



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

Appeal Number: IA/15549/2014

THE IMMIGRATION ACTS

Heard at Field House

On 30th January 2015

Determination

Promulgated

On 12th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**AK
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr T Samuel of Counsel

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal McAll (the judge) promulgated on 18th June 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.
3. The Claimant is a citizen of the Ivory Coast born on 22nd October 1986.
4. The Claimant applied for a derivative residence card by submitting an application form dated 2nd September 2013, accompanied by a letter of the same date from Afric who were his legal representatives at that time. The letter contained submissions that in addition to, or in the alternative to being granted a derivative residence card, the Claimant should be allowed to remain in the United Kingdom based upon his family and private life under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
5. The application was refused by letter dated 15th March 2014 and the Respondent issued a Notice of Immigration Decision of the same date, indicating that the application had been refused with reference to regulations 15A(4A), (7)(b), and 18A(1)(b) of the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations). In giving reasons for refusal the Secretary of State noted that the application was based upon the fact that the Claimant was the joint primary carer of his son IK who is a British citizen, together with his partner DT. Because DT had leave to remain in the United Kingdom she is an exempt person under the regulations. Therefore the Claimant did not share equally the responsibility for his son's care with another person who is not an exempt person. The application was also refused as it was not accepted that IK would be unable to reside in the United Kingdom if the Appellant had to leave, as he could continue to live with DT with whom he lived at present.
6. The Secretary of State did not consider the Article 8 application, taking the view that if the Claimant wished to rely upon family or private life established in the United Kingdom, provisions were now included in the Immigration Rules for individuals seeking to remain on that basis, and a separate charged application would need to be made.
7. The Claimant appealed contending in brief summary that he was entitled to a derivative residence card, and that the decision breached his Article 8 rights.
8. The Claimant did not request an oral hearing, and therefore the appeal was determined on the papers. The judge found that the Claimant was not entitled to a derivative residence card for the reasons given by the Secretary of State. The judge went on to consider Article 8 under the provisions of the Immigration Rules, those being paragraph 276ADE in relation to private life, and Appendix FM in relation to family life, and found that the Claimant could not satisfy the requirements of those rules.
9. The judge then went on to consider Article 8 outside the Immigration Rules taking the view that he was entitled to do so even though there was no removal decision, by following the principles in JM v SSHD [2006] EWCA

Civ 1402, and by referring to the Upper Tribunal decision Ahmed [2013] UKUT 00089 (IAC). The judge went on to allow the appeal under Article 8 outside the Immigration Rules.

10. This caused the Secretary of State to apply for permission to appeal to the Upper Tribunal on a jurisdictional point, contending that the judge was not entitled to consider Article 8, and had materially erred in so doing.
11. I set out below paragraphs 3 and 4 of the application for permission;

“3. Insofar as is relevant paragraph 1 of Schedule 1 of the 2006 regulations provides:

The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1), except paragraphs (a) and (f);

sections 85 to 87.

4. Consequently all s84 grounds of appeal are admissible in EEA appeals except that an Appellant cannot plead the Immigration Rules 84(1)(a) or the exercise of discretion 84(1)(f). This is however subject to s85 of the 2002 Act which provides
 - (2) if an Appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.
 - (3) sub-section (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.”

12. The Secretary of State placed reliance upon Lamichhane v SSHD [2012] EWCA Civ 260 and in particular referred to paragraph 43 which is set out below;

“43. In my view, section 85(2) is a statutory extension of the jurisdiction of the Tribunal in cases in which there has been a statement made by the appellant under section 120. It follows that the Tribunal has no jurisdiction to consider or to rule on ‘any matter ... which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against’ if there has been no section 120 notice, and therefore no statement under that section. This conclusion is consonant with my conclusion as to the effect of section 96(1) as it now is. If it were otherwise, an appellant might not know whether he could raise any new ground in his appeal until the hearing of his appeal, and the test in section 96(1)(c) becomes unworkable.”

