Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16658/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 22nd October 2014	**On 6th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MRS SYEDA ZAHRA

(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Salmon, Solicitor
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of First-tier Tribunal Judge Batiste who, in a decision promulgated on the 16th July 2014, dismissed her appeal against the respondent's refusal of her application for an EEA Residence Card as confirmation of a derivative right of residence under European

Union treaties, transposed into UK law by Regulation 15A of the Immigration (European Economic Area) Regulations 2006.

2. The appellant is a citizen of Pakistan who currently resides with her British husband and children in the United Kingdom. Her appeal was dismissed under the Regulations because the First-tier Tribunal judge was not satisfied that the appellant was the primary carer of her children, concluding instead that she shared that responsibility with her husband. It followed from this that the children would be able to remain with their father if the appellant was required to leave the United Kingdom.

3. At paragraph 7 of his determination, Judge Batiste made the following observation:

> A … discussion took place as to whether Article 8 arose in the current appeal. I find that it does not. The present application is for a derivative residence card. It is made clear in the reasons for refusal letter that a decision was not made under Article 8; that a decision not to issue a derivative residence card does not in itself require the appellant to leave the United Kingdom; and if attempts were made to remove the appellant she would have a separate opportunity to make representations against that removal. As a result, this determination does not consider Article 8.

4. Designated Judge Shaerf granted permission to appeal against that part of the determination in the following terms:

> There is no widely accepted view whether Judges of the First-tier Tribunal should deal with Article 8 claims in determinations of appeal under the Immigration (EEA) Regulations 2006 when there are no removal directions. The judgment in *JM (Liberia) v SSHD [200]* (sic) *EWCA Civ* (sic) was before the 2006 Regulations came into force. The Judge was right to note there were no directions for the removal of the appellant. The appellant had filed the judgment in *Berrhab v Netherlands (Appellant. No. 10730/84)* which it is arguable placed some requirement on the Judge to consider substantively the Article 8 claim. Permission to appeal is granted.

5. In my judgement, the case of *Berrhab v Netherlands* does not assist the appellant. In that case, the European Court of Human Rights held that it was the Dutch government's refusal to grant the applicant a new resident permit and "his resulting expulsion" which, together, constituted an unjustified interference with the applicant's rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms [see paragraph 22; emphasis added]. In this appeal, the issue is whether mere refusal by the respondent to recognise the appellant's claim to a right of residence under European Union treaties was, without more, sufficient to engage the appellant's rights under Article 8.

6. Mr Salmond in any event placed rather greater reliance upon the judgement of the Grand Chamber of the European Court of Justice in the case of *Dereci* [2011] Case C-256/11, and in particular paragraphs 72 and 73:

> 72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that the situation is not covered by European Union Law, it must undertake that examination in light of Article 8(1) of the ECHR.
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> 73. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.

7. The above passages have to be read in context. The main proceedings concerned a Turkish national who asserted his rights under the "standstill" clause of the Ankara agreement. The issue in the subsidiary proceedings was whether the applicant's right to respect for private and family life fell to be considered under Article 7 of the European Charter or the equivalent right under Article 8 of the ECHR. In my view, the European Court of Justice was merely seeking to explain that the circumstances in which an EU citizen's rights under the European Charter may be engaged are limited to the operation of EU law, whereas the commensurate rights under the ECHR are of wider application. The Court's observations in paragraphs 72 and 73 were thus predicated upon the assumption that the facts of a particular case required the competent authority to consider a citizen's right to respect for private and family life, in order to explain the respective spheres of operation of the Charter and ECHR. It was not however purporting to set out a comprehensive list of the circumstances in which the right would be engaged in the first place.

8. I am thus satisfied that the question of whether the First-tier Tribunal was right not to consider the appellant's case under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms is ultimately one of jurisdiction. The Tribunal is of course a creature of statute whose jurisdiction is circumscribed by the provisions of the Nationality, Immigration and Asylum Act 2002. It may thus only consider an appeal against one of the 'immigration decisions' listed in Section 82, and only then by reference to one of the grounds that are listed in Section 84.

