



IAC-FH-CK-V1

Upper Tribunal
(First Tier Tribunal and Asylum Chamber) Appeal Number: IA/32737/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11th November 2014

Decision and Reasons
Promulgated
On 17th November 2014

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
DEPUTY UPPER TRIBUNAL JUDGE IAN FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS YAO ZHU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan , Home Office Presenting Officer

For the Respondent: Mr A Mahmood, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a determination promulgated on 18 June 2014 by the First-tier Tribunal (Judge Miller) allowing an appeal by the claimant against the Secretary of State's refusal to issue her a derivative residence card on the basis that she is a third country national upon whom a British Citizen is dependent in the UK, in line with the case of **Ruiz Zambrano** (European Citizenship) (2011) EUECJ C-34/09. In order to avoid any confusion we shall refer to the parties as

“the Secretary of State” and “the Claimant” respectively. At the end of the hearing we reserved our decision, which we now provide with our reasons.

2. There is no dispute that in order to qualify for a residence card by that route the Claimant had to establish that she fulfils the criteria set out paragraph 4A of Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”) which reflects the **Zambrano** principles. She had to establish, to the civil standard, that she was the “primary carer” of a British citizen under the age of 18, that the relevant British citizen resides in the UK, and that the relevant British citizen would be unable to reside in the UK or in another EEA State if she were required to leave. “Primary carer” is defined by paragraph 7 of Regulation 15A as a direct relative or legal guardian who is the person who has primary responsibility for that person’s care.
3. It was accepted by both the parties’ legal representatives at the hearing before the First-tier Tribunal (and recorded in paragraph 18 of its determination) that the paucity of the documentation submitted with the application meant that the original decision by the Secretary of State to refuse the residence card was justified. However the Claimant submitted additional evidence in support of her appeal.
4. The Claimant is a citizen of China. She first came to the UK as a student in September 2000 and has remained here ever since. She has been married since March 2012 to a man who has dual Hong Kong and British nationality and who has been lawfully in the UK for around 25 years. Her husband is the proprietor and manager of a restaurant in Oxford which is open every day from 12 noon to 11pm. He employs seven staff, and apart from being present throughout opening hours, he does all the shopping for the restaurant. His mother is an elderly widow who lives in Cheltenham. The Claimant’s only relatives in the jurisdiction are her brothers, aged 12 and 16, who are both at school.
5. The couple have a son who was born on 11 September 2008, a month after the Claimant’s visa ran out. He is now six years old and in the reception class at school. The Claimant had fallen pregnant unexpectedly when she was studying at Oxford Brookes University. The First-tier Tribunal found that it was only the fact that she accidentally became pregnant that led to the Claimant stopping her studies, and that she was in a normal marriage relationship with her husband. The Tribunal also accepted the evidence of the couple, supported by a letter from the child’s school, that the Claimant is a full time carer for their son, and that she is the person who takes him to school and collects him at the end of the day.
6. The Tribunal found in paragraph 21 of the determination that the Claimant has primary responsibility for the child. That finding is not, nor could it be challenged. However the Secretary of State contends that the Tribunal misdirected itself in law in relation to the application of Regulation 15A(4)(c) and that there was insufficient evidence to establish that the child would be unable to remain in the UK or EEA if the Claimant were required to leave.

7. On behalf of the Secretary of State, Mr Tufan submitted that the existence of a British citizen parent who would be able to assume the responsibility for caring for the child, but chooses for economic or other reasons not to, excludes the Claimant from qualifying for a derivative right under Regulation 15A. It is insufficient to show that the father is working long hours and sleeps in the morning, or that he feels he cannot leave his staff to manage the business in his absence because they “rely on him” (see paragraphs 12, 15 and 17 of the First-tier Tribunal’s determination).
8. Mr Tufan relied on the decision in **MA and SM** (Zambrano: EU Children outside EU) Iran [2013] UKUT 00380 and in particular upon what was said in paragraph 41, adopting and agreeing with the summary of the relevant principles to be derived from **Zambrano** and subsequent decisions of the CJEU and the domestic courts set out by Hickinbottom J in **Sanneh v Secretary of State for Work and Pensions** [2013] EWHC 793 (Admin):

“... the rights of an EU child will not be infringed if he is not compelled to leave. Therefore even where a non-EU ascendant relative is compelled to leave EU territory, the article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU and who can and will in practice care for the child.

