Secretary of State to prevent an appeal being brought against a "new decision" if there has been an "old decision (whether or not an appeal was brought against it and whether or not any appeal brought against it has been determined). Nothing in its wording seeks to modify the definition of a S120 notice as given in S120 itself. Failure on the part of the Secretary of State to apply S96 does not alter the basic concepts set out in the structure of the 2002 Act that (i) require a decision to be made in relation to a particular application; (ii) provide rights of appeal only in relation to appeals against a particular (historic) decision; and which (iii) provide for final determination of an appeal.

16. I concur with Mr Wilding in considering that if Mr Solomon's approach was adopted, the entire decision-making process in the field of immigration would become a constant regurgitation of old grounds and reasons given in response to old S120 notices no matter how unconnected they were to the situation as at the date of application. The "one-stop shop" would indeed become a multistop carousel. As is made apparent by the facts of this case, it would entail decision-makers and courts and tribunals having to trawl back to S120 notices served years ago in very different factual and legal circumstances– in the claimant's case, over 6 years ago.

17. For the above reasons my decision is that the First-tier Tribunal judge materially erred in law in allowing the appeal on "not in accordance with the law" grounds. The only decision under appeal was that against refusal to issue a permanent residence card under the 2006 EEA Regulations. Yet the judge made no findings in relation to the EEA decision under appeal at all: see [4]. That was a material error of law.

18. Having concluded that the judge materially erred in law, I turn to consider whether I am in a position to re-make the decision without further ado. I am satisfied that I am not in a position to re-make the decision myself because the effect of the judge's decision is that the appeal has not yet being considered at all. That being so, it falls squarely under the Senior President's Practice Statement governing remittals to the First-tier tribunal. I hereby remit this case to the First-tier Tribunal with a direction that the only matter to be considered by it concerns the appeal against the Secretary of State's decision of 2 September 2014 refusing to issue the claimant with a permanent residence card. The composition of the First-tier Tribunal should not include Judge R.A. Cox.

19. No anonymity direction is made.

Signed Date: 17 May 2016

Dr H H Storey
Judge of the Upper Tribunal