13. In the current appeal the Secretary of State argued that because no section 120 notice had been served upon the Appellant, he could not make a section 120 statement, and therefore the only ground of appeal open to him was section 84(1)(d) which is;

“(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 the Community Treaties in respect of entry to or residence in the United Kingdom;”

14. It was contended that this appeal could be distinguished from JM, because in that decision a section 120 notice had been served. It was argued that Lamichhane was authority to confirm that the fact that the Secretary of State did not advance a jurisdictional point to the First-tier Tribunal was immaterial.
15. Permission to appeal was granted by Judge of the First-tier Tribunal Ford in the following terms;

“It is arguable that Judge McAll may have erred in not fully considering whether a relevant s120 notice was served by the Secretary of State and if so whether a relevant statement was served in response and if so whether human rights grounds were raised in that statement.

There is an arguable material error of law.”

16. Following the grant of permission the Claimant did not lodge a response pursuant to Rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.
17. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Upper Tribunal Hearing

Preliminary Issues

18. At the commencement of the hearing Mr Samuel indicated that he had only received instructions the evening before the hearing, although he was ready to proceed, and provided written submissions dated 29th January 2015, together with the opinion of Advocate General Sharpston dated 30th September 2010, and an unreported determination prepared by Deputy Upper Tribunal Judge Baird promulgated on 15th September 2014.
19. Mr Bramble made an application for the hearing to be adjourned as he understood that there were other cases involving residence card applications and Article 8, which were pending, and which were to be decided in the future by a Presidential panel. Mr Bramble submitted directions made by Upper Tribunal Judge Coker dated 22nd January 2015 in a separate case, but which indicated that the issue of Article 8 and

residence card applications were to be considered in the future. I asked Mr Bramble whether the particular jurisdictional point raised by the Secretary of State in this appeal was to be considered by a Presidential panel, and Mr Bramble believed that it was but could not specifically confirm this.

20. Mr Samuel did not oppose the adjournment application but advised that his client would not wish to be joined in to a case to be decided by a Presidential panel for financial reasons, but would not object to this case being stayed until a Presidential panel had made a decision. This was on the proviso that the jurisdictional point raised here, was to be considered by the panel.
21. I retired to consider the application. When the hearing resumed, I indicated that I had been unable to confirm that the point raised by the Secretary of State as to jurisdiction, was going to be considered by a Presidential panel, and that as far as I could ascertain, no date had been fixed for a panel hearing. I therefore decided that it was appropriate to proceed and hear submissions, and therefore refused the adjournment application.

Submissions

22. Mr Bramble relied upon the grounds contained within the application for permission to appeal. I was asked to find that JM could be distinguished, as a section 120 notice had been served in that case, and that involved an appeal where removal could be regarded as imminent, which was not the case here, and I was asked to find that Lamichhane was conclusive authority to confirm that because a section 120 notice had not been served in this appeal, the judge had no jurisdiction to consider Article 8.
23. Mr Samuel relied upon his written submissions and pointed out that human rights had been raised in the application to the Secretary of State, and therefore a section 120 notice or statement would not have added anything, because human rights had already been raised in the application. Mr Samuel accepted that the determination of Judge Baird did not assist as it was not on point, and it was contended that the judge was correct to deal with Article 8 as he did.
24. Mr Samuel relied upon European law pointing out that Articles 20 and 21 of the Treaty on the Functioning of the European Union were relevant and had direct effect. In addition Article 7 of the Charter of Fundamental Rights of the European Union provides for the same rights as Article 8 of the 1950 Convention, and that to seek to exclude Article 8, and thereby Article 7 of the Charter in interpreting the rights of those seeking to establish an EEA right of residence would be an impermissible limitation on the interpretation of the Treaty rights.