It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.

Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent [being] (for example) removed .. although... such actions as removal... may result in an interference with some other right, such as the right to respect for family life under article 8 of the European Convention of Human Rights.”

9. Moreover, in paragraph 56 of **MA and SM**, when considering the second appeal, that of SM, the Upper Tribunal observed that:
- “the mere fact that the sponsor cannot be as economically active as he would wish, because of his care responsibilities to [the children] is not sufficient to support a conclusion that [the children] would be denied the genuine enjoyment of their EU citizenship rights, nor would this be the case if the sponsor were required to stop working altogether. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living.”
10. Mr Mahmood, on behalf of the Claimant, pointed out that the facts of SM were very different from the present case, in particular because one of the children was already living in the UK with their father whilst their mother was seeking leave to enter. In such circumstances, he submitted it would

have been well-nigh impossible for the mother to show that the child would be compelled to leave/unable to remain in the EU if she was refused entry into the UK to join the rest of the family.

- 11.** That is of course true, but it does not follow that the observations made in paragraph 56, still less the principles adumbrated in paragraph 41 of **MA and SM**, do not apply with equal force to the present case. The appeal in MA was allowed because the father had mental health issues which meant that he did not have the capability of looking after the child without posing a significant risk to the child's well-being. The father in SM, by contrast, was capable of looking after not just one but both the children, including the child who was currently living with his wife in Thailand, and even if caring for them meant that he would have to stop working altogether, that would not mean that the **Zambrano** test (or the test under Regulation 15A (4A)(c) of the EEA Regulations) was met.
- 12.** There is no finding in the determination by the First-tier Tribunal in the present case that the child would be compelled to leave if his mother was removed from the UK. The Tribunal does not even expressly address the test in Regulation 15A(4A)(c), namely, would the British citizen be "unable to remain" in the UK if his mother were required to leave? Insofar as any relevant fact-findings are made, the Tribunal appears to accept that the child could remain with and be cared for by his father, see paragraph 21, but "alternatively" he would have to travel with his mother to China.
- 13.** In his skeleton argument for the appeal and in his oral submissions before us Mr Mahmood focused upon the phrase "can and will in practice look after the child". He sought to persuade us that the Tribunal had made a finding of fact that the father would not *in practice* be able to care for the child because if Mr Tam were left to care for the child then he would, in reality, have to give up his restaurant "with dramatic consequences".
- 14.** We are unable to read those findings into the determination. However even if the First-tier Tribunal had concluded that Mr Tam would have to give up work to look after the child, which it did not, that would have been insufficient, for the reasons stated in paragraph 56 of **MA and SM**. There was no evidence to support a finding that Mr Tam would not make the effort to look after his son and adjust his working practices if he had no choice but to become his sole carer, and no such finding was made by the Tribunal. On the contrary, as we have already pointed out, the findings in paragraph 21 of the determination appear to be premised on an acceptance by the Tribunal that if the Claimant were forced to leave, the child could remain in the UK with his father and be cared for by him, or else leave with his mother. In terms of the practicalities both options seem to have been regarded as equally possible.
- 15.** The fact that the decision as to which parent cared for the child was a matter of choice appeared at one stage to be common ground. Paragraph 7 of the document entitled "Further Statement of the Appellant" dated 2 October 2014 which purports to be a response to the Secretary of State's Notice of Appeal under Rule 24 of the Tribunal Procedure (Upper Tribunal

Rules), and which was settled by counsel previously instructed on behalf of the Claimant, states as follows:

“In the circumstances there was no evidence of unwillingness by the husband to care for the child. On the contrary, at paragraph 17 [of his witness statement] the husband said he spent all his free time as a united family but if he was to run his business properly he needed to be away from the family home on a regular basis for long hours at a time.”

