



IAC-FH-AR-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/08246/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10<sup>th</sup> February 2015**

**Decision & Reasons Promulgated  
On 26<sup>th</sup> February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ZU**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: Miss N Hashmi, Counsel, instructed by Lincolns Solicitors

**DECISION AND REASONS**

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure  
(Upper Tribunal) Rules 2008**

*The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order.*

*Unless and until a Tribunal or court directs otherwise, the Appellant (as he was before the First-tier Tribunal) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their*

*family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.*

1. Although the Secretary of State is the Appellant in these proceedings I will refer to the parties as they were before the First-tier Tribunal. The Appellant, a national of Bangladesh appealed to the First-tier Tribunal against the decision of the Secretary of State dated 18<sup>th</sup> February 2015 to refuse his application for a derivative residence card under the Immigration (EEA) Regulations 2006 as amended (the 2006 Regulations).
2. Judge of the First-tier Tribunal Rhys-Davies dismissed the appeal under the 2006 Regulations. That decision has not been challenged. The judge then went on to consider the appeal under Article 8 of the European Convention on Human Rights. At paragraph 25 of the determination the judge said “I find that notwithstanding the Respondent's stance that such arguments would not be considered without a fresh application, I have the jurisdiction and the obligation to consider these arguments”. The judge found that it was clear that the Appellant did not satisfy any of the Immigration Rules in relation to private or family life and went on to consider the five stage test set out in **R v SSHD ex parte Razgar [2004] UKHL 27**. The judge found that the decision not to grant a residence card amounted to an interference with the Appellant's right to respect for his family life and that the decision was not proportionate to the respondent's legitimate aim. The judge therefore allowed the appeal under Article 8.
3. The Secretary of State appealed against that decision on the basis that, in allowing the appeal under Article 8, the judge materially erred in law in that no notice under Section 120 of the Nationality, Immigration and Asylum Act 2002 was served and no decision had been made to remove the Appellant. It is contended that the Appellant cannot, in an appeal under the 2006 Regulations, bring a Human Rights challenge to removal.
4. Permission to appeal was granted on the basis that the grounds are arguable in light of the decision of the Upper Tribunal in **Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)** and that of the Court of Appeal in **TY (Sri Lanka) v SSHD [2015] EWCA Civ 1233**.
5. At the hearing before me Miss Hashmi accepted that the case law is clear that, where no Section 120 notice or removal directions had been served in an EEA appeal, the judge was unable to consider Article 8. However, she submitted that there is an intimation in the reasons for refusal letter that the Appellant would have to return to Bangladesh and that if he did not do so his removal would be enforced. She submitted that it was open to the judge therefore to consider Article 8.
6. Mr Whitwell submitted that the judge erred at paragraph 25 in deciding that he had jurisdiction to consider Article 8 in light of the case law.
7. The Upper Tribunal, in **Amirteymour** and the Court of Appeal, in **TY (Sri Lanka)** gave guidance in relation to the availability of human rights

grounds in an appeal against the refusal of a residence card under the EEA Regulations. In **TY** Jackson LJ said;

“35. 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.

36. In the result therefore I reach a similar decision on the issues before us to the decision reached by the Upper Tribunal in *Amirteymour v Secretary of State for the Home Department* [2015] UKUT 00466 (IAC). The Upper Tribunal in *Amirteymour* distinguished *JM (Liberia)* on a different basis from that which I have identified. See *Amirteymour* at [50]. Nevertheless in the end the Upper Tribunal has come to the same decision as myself. ...”

8. I have considered the judge's decision in light of the cases of this case law. I also note that in the reasons for refusal letter the Secretary of State invited the Appellant to make an application for leave to remain on the basis of his family life should he wish to do so.
9. In these circumstances I am satisfied that it was not open to the judge to go on to consider the appeal under Article 8 of the ECHR. I therefore set aside that part of the judge's decision. I preserve the judge's unchallenged findings in relation to the 2006 Regulations.
10. In accordance with the case law and the legal framework I remake the decision in relation to Article 8 by dismissing the human rights appeal for the reasons set out above.

### **Notice of Decision**

11. The decision of the First-tier Tribunal in relation to the EEA Regulations is preserved.
12. The decision of the First-tier Tribunal in relation to Article 8 of the ECHR is set aside and remade by dismissing it.

Signed

Date: 23<sup>rd</sup> February 2016

Deputy Upper Tribunal Judge Grimes

### **TO THE RESPONDENT FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 23<sup>rd</sup> February 2016

Deputy Upper Tribunal Judge Grimes