



Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: EA122302016
EA122282016

THE IMMIGRATION ACTS

**Heard at Field House
on 26 June 2017**

**Decision and
Promulgated
on 27 June 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MARVIN MIRANDA
JENNIFER MIRANDA
(anonymity direction not made)**

Respondent

Representation:

For the Appellant: Miss Isherwood, Senior Home Office Presenting Officer.
For the Respondent: no appearance.

ERROR OF LAW DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Cox ('the Judge') promulgated on 5 April 2017 in which the Judge dismissed Mr and Mrs Miranda's appeals on EEA grounds but allowed the appeals as it was said the decision under

challenge was “in breach of community law” which is taken to be a reference to Article 8 ECHR.

2. The Secretary of State was granted permission to appeal on the basis it is accepted the EEA Regulations were not engaged in the appeal but that in allowing the appeal on article 8 grounds the First-tier Tribunal Judge may have erred in law in not applying *Amirteymour and Others (EEA Appeals; Human Rights) [2015] UKUT 466*.

Error of law

3. Mr and Mrs Miranda, born on 11 February 1961 and 11 October 1968 respectively are citizens of the Philippines. On 10 August 2016, they applied for EEA Family Permits as the parents of an EEA national studying in the UK.
4. Neither Mr nor Mrs Miranda attended the hearing as their home address is in Crete. They asked the Judge to determine the matter on the papers.
5. The basis of the appeal is a claimed entitlement to a derived right of residence pursuant to Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (the Regulations). The Judge at [19] found Mr and Mrs Miranda did not meet the requirements for a derived right of residence as there was no suggestion that their son, the EEA national, would have to leave the UK. As such the respondent’s decision was held to be in accordance with the EEA regulations which is an arguably sustainable finding in relation to which permission to appeal has not been granted in any event.
6. The Judge found that by virtue of section 84 of the Nationality, Immigration and Asylum Act 2002 he was required to consider whether the decision breached Mr and Mrs Miranda’s community law rights. Although nationals of the Philippines the address they provided for the appeal is in Crete indicating they are within the territory of the European Union.
7. The Judge was aware of the decision in *Amirteymour and Others (EEA Appeals; Human Rights) [2015] UKUT 466* as specific reference is made to this case at [23 – 24] in the following terms:

23. I am aware that in **Amirteymour and Others (EEA Appeals; Human Rights) [2015] UKUT 466** the Upper Tribunal held that an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. However, I am satisfied that the Appellant’s circumstances are very different to the applicants in **Amirteymour**. Although the applicants in that case were all seeking to rely on derived rights of residence under the EEA regulations, they all resided in the UK and were over stayers. The decision did not formally seek to remove them (no section 120 notice had been served). In addition, it was open to them to make an application under the Rules (including Appendix FM). I also note that the tribunal did not consider whether the applicants could rely on rights under the Charter.

24. Unlike the applicants in **Amirteymour** in the present case, the ECM considered whether the decisions breached the Appellant’s human rights and concluded that the decision did not interfere with their Article 8 rights. In the

alternative, the ECM concluded that any interference is justified to maintain effective immigration control, is proportionate and appropriate.

8. In [25] the Judge concluded that having found he could consider whether the decision is in breach of an EU citizen's article 8 rights he would adopt the step by step approach set out in *Razgar*. The problem is that nowhere in the preceding paragraphs of the determination does the Judge consider whether, notwithstanding comments made by the ECM, the appellants have a right of appeal on Article 8 grounds.
9. The first point to note is that the decision under appeal is that of the Entry Clearance Officer (ECO) dated 22 August 2016 and not the review of decision by the Entry Clearance Manager (ECM) which upheld the decision.
10. The ECO refused the application for the EEA Family Permit but made no decision in relation to Article 8 ECHR. The ECM conducted a review followed receipt of Mr and Mrs Miranda's appeal. The grounds of appeal challenge only the EEA decision as the section that requires completion for a human rights decision has been left blank. There was therefore no appeal under the Human Rights Act lodged by Mr and Mrs Miranda.
11. The second point is that illustrated by the decision of the Court of Appeal in *Amirteymour v The Secretary of State for the Home Department [2017] EWCA Civ 353*, handed down on 10 May 2017, in which the Court heard the appellant's appeal against the decision of the Upper Tribunal.
12. Giving the lead judgment Lord Justice Sales, when considering the issue of jurisdiction to consider Article 8 in an appeal pursuant to regulation 26(1) said at [36 - 40]:
 36. In my view, the only situation in which the Tribunal has jurisdiction to consider a general case based on Article 8 (not concerning a decision to remove the appellant) in an appeal pursuant to regulation 26(1) is where the Secretary of State or an immigration officer serves a notice under section 120 of the 2002 Act - sometimes called a "one stop notice": see *AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076; [2011] 1 WLR 385*, para. [3] - requiring the appellant to set out the entirety of his case as to why he says he is entitled to remain in the UK. Paragraph 4(8) of Schedule 2 to the EEA Regulations provides that section 120 shall apply "if an EEA decision has been taken or may be taken" in relation to the individual concerned. Paragraph 1 of Schedule 1 provides that section 85 of the 2002 Act applies in relation to an appeal pursuant to regulation 26(1). Section 85(2), read as adjusted for that context, provides that "if an appellant under regulation 26(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"; and in my view for this purpose the reference to grounds of appeal listed in section 84(1) is to be taken to be a reference to all the grounds of appeal in that provision, including also paragraphs (a) and (f).
 37. The object of a "one stop notice" under section 120 is to make the applicant bring forward his whole case regarding his claim to be allowed to remain in the UK so that it can be considered in one go in all its aspects, either by the Secretary of State or (after the Secretary of State