- 16.** In our judgment the First-tier Tribunal plainly made a material error of law in the determination because it failed to address the relevant test under Regulation 15A (4A)(c). Had it turned its mind to the proper criteria, it would have concluded that the child would be able to remain in the UK, and therefore the Claimant does not qualify for a derivative residence card under Regulation 15A of the EEA Regulations. To that extent the Secretary of State’s appeal in respect of the refusal to grant the Claimant a residence card under the Regulations must succeed.
- 17.** However, Mr Mahmood contended that even if that were right, the Claimant’s appeal against the Secretary of State’s decision had to succeed under Article 8 in any event. That gave rise to the interesting question whether there was a live issue under Article 8, and if so whether we were bound to address it in our determination of this appeal. Our instinctive reaction was to answer those questions in the negative, but it transpired that the position was not quite as straightforward as might have first appeared.
- 18.** In the letter dated 23 July 2013 setting out the Secretary of State’s reasons for refusal of the Claimant’s application, there is express reference to the changes to the Immigration Rules that were brought into effect in July 2012, which are intended to unify consideration under the Rules and Article 8. Article 8 considerations are now set out in Appendix FM and paragraph 276ADE of the Rules, although they are not exhaustive and cases which do not meet the criteria set out in the new Rules may still engage Article 8 outside the Rules – see **Gulshan** (Article 8 – new Rules – correct approach) [2013] UKUT 640. The letter states:

“You may wish to rely on family or private life established in the UK under Article 8 of the ECHR.... If you wish the UK Border Agency to consider an application on this basis you must make a separate charged application using the appropriate specified application form..... Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR.” (emphasis added)

The letter goes on to explain that if removal directions are served there will be an opportunity for the Claimant to make separate representations against her proposed removal.

- 19.** Article 8 was mentioned by the Claimant for the first time in the original grounds of appeal against the Secretary of State’s decision, where it is referred to (without elaboration) as an additional ground of appeal. It is

difficult to see how it could be argued that a failure by the Secretary of State to address Article 8 when no claim had been made on human rights grounds amounted to an error of law in these particular circumstances. Thus the complaint must be that the decision to refuse the residence card infringed the Claimant's rights under Article 8.

- 20.** Article 8 is not referred to at all in the First-tier Tribunal determination. This may have been for the very good reason that the decision of the Secretary of State which was the subject of the appeal was made purely under the EEA Regulations, and was confined to the question whether or not to grant the Claimant a derivative residence card. Despite this, the Tribunal did address s.55 of the Borders, Citizenship and Immigration Act 2009 and made a finding that the removal of the Claimant without her being accompanied by her son would be in breach of the Secretary of State's duty under that section. We infer that the Tribunal was not addressed on Article 8, because it is unlikely to have considered s.55 but not considered Article 8 if arguments were made to it on both.
- 21.** In the document containing the Claimant's Rule 24 response, to which we have already referred in Paragraph 15 of this determination, the Claimant's then counsel submitted that:

"Article 8 of the ECHR may not have been fully considered [by the First-tier Tribunal] as there was no need to do so when a clear acceptance of the Appellant as the primary carer was accepted [sic] by the IJ." [our emphasis].

The document then goes on to say that "If, however Art 8 should have been considered then it is clear from the evidence that the Appellant is part of a happy and coherent family" [again, our emphasis] and it proceeds to set out various reasons in support of that submission.

We find the way in which the matter is put in that document somewhat curious. It does not suggest in that Article 8 was ever raised by the Claimant as a live issue before the First-tier Tribunal, and it falls a long way short of criticizing the First-tier Tribunal for not considering or making findings about Article 8 in the determination. There is no contention that the First-tier Tribunal made an error of law in failing to consider Article 8.

- 22.** Mr Tufan drew our attention to the fact that under paragraph 400 of the current Immigration Rules, the Secretary of State is entitled to require a person who makes an application under Article 8 (or Appendix FM) to do so by filling in the appropriate form and paying the appropriate fee. This requirement may be waived (as we were told it generally is in asylum cases) but in the present case the Secretary of State had made it clear in the refusal letter that she was requiring that any such application by the Claimant be made by the formal route and that she would not consider the application otherwise.
- 23.** That being so, Mr Tufan submitted that it was not open to the Claimant to circumvent the requirements of paragraph 400 merely by adding a paragraph referring to Article 8 in the notice of appeal against a decision

to refuse her a residence card. The decision of the Secretary of State did not address Article 8 and that was a position that she was legally entitled to adopt because it was not a live issue - there was no application before her based on human rights grounds. Thus the failure to address Article 8 is not an error of law in the underlying decision, the FTT was not obliged to consider Article 8, and it is no proper basis for allowing the Claimant's appeal if she fails on the residence card point. Even if the Claimant had a really strong claim to be granted leave to remain because her removal would be a disproportionate interference with her Article 8 rights or those of the dependent child, that is no reason for reaching the conclusion that the First-tier Tribunal's erroneous decision that she should be granted a residence card under the EEA Regulation should stand.

