IAC-FH-AR-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/43334/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 20th October 2014** | **On 13th November 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

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

Appellant

**and**

**MR HENNI SELMOUN**

Respondent

**Representation:**
For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Miss S Haji, instructed by Fletcher Day LLP

**DETERMINATION AND REASONS**

**The Appellant**

1. The application for permission to appeal was made by the Secretary of State although I shall describe the parties as they were before the First-tier Tribunal, that is the Secretary of State is the respondent and Mr Selmoun is the appellant.

2. The appellant made an application as an Algerian national for a permanent registration card under the Immigration (European Economic

Area) Regulations 2006. That application was refused by the respondent on 2nd July 2013 because the appellant had not provided evidence to show that his former wife, the EEA national, had resided in the UK for a continuous period of five years or that he had retained a right of residence under Regulation 10(5) following his divorce on 30th November 2010.

3. First-tier Tribunal Judge Roopnarine-Davies allowed the appeal on 7th July 2014 on Article 8 grounds.

4. At the appeal she allowed the appellant to amend the grounds of appeal to include paragraph 276B of the Immigration Rules and in respect of private life under paragraph 276ADE and Article 8. This was recorded as accepted under paragraph 3 of the determination by Mr Wellings, the Home Office Presenting Officer.

5. In the application for permission to appeal the Home Office referred to **Lamichhane [2012] EWCA Civ 260** which stated

> "I conclude therefore that the Secretary of State's contentions as to the effect of Section 85(2) are well-founded and that an appellant on whom no Section 120 notice has been served may not raise before the Tribunal any grounds for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against."

6. Alternatively, it was submitted that the Immigration Judge erred in law by failing to follow the guidance in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC).**

7. At the hearing Mr Shilliday relied on **Lamichhane** and referred to **MM Lebanon and Others R on the Application of the Secretary of State for the Home Department [2014] EW Civ 985** on the basis that there was an alternative remedy, that it was open to the appellant to make a new application on Article 8 grounds. There was no jurisdiction to consider either Section 276ADE or Article 8. Any concession made by the Home Office Presenting Officer was an error in law and therefore could not be made. Schedule 1 to the EEA Regulations 2006 excluded reliance on Section 84(1)(a) and 84(1)(f). In **Ahmed Amos [2013] UKUT 00089** the Upper Tribunal failed to deal with the exclusion of the Immigration Rules but the law had moved on and Article 8 was now within the Immigration Rules. The facts in **Lamichhane** were not distinguishable. It was open to the appellant to make a new application under the Immigration Rules.

8. It was further contended by Mr Shilliday that **Gulshan** had been misapplied and it was necessary to show compelling circumstances. The marriage and children were not compelling circumstances and this was a material misdirection.

9. Miss Haji submitted that there was no material error of law. The judge did not allow it under the Immigration Rules and that Schedule 1 of the

EEA Regulations only excluded consideration of the Section 84(1)(a) and (f) that was in relation to the Immigration Rules and the discretion. The contention here was that the decision was in contravention of Section 6 of the Human Rights Act with reference to Section 84(1)(c) and 84(1)(g). Permission to amend the grounds had been allowed by the judge. The effect of the respondent's decision was the removal of the respondent and **JM (Liberia)** confirmed that further to Section 83(1)(c) the appellant's human rights should be considered.

10. The facts in **Lamichhane** were different in that the appellant was seeking to switch categories. That was not the case here.

11. In this case it was not a near-miss but he had a very lengthy residence in the UK and two EEA national children. Further to the case of **AG & Othrs (Policies;executive discretions; Tribunal's powers)** Kosovo **[2007] UKAIT 00082** where there is relevant policy and law the Secretary of State should take that into account. The Secretary of State had not done so. Later Miss Haji referred to the fact that she meant in fact that the Secretary of State had not considered the policy of every child matters. She submitted that **Ahmed Amos** clearly indicated that they had jurisdiction to entertain an Article 8 appeal. Further the Section 55 every child matters had not been taken into account.

12. All the factors led to the proportionality and to the assessment of Article 8 in terms of compelling and compassionate circumstances and this was clear from the determination. Even the Presenting Officer had conceded the compelling grounds. The judge proceeded to do a balancing act and considered that it was unreasonable to expect the appellant to relocate. The Immigration Rules were not a complete code.

13. Mr Shilliday submitted that if no Section 120 notice had been served then **Ahmed** was wrong. In **JM (Liberia)** there was a Section 120 notice. Further there was no policy in respect of this because in **AG** the policies referred to were DP5/96. That was not the case in this matter. The Secretary of State had stated that the appellant had failed to make out the case in respect of Section 55.

## Conclusions

14. The permission to appeal asserted that the First-tier Tribunal Judge had allowed the decision under the appeal under paragraph 276ADE. In fact this was not the case as identified at paragraph 7 of the determination. Nor did the judge allow the appeal further to Paragraph 276B. The judge allowed the appeal further to Article 8. It was on this basis that I considered whether the judge had jurisdiction.

15. In **Lamichhane** the decision of **AS Afghanistan v SSHD [2011] 1 WLR 385** was cited as stating that the Tribunal had no jurisdiction to consider the new matters in the absence of a section 120 notice. In that case, where no Section 120 notice was served the appellant attempted to switch

his claim from long residence to that of Tier 4 student. In this case the appellant argued human rights stemming from the refusal of the EEA residence card. Mr Shilliday's argument was that human rights claims now resided in paragraph 276 ADE and thus the appellant should have made a claim under the Immigration Rules and by claiming human rights the appellant was attempting to change his claim and this rendered the appeal similar to **Lamichane**. Although Mr Shilliday argued that **Lamichane** was similar to this matter I do not accept that. As stated in **MM Lebanon v SSHD [2014] EWCA Civ 985** confirmed

*'Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the **Huang** tests and UK and Strasbourg case law'.*

16. There was no suggestion that Paragraph 276ADE was in fact a complete code and no authority that human rights may only be raised where an application further to Paragraph 276ADE has been made. The human rights claim can attach to the EEA residence card refusal and further to Section 6 (1) of the Human Rights Act 1998 (1), it is unlawful for a public authority to act in a way which is incompatible with a Convention right. That applies to any decision made by the Tribunal.