has taken a relevant decision) by the Tribunal on an appeal which is on foot in respect of such a decision. Where such a notice is served, the Tribunal has jurisdiction to consider all claims made in response to it, whether or not they were raised before the Secretary of State at the time she made the relevant decision against which the appeal is brought: see *AS (Afghanistan)*; *Lamichhane v Secretary of State for the Home Department* [2012] EWCA Civ 260; [2012] 1 WLR 3064, [43] (Stanley Burnton LJ); and *Patel v Secretary of State for the Home Department* [2013] UKSC 72; [2014] AC 651 at [44] (Lord Carnwath JSC) and [67]-[70] (Lord Mance JSC). The effect of para. 4(8) of Schedule 2 to the EEA Regulations and para. 1 of Schedule 1 to the EEA Regulations (read with section 85(2) and (3) of the 2002 Act) is to enable the Secretary of State to require the applicant for a decision regarding his entitlements under the EEA Regulations to bring forward all the immigration claims on which he seeks to rely and incorporate them into his application to be considered in one go as part of that application or, where the Secretary of State has already made an adverse EEA decision in his case, to require the applicant to bring forward all the immigration claims on which he seeks to rely and incorporate them in his appeal against that decision, to be considered in one go by the Tribunal.

38. The claims which might be asserted in response to a section 120 "one stop notice" could include claims based on the Immigration Rules as well as claims based on Article 8 or other Convention rights. In my opinion, where this occurs the Tribunal's jurisdiction in relation to an appeal against an EEA decision brought pursuant to regulation 26(1) will be expanded to cover all the claims raised by the appellant in his response to the section 120 notice, including both the claims based on the Immigration Rules and general claims based on Convention rights. It is only by giving this effect to the section 120 notice that the object which it is intended to have, to ensure that all immigration claims by that appellant are dealt with in one go through a simplified and truncated procedure, can be achieved. The effect given to a section 120 notice by para. 4(8) of Schedule 2 and by para. 1 of Schedule 1 (read with section 85(2) and (3)) in the context of an EEA decision and an appeal against an EEA decision therefore includes an expansion of the claims which are to be regarded as included in the relevant application made under the EEA Regulations and of the jurisdiction of the Tribunal to consider such claims on an appeal against a relevant EEA decision. Accordingly, for example, if in answer to a section 120 notice served in the course of an appeal against an EEA decision the applicant for leave to remain puts forward a claim based on the Immigration Rules, the Tribunal determining that appeal will also have jurisdiction to determine that claim, notwithstanding the fact that para. 1 of Schedule 1 to the EEA Regulations states that the grounds of appeal in section 84(1)(a) and (f) of the 2002 Act relating to the Immigration Rules do not apply in respect of an appeal pursuant to regulation 26(1). Service of a notice under section 120 confers jurisdiction on the Tribunal in any appeal then on foot to deal with all claims made in response to the notice.
39. No procedural unfairness to the Secretary of State arises from treating the Tribunal's jurisdiction as being expanded in this way. Such an expansion of jurisdiction only occurs when the Secretary of State or the relevant immigration official opts to serve a section 120 notice. By opting to serve such a notice they take the risk of an expansion of the claims to be addressed in existing proceedings in order to secure the benefit of being able to deal with all claims definitively and promptly in a single set of proceedings: see *Patel v Secretary of State for the Home Department* at [69] (Lord Mance JSC).

40. Turning to the facts of the present case, no section 120 notice was served by the Secretary of State. Therefore, the jurisdiction which the FTT was required to exercise was the limited basic jurisdiction which arises under regulation 26(1), without any expansion by virtue of section 120 and section 85(2) of the 2002 Act and the related provisions of the EEA Regulations. Under the Tribunal's basic jurisdiction under regulation 26(1), the FTT had no power to entertain the appellant's new case based on Article 8.
13. There is no evidence in this appeal that the ECO served a section 120 notice upon Mr and/or Mrs Miranda. Consequently, the jurisdiction the First-tier Tribunal Judge was required to exercise was that which arises under regulation 26(1) as advised in the notice of refusal which was exercised out of country, pursuant to regulation 27(1)(c) of the Regulations. Under regulation 26(1) the First-tier Tribunal had no power to entertain what amounted to a new case based on Article 8 ECHR.
14. I find the Secretary State has made out that the Judge materially erred in law in proceeding to determine the appeal by reference to Article 8 ECHR when it has not been made out he had any jurisdiction to do so.
15. I set aside the decision of the First-tier Tribunal so far as that Tribunal allowed the appeal pursuant to Article 8 ECHR. The dismissal of the appeal pursuant to the Regulations stands as there is no legal error made out in relation to the same.
16. The Upper Tribunal has no jurisdiction to remake the decision relating to Article 8 ECHR.

Decision

17. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I am unable to remake the decision for want of jurisdiction.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 26 June 2017