24. Mr Mahmood submitted that Article 8 was engaged and was relevant. He relied on the decision of the Court of Appeal in **JM (Liberia)** [2006] EWCA Civ 1402, although at the time of the hearing, we were not supplied with a copy of that case.
25. **JM (Liberia)** concerned a person who, having entered the UK lawfully as a visitor, claimed asylum and simultaneously made a claim under Article 8 ECHR. A preliminary issue was raised about the jurisdiction of the Asylum and Immigration Tribunal ("AIT") to entertain the latter claim. The argument advanced was that as the appeal was only against a refusal to vary the appellant's leave, which did not then entail his imminent removal, the tribunal had no jurisdiction to hear or determine the Article 8 claim. The AIT agreed with that submission, but gave permission to appeal to the Court of Appeal.
26. The sole issue that the Court of Appeal had to determine was whether the human rights claim could lawfully be determined by the Asylum and Immigration Tribunal (AIT) in the absence of an imminent threat of removal from the UK. That in turn depended on the construction of the relevant statutory provision which conferred jurisdiction on the AIT, s.84(1)(g) of the Nationality Immigration and Asylum Act 2002. The question was whether the refusal to vary leave was an immigration decision "in consequence of which" the appellant's removal would be unlawful. The Court of Appeal decided that it was, and construed the statute as conferring jurisdiction on the AIT. In consequence the AIT was able to determine the appeals in respect of the refusal of both claims at the same time.
27. One of the factors that influenced the Court of Appeal's decision was that the contrary view would have obliged the unsuccessful asylum-seeker to commit a criminal offence by remaining in the jurisdiction until removal directions were set, in order to be able to have his Article 8 claim considered (see paragraph 18). The contrary construction of s.84(1)(g) also meant that there was at least one class of case in which it was possible that the human rights claim could never be adjudicated upon in the UK (paragraph 20).

- 28. JM Liberia** is a case which is solely about the jurisdiction of a Tribunal to hear and determine a claim which has been raised before it. It is not authority for the wider proposition that a decision to refuse someone a visa (let alone a residence card) will automatically raise human rights issues even if no human rights claim has been made. It also concerned the refusal of a claimed right to remain in the UK, which is quite distinct from the refusal of a residence card.
- 29.** Mr Tufan submitted that there have been many substantial changes to the legal landscape and to the Immigration Rules since 2006, including most pertinently the introduction of the requirements of paragraph 400. It would be unsafe to assume that the same reasoning would apply against that very different background.
- 30.** In response to those submissions, Mr Mahmood drew our attention to a decision of the Upper Tribunal (Lang J and Upper Tribunal Judge Storey) in **Ahmed** (Amos; Zambrano; reg 15A (3)(c) 2006 EEA Regs) [2013] UKUT 00089. That was a case concerning a third country national woman who was seeking rights of residence following her divorce from an EEA national by whom she had two children, both of whom were also EEA nationals. One of the central issues in that case was whether she had a derived right of residence under a different paragraph of Regulation 15A of the EEA Regulations or under article 12 of Regulation 1612/68. It was held that she had a right of residence under the latter Regulation, even though she did not qualify under Regulation 15A. That part of the determination was recently upheld by the Court of Appeal [2014] EWCA Civ 995, but the Article 8 issue raised in the case was not the subject of appeal.
- 31.** The Article 8 issue in the **Ahmed** case was formulated as being whether the fact that the appellant's children were EEA nationals meant that the decision refusing to grant her a residence card violated her right to respect for family life under Article 8 ECHR. As to that, the submission made to the Upper Tribunal (recorded in paragraph 14 of its determination) was that the appellant was entitled to succeed in her appeal on Article 8 ECHR grounds on the basis that she had been in the UK since March 2004 and the eldest of her two children had been in the UK for 7 years (and thus would satisfy EX 1(a) of the current Immigration Rules) as well as Art 8 on the basis of the leading cases.
- 32.** In **Ahmed** the First-tier Tribunal had actually considered a claim made under Article 8. It is less clear from the report whether the Secretary of State had done so at the time of making the original decision to refuse the residence card; but it appears to have been common ground between the parties that there was a live claim under Article 8 by the time the matter reached the First-tier Tribunal. There was also sufficient material before the First-tier Tribunal to enable both that Tribunal and the Upper Tribunal to make a full Article 8 evaluation - including a consideration of whether the appellant met the requirements of the new Immigration Rules.
- 33.** Moreover, the Secretary of State expressly accepted that the First-tier Tribunal judge had erred in his treatment of Article 8 (see paragraph 24 of

