



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/13258/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Decision & Reasons Promulgated
On 27 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALI SANGARE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. T. Melvin, Home Office Presenting Officer
For the Respondent: Mr. I. Khan, Counsel instructed by ICS Legal

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Lucas, promulgated on 15 March 2018, in which he allowed Mr. Sangare's appeal to the limited extent that it be remitted back to the Secretary of State.
2. For the purposes of the decision I refer to the Secretary of State as the Respondent and to Mr. Sangare as the Appellant, reflecting their positions as they were before the First-tier Tribunal.
3. Permission to appeal was granted as follows:-

“The respondent seeks permission to appeal, in time, against the Decision of Tribunal Judge Lucas promulgated on 15 March 2018 to allow the appellant’s appeal against a decision of the respondent to refuse to issue a residence card as confirmation of the right to reside in the UK as the divorced partner of an EEA national “to the limited extent” that it be sent back to the respondent for further consideration under article 8.

A Judge may allow or refuse an appeal but does not have the power to direct the respondent to consider an article 8 claim by an appellant who has not made an article 8 claim to the respondent.”

4. The Appellant attended the appeal. I heard submissions from both representatives following which I reserved my decision.

Error of Law

5. At [22] and [23] of the decision the Judge states:-

“Under these circumstances, the current course is for this appeal to be allowed but only to the limited extent that it is remitted to the Respondent for a full consideration of the Article 8 claim that has now been lodged by the Appellant. It is not the fault of the Appellant that the Respondent was not present at this appeal. Equally, it is not the fault of the Respondent that she has not had the opportunity to consider a claim that was not lodged. The Article 8 claim therefore needs to be considered.

The appeal is allowed but limited to the extent that is indicated at paragraph 22 above.”

6. I find that the Judge has erred in law in allowing the appeal to the limited extent that it be remitted to the Respondent.
7. The Judge had before him an EEA appeal. Following the case of Amirteymour [2017] EWCA Civ 353, no appeal on Article 8 grounds can be brought in an EEA appeal. There was no basis on which the Appellant could argue human rights before the Tribunal given that he had an EEA appeal and there were no removal directions.
8. The only issue before the Judge was the refusal to issue a permanent residence card under the EEA Regulations. That was the extent of the Appellant’s appeal rights before the Judge.
9. At [18] the Judge finds:-

“The Tribunal is not at all convinced by the Appellant’s claim under 10(6) of the Regulations. The discrepancies in the documents provided – P60s and wage slips – together with the discrepancies highlighted in his interview were not at all encouraging of that claim.”

10. I find that the Judge has found at [18] that the Appellant’s appeal cannot succeed under the EEA Regulations. It therefore fell for the Appellant’s appeal to be dismissed given

that the only right of appeal was against the decision to refuse to issue a permanent residence card. There was no cross-appeal by the Appellant in relation to this finding.

11. However, the Judge did not stop by refusing the appeal under the EEA Regulations, but continued to look at the Article 8 claim on the basis of the Appellant's relationship with a UK citizen and their UK citizen child. The Judge acknowledges at [20] that this aspect of the claim has not been considered at all by the Respondent given that it was not raised by the Appellant when the claim was lodged in April 2016.
12. At [21] the Judge states the Tribunal is not the primary decision maker in relation to the Article 8 claim. Whether or not this is right is irrelevant in this case as the Judge did not have the jurisdiction in any event to consider Article 8.
13. It was submitted by Mr. Khan that the Judge could have considered section 117B(6) of the 2002 Act because it is an Act of Parliament and therefore it was open to him to consider it. I was not directed to any authority to show that section 117B(6) can be considered as a stand alone section in an EEA appeal, or any authority which shows that it can be considered outwith a consideration of Article 8 on human rights grounds. Section 117A makes clear that this part of the 2002 Act, which includes section 117B(6), applies where a court or tribunal is determining whether a decision "made under the Immigration Acts" breaches a person's right to respect for private and family life under Article 8. Section 117A(2) provides that section 117B is to be considered when "considering the public interest question". This was not the case in this appeal.
14. Section 117B falls to be considered when the proportionality exercise and the weight to be given to the public interest is being considered in an Article 8 appeal. There is no Article 8 claim before the Judge in an EEA appeal and, as I stated above, no authority was provided to show me that section 117B is freestanding and can be considered by any Tribunal in any appeal.
15. The Judge had no power to allow the appeal to the limited extent that it be remitted to the Respondent. It has been confirmed in the case of Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) that it is no longer possible for a Tribunal to allow an appeal on the ground the decision is not in accordance with the law. The headnote states:

"Following the amendments to ss.82, 85 and 86 of NIAA 2002 by the Immigration Act 2014, it is no longer possible for the Tribunal to allow an appeal on the ground that a decision is not in accordance with the law. To this extent, Greenwood No. 2 (para 398 considered) [2015] UKUT 00629 (IAC) should no longer be followed."
16. As accepted by Mr. Khan, it may have been better had the Appellant made a fresh application either under the EEA Regulations, or under Article 8, given that he is the father of a British child. That is not what the Appellant did. He instead attempted to tack an Article 8 appeal onto his EEA case. Amirteymour is clear that the Tribunal has no jurisdiction to consider Article 8 in an EEA appeal.

17. I find that the Judge erred in allowing the appeal to the limited extent that it was remitted to the Respondent, when he had no power to do so. He only had the power to allow or dismiss the appeal.

Notice of Decision

18. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
19. I adopt the unchallenged finding at [18] that the Appellant's evidence showed that he did not meet the requirements of the EEA Regulations.
20. I remake the decision dismissing the Appellant's appeal under the EEA Regulations.
21. No anonymity direction is made.

Signed

Date 26 June 2018

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed

Date 26 June 2018

Deputy Upper Tribunal Judge Chamberlain