25. Mr Samuel submitted that the judge had effectively implemented EU law by considering Article 8 in conjunction with the 2006 EEA regulations, and had not materially erred in law.
26. Mr Bramble disagreed that the Secretary of State's position contravened European law. I was asked to note that the judge had considered the Article 8 rights of the Appellant, a non-EEA national. The Appellant's son is a British citizen and has the right to remain in the United Kingdom, as does his mother, the Appellant's partner. As there were no removal directions, and removal was not imminent, and no section 120 notice had been served, I was asked to conclude that the judge had erred in considering Article 8.
27. Mr Samuel responded briefly by submitting that in relation to Zambrano, that Advocate General Sharpston had found that Article 8 could be considered on a free-standing basis. Mr Bramble did not wish to respond further.
28. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

29. It is common ground that the Secretary of State did not serve with the Notice of Immigration Decision a notice pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002 which is a requirement for a person to state his reasons for wishing to enter or remain in the United Kingdom, any grounds on which he should be permitted to enter or remain in the United Kingdom, and any grounds on which he should not be removed from or required to leave the United Kingdom.
30. At first sight it would appear that a different conclusion was reached by the Court of Appeal in JM, from that reached in Lamichhane which is the later decision. Neither of those cases related to an application made under the 2006 regulations. Although Lamichhane is the later decision, there is no reference within it to JM.
31. The Court of Appeal in Lamichhane were not considering human rights, but were considering an Appellant's claim raised in his Notice of Appeal to the First-tier Tribunal that although his application to the Secretary of State had been for leave to remain based upon long residence, the Tribunal should have considered his claim to remain as a Tier 4 Student, because that had been raised in his appeal.
32. JM involved consideration of a variation of leave application and Laws LJ stated at paragraph 28;

“28. The short, but important, position is that once a human rights point is properly before the AIT, they are obliged to deal with it. That is consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act and seems to me to be the proper result of the construction of the relevant provisions.”

33. However, in my view, the grounds prepared by the Secretary of State make a valid point, in that it is clear from paragraph 23 of JM that a section 120 notice was served in that case, whereas such a notice was not served in Lamichhane. Therefore I accept that it is possible to distinguish JM on that ground.
34. I have also considered section 86(2) of the Nationality, Immigration and Asylum Act 2002 which is set out below;

The Tribunal must determine –
 - (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
 - (b) any matter which section 85 requires it to consider.
35. Although the above section states that a Tribunal must consider any matter raised as a ground of appeal, this must be subject to the proviso, that a Tribunal must consider any ground that it has jurisdiction to consider, and that is the point raised by the Secretary of State in this appeal, and therefore section 86(2) does not provide an answer, as to whether the judge erred in law in considering Article 8.
36. I have also considered the Upper Tribunal decision Ahmed which was considered by the First-tier Tribunal. This decision was published after Lamichhane, and demonstrates the Secretary of State taking a very different position to that adopted in this appeal.
37. Ahmed involved a third country woman with two EEA national children seeking rights of residence in the United Kingdom following her divorce from an EEA national. The Secretary of State's representative made the submission which is set out in paragraph 43;

"43. Mr Deller submitted that although the decision at issue in this case – refusal of a permanent residence card – was not a removal decision, it would appear, on JM (Liberia) [2006] EWCA Civ 1402 principles, that the Tribunal should consider the case on the basis that a putative consequence of the refusal decision is that the Respondent would proceed to direct her removal to Pakistan."
38. The Upper Tribunal in Ahmed, found that the First-tier Tribunal had erred, inter alia, in respect of its treatment of Article 8, by failing to take into account key relevant factors when conducting the Article 8 balancing exercise. The First-tier Tribunal decision was set aside and remade by the Upper Tribunal, and allowed under Article 8. There was no mention of Lamichhane in the Upper Tribunal decision, although it is not clear from the determination whether a section 120 notice was served. Therefore I conclude that Ahmed does not provide a definitive answer to the jurisdictional issue raised by the Secretary of State in this appeal.

39. Lamichhane appears unequivocal in providing an answer to the following question;

“(c) May the Tribunal consider additional grounds advanced by an appellant if no section 120 notice has been served, and if so is it under a duty to do so?”

40. The answer is given by Stanley Burnton LJ in paragraph 41 which is set out below;

“41. I conclude, therefore, that the Secretary of State’s contentions as to the effect of section 85(2) are well-founded, and an appellant on whom no section 120 notice has been served may not raise before the Tribunal any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against. The answer to question (c) above is No.”