the Upper Tribunal determination). As paragraph 43 of the determination made clear, the appellant in that case had strengthened her claim under Article 8 in the two years that had passed since the original decision to refuse her a residence card. There was even an express acknowledgment by the Home Office Presenting Officer that the Article 8 claim was “very strong”.

34. Further, in being persuaded to consider the Article 8 arguments in **Ahmed** the Upper Tribunal appears to have been strongly influenced by a concession made by the Presenting Officer that it should treat the refusal of a residence card as “indicative of an intention to remove” or that the appellant’s removal was a “putative consequence of that decision” (see e.g. Paragraphs 43, 69 and 79 of the determination, all of which make express reference to **JM (Liberia)**).

35. In **FK (Kenya) v Secretary of State for the Home Department** [2010] EWCA Civ 1302 the Court of Appeal was considering the refusal of an application for a permanent residence card under the EEA Regulations. The refusal letter indicated that if the claimant’s appeal was unsuccessful and the claimant did not leave the jurisdiction voluntarily, he would be removed to Kenya. The claimant therefore argued on appeal that although the decision was not a removal decision, it had the same effect as a removal decision and therefore it was a “disproportionate interference with his family right.” Sullivan LJ (with whom Maurice Kay and Lloyd LJ agreed) disagreed with that analysis at paragraph 13:

“.. when considering the merits of the appellant’s appeal on Article 8 grounds against the determination, it must be remembered that the Secretary of State’s decision which was under appeal was not a removal decision. All that the Secretary of State had done was to refuse to issue the appellant with a permanent residence card. Strictly speaking, the question is whether that decision was a disproportionate interference with the appellant’s Article 8 rights. However, the Immigration Judge can be forgiven for approaching the Article 8 issue as she did because it was being submitted on behalf of the appellant that the decision to refuse him a permanent residence card was tantamount to a removal decision”.

36. He went on to say in paragraph 17 that it was “very doubtful whether it was appropriate for the Article 8 issues raised by the appellant to have been resolved at this stage when there had been no removal decision” and that it was “at best premature for the Tribunal to be asked to consider the Article 8 issue in this appeal.” The Court of Appeal nevertheless went on to uphold the Tribunal’s decision on the Article 8 issues in that case, which was unfavourable to the appellant.

37. There was no point taken in **Ahmed** about a failure by the appellant to adhere to the formal requirements for making a claim under Article 8, in the face of a specific direction that she must do so, or about the impact of the introduction into the immigration rules of such requirements on the approach taken by the Court of Appeal in **JM (Liberia)**.

- 38.** We do not regard the decision by the Upper Tribunal in **Ahmed** to consider the article 8 arguments when urged to do so by both parties in the peculiar circumstances of that case, obliges us to follow suit, or sets any precedent in that regard. **Ahmed** is not authority for the proposition that the Upper Tribunal is obliged to determine a putative human rights claim in the context of an appeal relating to the EEA Regulations, especially when it has neither been addressed in the original decision of the Secretary of State nor by the First-tier Tribunal. The Upper Tribunal in **Ahmed** considered the argument in respect of Article 8 because it was invited to, and nobody suggested that it would be inappropriate for it to do so: on the contrary, the representative of the Secretary of State positively encouraged its consideration.
- 39.** The situation in the present case is far removed from that in **JM (Liberia)** and the issue before us is not one relating to our jurisdiction. The fact is that the claimant did not make an Article 8 application or an application under Appendix FM when she sought her residence card. She was told in the decision letter how to go about making such an application. She could have made such an application but did not. She is not obliged to wait for removal directions to be set before she makes that application. Moreover, a successful application for leave to remain under Article 8 or Appendix FM would not entitle her to a residence card. The two routes are distinct, and although some of the criteria may overlap in a case such as this, they involve different and separate considerations.
- 40.** In **JM (Liberia)** the Court of Appeal observed (in paragraph 28) that once a human rights point is properly before the AIT, they are obliged to deal with it. In our judgment there can be no such obligation in a case where the Article 8 claim is not properly before the Tribunal – because it was never made to the Secretary of State and thus quite understandably the decision under appeal to the First-tier Tribunal did not touch upon it. Matters might well be different if the Secretary of State is content for the First-tier Tribunal to consider Article 8, or if the underlying claim is for asylum or humanitarian protection. In any event, we consider that it would be wrong in principle for this Tribunal, which is an appellate Tribunal, to make the one and only determination of a substantive human rights claim that has not been considered by the Secretary of State or even by the First-tier Tribunal, in circumstances where it cannot be argued (and has not even been argued by the Claimant) that the First-tier Tribunal erred in law by failing to consider it.
- 41.** That is especially true when the Claimant has been expressly told by the Secretary of State that if she wants a claim to remain to be considered under Article 8 or Appendix FM she must follow the proper procedures and pay the appropriate fee as mandated by the Rules. **JM (Liberia)** was decided long before those requirements were introduced.
- 42.** If the First-tier Tribunal (and the Upper Tribunal) were to consider the appeal under Article 8 even though no claim has been made under Article 8 (and thus the Secretary of State has never considered such a claim) on the artificial presumption that the decision to refuse a residence card on