9. By virtue of paragraph 1 of Schedule 1 of the Immigration (European Economic Area) Regulation 2006, an EEA decision is to be treated "as if it were an appeal against an immigration decision under Section 82(1)". The right of appeal against an EEA decision thus arises because it is to be treated "as if" it were an appeal against an immigration decision, rather than because it is listed as such under Section 82 of the 2002 Act.

10. It is clear that the First-tier Tribunal judge dismissed the appeal on the basis that the only ground of appeal that was available under Section 84 was that contained within sub-section (1)(d),

> (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under Community Treaties in respect of entry to or residence in the United Kingdom.

Permission has not been granted to argue that dismissal of the appeal on that ground was an error of law. Rather, the issue in contention is whether the Tribunal ought also to have considered the appeal on the ground contained within sub-section (1)(g), namely, "that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights".

11. The 2002 Act contains a complete codification of the rights of appeal to the Tribunal which it created. Its individual provisions should therefore be construed as part of a coherent whole rather than in isolation. There is thus a clear correlation between Section 82(2)(d) and Section 84(1)(g) of the Act. Under the former provision, a person may appeal against a decision to refuse to vary his or her leave to enter or remain in the UK, only "if the result of the refusal is that the person has no leave to enter and remain". Under the latter provision, a person may only appeal on this ground if his or her removal arises "in consequence of" the immigration decision in question. If follows that if a person does not have extant leave to remain in the UK at the time when his or her application for further leave to remain is refused, then their subsequent removal will not "in consequence of" that refusal, but will instead be the consequence of the fact they were already without such leave at the time when the immigration decision was made.

12. In JM (Liberia) v Secretary of State for the Home Department [2006] EWCA Civ 1402, the Court of Appeal held that where a person appeals against a decision to refuse to vary a person's leave to enter or remain in the UK, it is unnecessary for that person's removal to be imminent in order for the appellant to be able to rely upon the ground contained in Section 84(1)(g). However, that reasoning does not in my view lead to the conclusion that it is also unnecessary for there to be a causal link between the 'immigration decision' in question and the appellant's subsequent hypothetical removal. For this reason, and for the reasons that are set out below, I conclude that the concession by the Senior Presenting Officer in Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC), which was supposedly based upon the reasoning in JM (Liberia), was wrongly made. Moreover, it was not a concession that Mr Dewnycz was prepared to make in this appeal.

13. By contrast with a grant of leave to remain under the Immigration Rules, a person's right to reside in the UK under EEA treaties is not dependent upon a decision by the Secretary of State. It depends instead upon the circumstances of the relevant EEA national at the time when he or she is asserting the right in question. One of the consequences of this is that the existence of a person's right of residence may change between the time when the Secretary of State decides to refuse to issue him or her with a

Residence Card and the time when she comes to consider removing that person from the UK. The EEA national in question may thus not have been a "qualified person" under Regulation 6 at the time when the Secretary of State refused to issue a Residence Card, but may nevertheless have become such a person by the time that removal is being contemplated. A decision to refuse to issue a Residence Card and a later decision to remove the person who applied for it are not therefore causally linked. On the contrary, they are discrete decisions based upon the circumstances existing at the particular time when they are made.

14. It follows from the above that it was not an error of law for the First-tier Tribunal to decline to consider whether the appellant's removal "in consequence" of the decision to refuse to issue her with a Residence Card would be incompatible with her rights under Article 8 of the EHCR. Indeed, the Tribunal would in my judgement have erred had it purported to allow the appeal on this ground. This appeal must therefore be dismissed.

15. Before leaving this appeal, I would like to stress that the issue in any application that the appellant may make for leave to remain on the basis of her Article-8 rights would be quite different from that which arose in her application for an EEA Residence Card. It would be unnecessary, for example, for the appellant to show that she was the "primary carer" of her British children. The sole issue, under both the Immigration Rules and Section 117B of the 2002 Act, is likely to be whether it would be reasonable for the appellant's British children to be deprived of their birthright by leaving the UK in order to follow their mother to Pakistan.

Decision

16. The appeal is dismissed.

Anonymity not directed.

Signed Date

Deputy Judge of the Upper Tribunal 5th **November 2014**