



IAC-AH-DN-V1

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

Appeal Numbers: IA/47467/2014  
IA/50785/2014  
IA/50786/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22 February 2016**

**Decision & Reasons  
Promulgated  
On 12 April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

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

Appellant

**and**

**[MS] (FIRST APPELLANT)  
[AMR] (SECOND APPELLANT)  
[AKR] (THIRD APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer  
For the Respondents: Ms D Revill, Counsel

**DECISION AND REASONS**

1. This application for permission to appeal was made by the Secretary of State but nonetheless I shall hereinafter refer to the parties as they were

described before the First-tier Tribunal that is Miss RDS and her children as the appellants and the Secretary of State as the respondent.

2. The Secretary of State appeals with permission against a decision of First-tier Tribunal Boyes dated 27 August 2015 allowing the appeals of the first, second and third appellants to the limited extent that the application remained outstanding pending its lawful consideration.
3. The first appellant was born on [ ] 1983 and the second and third appellants, the children of the first appellant, were born on [ ] 2006 and [ ] 2007. All the appellants are nationals of Brazil and they appealed against the respondent's decision of 18 November 2014 to refuse them residence cards as a confirmation of a right to reside in the United Kingdom. That application was submitted on the basis of their claim to be in a durable relationship with a qualified EEA national [JM], a Portuguese national.
4. As the First-tier Tribunal Judge set out on 4 June 2003 the first appellant was refused leave to enter the United Kingdom and returned to Brazil on the same day and on 27 June 2004 the first appellant was refused leave to enter the United Kingdom and returned to Brazil on the same day. She claims to have entered the UK subsequently in 2005 and her children were then born. The father of the two children was [MCR], a Brazilian national. On 25 July 2013 the appellants applied for leave to remain in the United Kingdom in reliance upon Article 8 of the European Convention on Human Rights but that application was refused on 6<sup>th</sup> September 2013 with no right of appeal.
5. On 30 September 2013 an enforcement visit was undertaken at the appellants' residential address and the first appellant was interviewed and cautioned. She had two counterfeit Portuguese national identity cards and one counterfeit Italian national identity card in her possession and she was issued with an IS96 which included monthly reporting conditions.
6. What appeared to be an outstanding Article 8 application was reconsidered following judicial review proceedings and refused on 11 November 2013 and an appeal was dismissed by the First-tier Tribunal on 7 July 2014. She became appeal rights exhausted on 22 September 2014.
7. On 26 October 2014 the appellant applied for the EEA residence card and which was the subject of this appeal.
8. Judge Boyes considered the limited documentary evidence submitted and found that it was insufficient to demonstrate that the appellant's EEA national partner was exercising treaty rights [33]. Judge Boyes also found that it was the first appellant's case that the EEA national was not presently residing in the United Kingdom and that she had not shown that the EEA national was a qualified person. At paragraph [37] the judges states,

*“Whilst the most recent decision by the respondent relates to only the EEA application, the respondent has previously made decisions to remove the appellant. For that reason I have gone on to consider the issues relating to Article 8 (inside and outside the Immigration Rules) and, in doing so whether the respondent has complied with her duties under Section 55 of the Borders, Citizenship and Immigration Act 2009.”*

9. The judge then proceeded at paragraphs [38] to [43] to note the absence of any consideration of Section 55 by the Secretary of State in her Reasons for Refusal Letter. The judge noted that there was no reliable evidence before him [45].
10. At paragraph [46] the judge noted a primary consideration in the case was the best interests of the second and third appellants and this could not be assessed without reliable information. The judge found that the decision-maker was not properly informed *“of all the relevant facts of this case before reaching her decision”* and particularly at paragraph 48

*“In the circumstances it cannot be said that the decision-maker was properly informed of the children’s particular circumstances or the scrupulous assessment of what is in the children’s best interests has been carried out”*

and at [49]

*“For the above reasons the respondent has failed to comply with her statutory duties under Section 55 of the Borders, Citizenship and Immigration Act 2009 when making her decision in this case.”*

11. That application for permission to appeal was made by the Secretary of State which asserted that the appellant may only pursue grounds of appeal which were related to the underlying decision under challenge and that by definition EEA refusals did not taken in isolation require detailed consideration of Article 8 or other Convention matters. It followed that the extent to which the Convention matters would properly fall for consideration within the confines of an EEA appeal which would be limited as there was no requirement at the point it was decided that the appellant did not qualify under the EEA Regulations for him or her to leave the UK.
12. It was further submitted that the statutory jurisdiction of the Tribunal in EEA cases did no permit consideration of matters relating to the Immigration Rules including matters related to the detailed provision for Article 8 matters.
13. The residual duty of the Tribunal under Section 6 of the Human Rights Act 1998 did not extend to requiring detailed consideration of the Immigration Rules or Article 8 policy of the Secretary of State within the confines of the present appeal based upon the fact that a One-Stop Notice under Section 120 of the 2002 Act had not been served on the appellant.

A consideration of Article 8 was distinct from EEA matters. The appellant could not raise Article 8 matters during the course of her appeal.