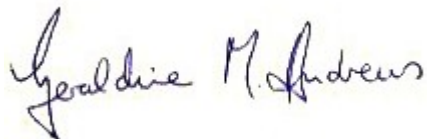
the legitimate basis that the claimant does not qualify under the EEA Regulations is to be equated with a decision to remove her that has not yet been made (and may never be made), then that would be tantamount to giving those in the position of this Claimant carte blanche to avoid making a proper application for consideration under Article 8/Appendix FM on the correct form and accompanied by payment of the fee and all the relevant documentation relied on.

- 43.** In any event, even if Article 8 was and is a live issue on this appeal, we prefer Sullivan LJ's analysis in **FK(Kenya)** to the approach that the Upper Tribunal was persuaded to adopt in **Ahmed**. If and to the extent that any Article 8 considerations even arise at this juncture, they do so purely by virtue of the mention of Article 8 in the grounds of appeal against the Secretary of State's decision. The question that we would have to address is therefore the one formulated by Sullivan LJ, namely, whether the refusal of a residence card amounts to a disproportionate interference with the Claimant's right to family life. It is not whether her enforced removal from the jurisdiction would amount to such a disproportionate interference.
- 44.** We consider that it would be wrong in principle to equate a decision to refuse the Claimant a residence card, because she fails to meet the relevant criteria, with a decision to refuse her the right to remain in the jurisdiction. The decision not to grant the Claimant a derivative residence card on the lawful grounds that she fails to qualify for one under the relevant EEA Regulations, cannot be regarded as an interference, let alone a disproportionate interference, with her right to family life under Article 8 ECHR. If and to the extent that the Upper Tribunal decided otherwise in **Ahmed** we respectfully disagree with it.
- 45.** No decision has been taken, as yet, to remove the Claimant from the UK with or without the child or to refuse her leave to remain. If and when such a decision is made, the Claimant will have the opportunity to raise arguments under Article 8. The Claimant can also make an application for leave to remain under Article 8 and/or Appendix FM without waiting for such a decision. That claim may very well succeed. Although she may have remained within the jurisdiction in breach of the immigration laws, on the face of it she appears to fall within exception EX1 of Appendix FM of the Immigration Rules. She may well qualify under other provisions of the Rules. Nothing that we have said in this determination is to be interpreted as precluding her from raising Article 8 in such circumstances. Our decision is expressly confined to rejection of the argument that refusing her a residence card in and of itself engages Article 8 or, if we are wrong about that, that the decision to refuse her the residence card amounts to a disproportionate interference with her right to a family life.

Decision

- 46. There was a material error of law in the determination of the First-tier Tribunal in respect of the Secretary of State's decision to refuse the Claimant a residence card.**

47. We set aside the determination of the First-tier Tribunal under Regulation 15A of the EEA Regulations and re-make the determination by dismissing the Claimant's appeal on all grounds.

A handwritten signature in blue ink that reads "Geraldine M. Andrews". The signature is written in a cursive style with a large initial 'G'.

Signed

Date 14th November 2014

Mrs Justice Andrews