41. In considering the issues raised in Lamichhane Stanley Burnton LJ recorded at paragraph 45

“45. In Sapkota, Jackson LJ said, with feeling:

‘127. I regret that this area of immigration law has now become an impenetrable jungle of intertwined statutory provisions and judicial decisions, with the result that reasonable differences of opinion (such as that between Aikens LJ and Arden LJ) are now perfectly possible. There is an acute need for simplification so that both immigrants and Immigration Officers may have a clearer understanding of their responsibilities and rights’

In my judgment, if anything Jackson LJ understated the problems. I could easily have reached contrary conclusions in this case, and given respectable reasons for doing so. There is an urgent need for a simply stated and clear codification of statute law and immigration rights, restrictions, administrative procedures and appeals.”

42. There is force in the arguments put forward by the Secretary of State in the appeal that I am considering, but the question in Lamichhane was whether the Tribunal may consider additional grounds advanced by an Appellant if no section 120 notice was served. The Claimant in this appeal made an application for a derivative residence card on form DRF1, but also, at the same time, made an application for leave to remain under Article 8 of the 1950 Convention. The letter from his legal representatives, which submitted the applications, was a lengthy letter running to just over eight pages. That letter makes it clear from page 3 until the conclusion, that the Claimant was seeking leave to remain in reliance upon Article 8, and it was submitted that this application should be considered in addition to, or as an alternative to, the application for a derivative residence card.

43. The Secretary of State’s decision dated 15th March 2014 refused the residence card application, and acknowledged the application made under Article 8, but declined to deal with it, unless a separate charged

application was made, because Article 8 was now contained within the Immigration Rules. GEN1.9(a)(iii) of Appendix FM provides that the requirement to make a valid application will not apply when an Article 8 claim is raised in an appeal. The appeal entered by the Claimant to the First-tier Tribunal was made without legal representation, and the grounds are contained in a letter dated 27th March 2014. Article 8 is specifically raised as a Ground of Appeal.

44. The judge dismissed the appeal under the 2006 regulations, and then considered the Immigration Rules dealing with private and family life, paragraph 276ADE and Appendix FM. That would seem to be an error, because paragraph 5 of the Immigration Rules provides that save where expressly indicated, the Immigration Rules do not apply to persons entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 regulations. However the error in considering the Immigration Rules is not material, as the appeal was dismissed under the rules.
45. The judge then went on to allow the appeal, having considered Article 8 outside the rules. I am not persuaded that he erred in law in so doing, even though no section 120 notice was served. This is because I find that Lamichhane is authority which confirms that in the absence of a section 120 notice, the Tribunal may not consider additional grounds advanced by an Appellant in an appeal. In this case, the Claimant did not advance additional grounds in his appeal. His initial application to the Secretary of State was to be granted a derivative residence card and/or be allowed to remain in the United Kingdom, under Article 8 of the 1950 Convention. He is not therefore raising a ground that was different to that contained in his application.
46. For that reason I conclude that the judge did not err in law in considering Article 8, and on the facts of this particular appeal, Lamichhane is not authority to confirm that the judge should not have considered Article 8. The challenge made to the determination of the First-tier Tribunal by the Secretary of State related to jurisdiction only, and there was no challenge to the adequacy of the judge's consideration of Article 8, and therefore as I find that the Secretary of State's jurisdictional point fails, I conclude that the determination must stand.

Notice of Decision

I find there is no material error of law in the decision of the First-tier Tribunal. That decision therefore stands and the appeal of the Secretary of State is dismissed.

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

The First-tier Tribunal made an anonymity direction because the appeal involved consideration of the best interests of children. I continue that order

pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008. This order is to remain in place unless or until this Tribunal, or any other appropriate Court, directs otherwise. No report of these proceedings shall directly or indirectly identify the Claimant or any member of his family. Failure to comply with this direction could amount to a contempt of court.

Signed

Date 5th February 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

As the decision of the First-tier Tribunal stands, so does the decision not to make a fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall