Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/39182/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 February 2016	**On 12 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOY NGOZI FREDERICKS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr F Abe, Legal Representative

DECISION AND REASONS

1. The respondent's appeal against the Secretary of State's decision to refuse to issue her with a residence card under Regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") was allowed by First-tier Tribunal Judge Ruth ("the judge") in a decision promulgated on 11 June 2015.

2. The respondent applied for a residence card on the basis of her relationship with a British citizen child, claiming derivative rights. The

judge found that the requirements of the 2006 Regulations were not met and there has been no challenge to that conclusion. Notwithstanding a clear statement made by the respondent's representative, Mr Abe, that he would make no submissions regarding Article 8, the judge went on to assess the merits of the appeal in this context. He noted that the grounds of appeal to the First-tier Tribunal made mention of Article 8 and that there had been no application to amend those grounds. He considered himself bound, on that basis, to decide whether the decision to refuse to issue a residence card was "in accordance with the Immigration Rules and Article 8 of the ECHR" (paragraph 23 of the decision). He concluded that the requirements of the Immigration Rules, contained in Appendix FM, were met. He observed that although it was not necessary for him to consider whether the respondent would succeed under Article 8 outside them, had such an assessment been required, she would indeed have also succeeded on this basis.

3. The Secretary of State applied for permission to appeal. It was contended on her behalf, first, that the judge erred in considering the Article 8 ground of appeal, in the light of Sarkar [2014] EWCA Civ 195. In the light of guidance given in that case, the ground fell to be treated as abandoned. Secondly, in any event, Article 8 was not engaged in the appeal, in the light of Amirteymour and Others [2015] UKUT 00466. No notice had been served on the respondent under Section 120 of the 2002 Act and no decision to remove her had been made. In these circumstances, the respondent was unable to bring a human rights challenge. Finally, as no Article 8 case was advanced at the hearing on the respondent's behalf, there was no opportunity for the appellant to address the Tribunal on this aspect. The judge erred in proceeding to make an assessment, without the Secretary of State being able to put a case.

4. Permission to appeal was given by an Upper Tribunal Judge on 15 October 2015.

5. The respondent has made no Rule 24 response.

Submissions on Error of Law

6. Mr Tarlow relied upon the grounds in support of the application for permission to appeal. The judge noted at paragraph 23 of the decision that the respondent did not intend to make any submissions on Article 8. In the light of Sarkar and Amirteymour, the decision contained clear, material errors of law.

7. In response, Mr Abe said that the respondent made an Article 8 application in January 2013, which was unsuccessful. Judicial review proceedings were brought in the summer of 2013 and the Secretary of State agreed to reconsider the case. That led to the respondent's application for a derivative residence card, under the 2006 Regulations, and to the present appeal. All the facts were put to the judge. Reference was made to the entire history of the case and to Article 8, on the respondent's behalf. The

Secretary of State withdrew her initial decision and then reconsidered the matter.

8. Mr Abe said that he did not accept that the judge erred in law as the best interests of the respondent's child were required to be taken into account. The judge was right to consider Article 8 and reliance was placed upon the decisions in Amos [2011] EWCA Civ 552 and Sanade [2012] 00048.

Conclusion on Error of Law

9. The decision has been prepared by a very experienced judge and it is readily apparent that he considered the respondent's case very carefully indeed. However, having noted at paragraphs 12 and 23 that no Article 8 submissions were to be made by Mr Abe on behalf of the respondent, the guidance given by the Court of Appeal in Sarkar fell to be applied. In those circumstances, notwithstanding mention of Article 8 in the grounds of appeal to the First-tier Tribunal, the ground was abandoned and the judge ought not to have considered it. In proceeding to make an Article 8 assessment, the no doubt unintended result was that the Secretary of State was shut out from putting a case. At paragraph 12 of the decision, the judge clearly recorded that as Mr Abe had said that he would make no Article 8 submissions, the Presenting Officer made no submissions on the Secretary of State's behalf on that issue.

10. The decision under appeal is a refusal to issue a derivative residence card and there has been no decision to remove the respondent under Regulation 19 of the 2006 Regulations (or on any other basis). There is nothing to suggest that she was served with notice under Section 120 of the 2002 Act and, unsurprisingly, there is no sign of any response to such a notice by her. In these circumstances, in the light of Amirteymour, Article 8 was not engaged and the judge erred in proceeding to make an assessment and allowing the appeal on this basis. The Upper Tribunal concluded that JM (Liberia) [2006] EWCA Civ 1402 was to be distinguished. Neither the factual matrix of that case nor the reasoning had any application to appeals against decisions to refuse to issue residence cards or similar documents, under the 2006 Regulations. It is important to note that promulgation of the judgment in Amirteymour occurred on 11 July 2015, several weeks after the judge promulgated his decision and so he cannot be criticised for failing to take it into account.

11. In these circumstances, notwithstanding the care with which the judge dealt with the appeal, the decision of the First-tier Tribunal must be set aside, as containing material errors of law.

Remaking the Decision

12. There has been no challenge to the judge's findings on Regulation 15A of the 2006 Regulations. This part of his analysis forms no part of the application for permission to appeal and there has been no Rule 24 response and no cross-appeal. Mr Abe confirmed that the judge's findings on Regulation 15A were not challenged in the remaking of the decision.

13. In directions given by the Principal Resident Judge, the parties were advised to prepare on the basis that if the decision of the First-tier Tribunal were set aside, any further evidence could be considered by the Upper Tribunal at the hearing, in order to remake the decision. Mr Abe said that his client's child was a salient feature of the case and that the child's best interests should be properly considered, as should Article 8 of the Human Rights Convention. Mr Tarlow said that he had nothing to add to his submissions on error of law. Article 8 was simply not engaged in the appeal and there was no challenge to the Regulation 15A findings.

14. In the light of the submissions made by the representatives, the outcome of the remaking of the decision is clear. Article 8 of the Human Rights Convention is not engaged. Mr Abe suggested that it was but, with respect to him, I am unable to accept that this is so. His client also suggested, at the end of the hearing, that her family circumstances were relevant. Although they are, of course, of very great importance to her, her human rights, and those of her close family members, are not engaged in this appeal. As there is no challenge to the dismissal of the appeal under the 2006 Regulations, in the light of the judge's finding that the requirements of Regulation 15A were not met, the overall result is that the appeal must be dismissed.

15. As Mr Abe may explain to his client, as no removal decision has been made, she may continue to enjoy family life with her child and the decision to refuse to issue her with a residence card will not prevent her from doing that. If a removal decision is made by the Secretary of State, an appeal may be brought and, in these circumstances, her human rights (and perhaps those of others) may be relied upon.

Notice of Decision

The decision of the First-tier Tribunal is aside. It is remade as follows: appeal dismissed.

Anonymity

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

As the appeal has been dismissed, no fee award may be made.

Signed Date

Deputy Upper Tribunal Judge R C Campbell