17. Indeed at paragraph 9 of **Lamichane** records as follows:

*'However, after the hearing on reflection the Senior Immigration Judge decided that the Tribunal did not have jurisdiction to consider that claim, since there had been no section 120 notice and therefore the statement making that claim was not a "statement under section 120". He said:*

*"13. Section 120 of the 2002 Act leaves it up to the Secretary of State whether or not she wishes a person who has received a negative immigration decision to make a statement of Additional Grounds. If an appellant has not been required to do so, it is not open to him to put before the Tribunal for determination matters which are not the subject of the immigration decision under appeal **(save, no doubt, for any asylum or human rights claim).** Any statement raising such matters is simply not 'a statement under section 120' for the purposes of section 85(2) and (3) of the 2002 Act, regardless of whether it calls itself a 'Statement of Additional Grounds'.*

*14. The Tribunal, to put it in a nutshell, has no jurisdiction to consider under section 85(2) of the 2002 Act a matter purportedly raised in a statement made under section 120, if that statement was not in fact*

*made under section 120. A statement will only be made under section 120 if the Secretary of State in a written notice has required the appellant to make it. The appellant cannot, by calling a statement 'a statement of additional grounds', compel the Tribunal to consider matters raised in that statement, if there has been no 'one-stop warning' or anything else constituting a requirement by the Secretary of State to make such a statement.*

*15. In the instant case, the First-tier judge was mistaken in thinking that she had jurisdiction to entertain a Tier 4 application, and I too have no such jurisdiction.*"'

18. This does not suggest that a human rights claim would fall foul of the lack of a Section 120 notice.

19. A human rights claim does not necessarily need to be considered only under the Immigration Rules (although the Rules may be a starting point) and **Lamichhane** made no contradiction of the assertion that this does not affect a human rights claim. Indeed the submissions in **Lamichhane** from the Home Office, which were accepted, were that it followed from Section 85 (2) of the 2002 Act that if no section 120 notice had been served the Tribunal could not consider any matter that might give rise to a right to variation of his leave to enter or to remain in the UK under a provision of the Immigration Rules other than that which was the subject of the Immigration decision under appeal. In this case I do not accept that the appellant is necessarily changing his application under the rules. This is because the human rights consideration stemmed from the refusal of the EEA residence card.

20. The issue was raised with respect to the need to make a decision with reference to Article 8 as the appellant was not about to be removed and thus did not face any violation of his Convention rights. **JM Liberia** accepted that a human rights claim is justiciable before the AIT notwithstanding that the decision under appeal was not a decision to remove the appellant form the UK and did not necessarily entail any such decision. It was decided that removal may at least be an indirect consequence of the refusal to vary leave. Once a person's appeal against his leave was dismissed he must leave the UK. Indeed the refusal letter in this instance advised the appellant that he should make arrangements to leave the United Kingdom. Indeed as stated at paragraph 22 of **JM Liberia**

*'It is true, judging anyway from the terms of the decision letter, that article 8 had not at that stage distinctly, been raised; it was raised later before the adjudicator. But article 8 issues might readily have been raised; and there is plainly force in this submission that, depending on the particular facts, human rights issues are indeed likely to be integral to the process of deciding whether an immigrant's leave should or should not be varied'.*

21. Although in **JM Liberia** a S 120 notice was served there was discussion as to whether Section 84(1)(c) suffices to allow a right of appeal on human rights grounds in every case where the immigration decision in question would give rise to an imminent removal. **JM** did refer to the fact that once a human rights point is properly before the AIT they are obliged to deal with it. Indeed **JM** confirmed that further to Section 86(3)(a) 'the tribunal must allow the appeal in so far as it thinks that a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules)'

22. I also accept that **Ahmed Amos [2013] UKUT 00089** which also addressed an EEA appeal applies and that the effect of the respondent's decision was the possibility of removal. In **Ahmed Amos** there was no indication of a Section 120 stop notice being served, the Upper Tribunal recorded in the decision that the Article 8 issue was only raised at the hearing. The Upper Tribunal at paragraph 69 accepted that the decision entailed the refusal of a residence card as 'indicative of an intention to remove' and there was no principled basis for taking a different view from that taken in respect of human rights law following **JM Liberia**. The Tribunal clearly stated that it was entitled to deal with Article 8 in this type of appeal and this is a reported case. In this instance, it was clear that further to Schedule 1 of the EEA Regulations the appellant is able to raise the ground of Section 84(1)(c) or 84(1)(g) and this was specifically permitted at the hearing before the First-tier Tribunal and was recorded as a concession by the Entry Clearance Officer.

23. This was a matter which fell to be determined by the First-tier Tribunal Judge. The material facts of the case did not alter and I find the judge was entitled to consider the matter under Article 8.

24. Further to the point in relation to **Gulshan** it is clear from a reading of the decision as a whole that the judge found the very long residence of the appellant in the UK, that being over 21 years or thereabouts, and the fact that he had two children in the UK was sufficient to give arguably good grounds that the matter should be considered outside the Immigration Rules which is what the judge did. The judge addressed the issues with respect to proportionality and found in favour of the appellant. Further to MM Lebanon I find that the judge was so entitled.

25. I find there is no error of law and the determination shall stand.

Signed Date 12th November 2014

Deputy Upper Tribunal Judge Rimington