Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37768/2014

THE IMMIGRATION ACTS

Heard at Birmingham ET	**Decision & Reasons Promulgated**
On 5 February 2016	**On 10 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS DAPHNE ZAKEO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Tapfumaneyi, PT Law & Associates

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Frankish promulgated on 3 June 2015, in which he allowed the respondent's appeal against a decision to refuse her application for an EEA Residence Card, on Article 8 ECHR grounds.

2. Permission to appeal was granted by First-tier Tribunal Judge Nicholson on 17 August 2015.

Anonymity

3. No direction has been made previously, and there is no reason for one now

Background

4. The respondent is a national of Zimbabwe born on 21 September 1977. She last entered the United Kingdom in 2007 and has made a variety of applications to extend her stay including under Tier 4 of the Points-Based Scheme and asylum. Removal directions were made on 23 August 2010.

5. On 6 June 2014, the respondent applied for an EEA Residence Card on the basis of derivative rights, as the carer of a British citizen child. Her application was refused, as she had not provided evidence as to why the child's father, with whom she appeared to reside, was not in a position to provide care for the child.

6. The respondent appealed to the First-tier Tribunal.

The hearing before the First-tier Tribunal

7. The FTTJ heard no submissions on the respondent's behalf which related to the claim under the Regulation 18A of the Immigration (European Economic Area) Regulations 2006. Instead, the respondent's case was argued on the basis of Article 8 alone, that it fell both within the Immigration Rules and outside of them. The FTTJ concluded that there were insurmountable obstacles to family life taking place outside the United Kingdom, as per EX.1 of Appendix FM.

The grounds of appeal

8. In essence, the first ground argues that the FTTJ made a material misdirection in law in, firstly, treating the best interests of the appellant's child as "the primary or paramount consideration." In addition, the FTTJ had misdirected himself by failing to weigh the respondent's "very poor" immigration history against the ostensible best interests of the child and purported to apply the principle in Chikwamba v SSHD [2008] UKHL 40 without further enquiry as to whether this was appropriate on the particular facts. Furthermore, it was argued that the FTTJ had no jurisdiction to consider Article 8 ECHR as no removal decision had been taken. It remained open for the respondent to make a human rights application. The second ground argued that the FTTJ failed to give adequate reasons in support of a material finding. That finding was that any separation of the family would be permanent on the basis that the financial requirements for a partner could not be met. The FTTJ did not consider whether the respondent might succeed on Article 8 outside of the Rules or under the ECO's residual discretion.

9. Permission to appeal was granted on the basis that it was arguable that the FTTJ had no jurisdiction to consider Article 8 in an EEA appeal. Permission was not expressly refused on the remaining grounds.

10. Since permission was sought, there have been relevant case law developments. The following was said in the headnote of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466;

> "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. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature. "

11. In TY (Sri Lanka) [2015] EWCA Civ 1233 the Court agreed with Amirteymour in finding that an American father/carer of an EEA child who was refused under EEA Regulations could not rely on Article 8. At [35] the Court said; "*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*". At [26] and [27] the CA said that "*...The appellant would only have such a right (to proceed under Article 8) if the Secretary of State had served a one stop notice pursuant to section 120 of the 2002 Act and paragraph 4 (8) of Schedule 2 to the EEA Regulations....Since there is no section 120 one stop notice, the appellant is confined to the subject matter of the original decision*".

12. In this instance, no decision was made to remove the respondent; on the contrary the reasons for refusal letter invites her to either make a charged human rights application or to submit a further application for a Derivative Residence Card should she consider that she has a right to reside in the United Kingdom. The said letter also invites the respondent to make arrangements to leave, failing which her departure may be enforced, however the letter stressed that she will be contacted and given a separate opportunity to make representations against the proposed removal. Furthermore, the respondent does not claim that she has been served a section 120 notice. Accordingly, the FTTJ had no jurisdiction to consider and decide the appellant's human rights arguments.

13. As indicated above, the FTTJ recorded at [20] of his decision, that counsel for the respondent "*contended that the appellant falls both with the foregoing Rules as well (as) case law outside of the Rules*." There was, rightly, no attempt to argue that the respondent was entitled to a Derivative Residence Card owing to the fact that the EEA child's father lives with that child and the respondent in a family unit. Consequently, she is not the primary carer of the child and there is at least one other person (the father) who shares equal responsibility for that child's care.

The hearing

14. Mr Diwnycz promptly advised me that the Secretary of State wished to withdraw the appeal. It transpired, from a file note that he showed me, that Ms Zakeo had been granted leave to remain.

15. I accordingly considered the following provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008;

> **17.**—(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—
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> (a) [ ] by sending or delivering to the Upper Tribunal a written notice of withdrawal; or
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> (b) orally at a hearing.
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> (2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.

16. In view of the fact that the respondent had been granted leave to remain in the United Kingdom, I was prepared to consent to Mr Diwnycz's oral notice of withdrawal. I therefore had no need to hear from Mr Tapfumaneyi or make a decision on what appeared to be a clear error of law on the basis of a want of jurisdiction.

Decision

I consent to the Secretary of State's application to withdraw the appeal.

Signed Date: 7 February 2016
Deputy Upper Tribunal Judge Kamara