14. The judge should have addressed whether the removal of the appellant would be likely to follow. An indication that the Secretary of State was not presently considering removal directions was indicated by the refusal letter with an invitation to the appellant to submit an Article 8 application. In the absence of impending removal directions the appellant could make an application from within the United Kingdom. Having found the appellant did not meet the requirements of the EEA Regulations the judge should have dismissed the appellant's appeal on the basis and restricted the consideration of the Regulations alone.
15. Reliance was placed on **Amirteymour and Others (EEA appeals; human rights) [2015] UKUT 466 (IAC)**,

*"Where no notice under Section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in **JM (Liberia) [2006] EWCA Civ 1402** has any application to appeals of this nature."*

16. Permission was granted by First-tier Tribunal Judge Page.

### **The Hearing**

17. At the hearing before me Ms Willocks-Briscoe submitted that this was a limited issue and that any appeals on human rights grounds were not before the Tribunal. Section 55 applied to the balancing interests of the children and the state and these were not in issue here as there was no indication of a removal. The applicant was invited to make submissions regarding Article 8 to which Section 55 would be applied. Article 8 was excluded in this matter however she agreed that there was a lacuna in law.
18. Ms Revill submitted that **Amirteymour** was not good law in this case and could be distinguished. There was a failure by the Secretary of State to apply Section 55 and this was a matter of public law. I was referred to the case of **Granovski v Secretary of State for the Home Department [2015] EWHC 1478** which at paragraph 81 confirmed that "There is no category of immigration decision-making to which consideration of Section 55 ... does not apply". This was the case notwithstanding that the decisions in **Granovski** did not require the child applicants to leave the UK.
19. The question of whether the decision was in accordance with the law was a ground of appeal to be considered by the judge and it was on this basis that she allowed the appeal to a limited extent only.

## **Conclusions**

20. A specific ground of appeal before the First-tier Tribunal was that the Secretary of State's decision was not in accordance with the law and in contravention of Section 55 of the Borders, Citizenship and Immigration Act 2009. I questioned at the start of the hearing the nature of the final decision of the judge whereby she states that she dismisses the appeals under European Community Law grounds and also allows the appeals of the first, second and third appellants only to the limited extent that the application remains outstanding pending its lawful consideration. **Amirteymour** and **TY (Sri Lanka) v Secretary of State for the Home Department [2015] EWCA Civ 1233** which confirms **Amirteymour**. make no reference to the consideration of Section 55 of the Borders, Citizenship and Immigration Act 2009 and this sets out as follows:

*"55 Duty regarding the welfare of children*

- (1) The Secretary of State must make arrangements for ensuring that -
  - (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
  - (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.**
- (2) The functions referred to in subsection (1) are -
  - (a) any function of the Secretary of State in relation to immigration, asylum or nationality;*
  - (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;*
  - (c) any general customs function of the Secretary of State;*
  - (d) any customs function conferred on a designated customs official.**
- (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*
- (4) The Director of Border Revenue must make arrangements for ensuring that -*

- (a) *the Director's functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
  - (b) *any services provided by another person pursuant to arrangements made by the Director in the discharge of such a function are provided having regard to that need.*
- (5) *A person exercising a function of the Director of Border Revenue must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (4).*
- (6) *In this section –*
- *“children” means persons who are under the age of 18;*
  - *“customs function”, “designated customs official” and “general customs function” have the meanings given by Part 1.*
- (7) *A reference in an enactment (other than this Act) to the Immigration Acts includes a reference to this section.*
- (8) *Section 21 of the UK Borders Act 2007 (c. 30) (children) ceases to have effect.”*

21. I can accept entirely that the judge was not entitled to consider the matter in relation to Article 8 grounds because no Section 120 notice had been served and there was no removal decisions taken in respect of the appellants. The argument however that Section 55 only can be deployed in relation to an Article 8 consideration must be incorrect. Section 55 even though it may be a response to the UN Convention on the Rights of the Child and subsequent litigation, is nonetheless now a statutory consideration and the decision in **Granovski** confirms that there is no category of immigration decision-making to which consideration of Section 55 does not apply. I do not accept the premise that just because there is no removal decision that the welfare of the children would not be affected. There is no doubt that the Secretary of State was aware that this decision affected children because decisions were issued to both the second and third appellant.

22. The judge was entitled to consider the matter as to whether the decision was in accordance with the law and that was a legitimate ground of appeal to be considered. I considered whether Section 55 would apply to the decision of the mother bearing in mind she herself is not a child but I conclude that the ambit of Section 55 is wide enough to include a consideration of the needs to make arrangements for ensuring that the functions of the Secretary of State in relation to immigration, asylum or nationality are discharged having “regard to the need to safeguard and promote the welfare of children who are in the United Kingdom”. As I

state I note that there is no removal decision but clearly the effect of a lack of residence card may indeed affect the welfare of the children. The uncertainty in relation to immigration status in itself would have an effect on the children. A decision in relation to the first appellant will have an effect on the children as she is the mother.

23. It would appear that the judge is applying her decision in relation to Section 55 to both the EEA decision which indeed is the only one under real consideration. As I note at paragraph [44] she states "In the decision of 18 November 2014 only the Immigration (European Economic Community) Regulations are considered. There was no further consideration of Appendix FM or paragraph 276ADE."
24. Therefore the judge was aware of the confines of the decision and found at paragraphs [48] and [49] that the respondent had failed to comply with the statutory duties under Section 55.
25. As such I found there is no material error of law and even if the decision had to be remade I too would find that the Secretary of State has failed to make any reference to Section 55 in the decision and she is statutorily bound to do so for the reasons I have set out above.
26. I find that the decision of First-tier Tribunal Judge contains no material error of law and the decision shall stand.

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

Unless and until a Tribunal or court directs otherwise, the appellant 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. This is in place because the decision involves minors.

Signed

Date 2<sup>nd</sup> April 2016

Deputy Upper Tribunal Judge Rimington