Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25518/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 14 July 2014	**on 22 July 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SHAZIA MAJID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Bali, of DRB Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant is a citizen of Pakistan, born on 7 July 1974. By letter dated 8 May 2013 the respondent refused her application for a derivative residence card under the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). The letter advised the appellant that her entitlement to remain in the UK had been assessed solely on the basis of the Regulations, and that if she wished to make any other

application, such as on the basis of family and private life interests under Article 8 of the ECHR, this was now incorporated within the Immigration Rules and a separate application should be made. In the absence or such an application, the respondent had not considered whether removal from the UK would breach Article 8.

2) First-tier Tribunal Judge Balloch dismissed the appellant's appeal by determination promulgated on 28 February 2014. Paragraph 30 records the submission for the appellant that "if the present appeal is refused then there will be refusal directions and Article 8 should therefore be heard in the present appeal." At paragraph 31 the judge said that in the circumstances she made no findings in respect of Article 8, because a full application could be made for consideration by the respondent.

3) The appeal to the Upper Tribunal is on the grounds that the judge erred by failing to address whether removal would breach the appellant's or her family's Article 8 rights. Reference is made to *JM v SSHD* [2006] EWCA Civ 1402 (which is reported at [2007] Imm AR 293).

4) Mr Bali submitted that a judge was bound to determine all grounds of appeal placed before her. He said that this was a case which ought to have succeeded not outside but within the Immigration Rules.

5) I pointed out that an appeal cannot be allowed under the Immigration Rules in an appeal brought under the Regulations. Mr Bali submitted that nevertheless it was desirable for all matters to be resolved in the one process without further application.

6) Representatives were unable to refer me to any reported case in point, other than *JM*, either of the Upper Tribunal or of any Court. Mr Bali was vaguely aware of a case called *Ahmed.* He did not have the citation, but he thought the case held that Article 8 could be raised on an appeal under the Regulations.

7) I reserved my determination.

8) The case which Mr Bali had in mind is *Ahmed* [2013] UKUT 00089, a successful appeal under the Regulations in which Article 8 was also considered. However, the correct approach to Article 8 in a case like this was not the main topic.

9) *JM* does hold that a removal decision is not required before Article 8 issues may be considered. The situation in that case was very different from this. It did not arise from an appeal under the Regulations, but was a refusal to vary leave. At the point of the appeal being dismissed, the appellant would be put in the position of committing a criminal offence. There was no offer from the respondent to look at an application raising family and private life or other human rights issues. *JM* is not an authority for looking at the present case on the assumption that removal will follow on the failure of the appeal.

10) Particularly since the July 2012 amendments to the Rules, any Article 8 consideration must begin by addressing the family and private life provisions in the Rules. However, the ground that a decision is not in accordance with the Rules is not available on an appeal under the Regulations, for the following reasons.

11) Regulation 26 provides the right of appeal to the First-tier Tribunal. Schedule 1, paragraph 1, states which provisions of the 2002 Act are to have effect in an appeal under the Regulations. Section 84(1)(a) and (f) are excepted. The ground of appeal at (a) is "that the decision is not in accordance with immigration rules", and at (f) "that the person taking the decision should have exercised differently a discretion conferred by immigration rules".

12) Schedule 1, paragraph 1 of the Regulations does not give effect to section 120 of the 2002 Act in an appeal of this nature, and the respondent does not appear in this case to have served any purported notice requiring the appellant to state any additional grounds. An extension of grounds of appeal to include the Immigration Rules could not arise in that way.

13) On the other hand the ground of appeal that a decision is unlawful for incompatibility with ECHR rights (section 84(1)(c) of the 2002 Act) is available on an appeal under the Regulations. Section 86(2) applies, which obliges a judge to determine "any matter raised as a ground of appeal (whether or not by virtue of section 85(1)". However, a Judge can only deal with a ground of appeal which it is legally competent to raise, and that does not include grounds going to the Immigration Rules.

14) Substantive consideration of family and private life issues would inevitably involve looking at the Rules, but the appeal could not be allowed under the Rules, even if their requirements were met. And surely an appeal could not be allowed on human rights grounds outside the Rules when a route under the Rules existed?

15) The answer I think is that the Article 8 ground of appeal had form but no substance, because there is no meaningful interference with Article 8 rights when an appellant is invited to submit any application open to her for consideration under the Rules. There is no right to be excused from making an application. There is no good reason for considering this appeal as if removal was a present threat, opening up grounds of wider scope.

16) That answers the question which was live at the hearing. Since then I have noticed some other features of the case worth mentioning, although there were no submissions on them, and they do not change the outcome. The notice served on the appellant is headed "notice of immigration decision" as well as "refusal to issue a residence card". Such a refusal is not an immigration decision as defined in section 82(2) of the 2002 Act, so the heading is at first sight odd. Schedule 1, paragraph 1 of the Regulations applies certain provisions of the 2002 Act to an appeal under the regulations "as if it were an appeal against an immigration decision under section 82(1)" but that does not appear to me to make the decision into an immigration decision. However, section 105 of the

2002 Act and regulations made thereunder do have effect in an appeal under the Regulations, and section 105 empowers the respondent to "make regulations requiring a person to be given written notice where an immigration decision is taken in respect of him". The notice in this case is made "in compliance with the Immigration (Notices) Regulations 2003", made under section 105. That explains the heading. The relevant provisions do not bring back by a roundabout route the excluded grounds of appeal under section 84(1)(a) and (f).

17) The notice goes on to list grounds on which the appellant is entitled to appeal "under section 82 [of the 2002 Act] and Regulation 26", as follows:

> that the decision is not in accordance with immigration rules
>
> that the decision is unlawful because it racially discriminates against you
>
> that the decision breaches rights which you have as a member of an EEA National's family under Community Treaties relating to entry to or residence in the United kingdom
>
> that a discretion under the immigration rules should have been exercised differently
>
> that the decision is otherwise not in accordance with the law

18) The list does not seem to correspond with the grounds in section 84 of the 2002 Act or with those provided by the Regulations. As far as I can see, it wrongly includes grounds (a) and (f) relating to the immigration rules and wrongly omits grounds (c) incompatibility with ECHR rights and (g) removal would breach UK's obligations under the Refugee Convention or would be incompatible with ECHR rights. A ground of appeal can neither arise from nor be removed by an erroneous statement by the respondent.

19) The form of notice, including the statement of grounds of appeal, is in common use. I have been able to find it readily in several other cases. If my apprehension that its terms are defective is correct, it is hardly surprising that confusion arises about the issues which properly arise on appeals under the Regulations.

20) It is also somewhat difficult to reconcile what the letter accompanying the notice says about making arrangements to leave the UK with the suggestion that an application be made under the Rules. However, the overall sense of the notice and letter, read together, with invitations at the end to make further applications under the Rules or Regulations if their terms can be met, is that the threat of removal is wholly insubstantial. That is the decisive point in this appeal.

21) In the present case, the determination of the First-tier Tribunal should have dismissed the appeal under reference to Article 8, rather than "making no findings" at ¶31, because there was a ground and a duty to resolve it. The determination should not have referred at ¶32 to the respondent's decision being "in accordance with the law and Immigration Rules and with the Regulations", because there was no ground of appeal under the Rules. However, the final decision is simply, "the appeal is dismissed". That correctly disposes of all issues, so the determination shall stand.

15 July 2014
Judge of the Upper Tribunal