



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/49610/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

On: 16 October 2014

Prepared: 9 November 2014

Determination

Promulgated

On 13 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MRS YASMIH SHEIKH NUR
NO ANONYMITY ORDER MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr K Hersi, Solicitor (Hersi and Co)

**For the Respondent: Mr S Kandola, Senior Home Office Presenting
Officer**

DECISION AND REASONS

1. The appellant is a national of Somalia, born on 1st January 1974. Her appeal against the respondent's decision dated 12th November 2013 to

refuse to issue her with a permanent residence card pursuant to the Immigration (EEA) Regulations 2006 (“the 2006 Regulations”) was dismissed by the First-tier Tribunal Judge in a determination promulgated on 11th June 2014.

2. It was accepted at the hearing that the appellant was unable to meet the requirements under Regulation 10(5)(a) and 15(1)(b) of the 2006 Regulations. Accordingly, the appellant's representative indicated that she was “trying to run an Article 8 argument.” [4]
3. The respondent's representative noted that this was not a case which involved an intention to remove the appellant and that pursuant to the 2006 Regulations, there was no scope for considering an Article 8 argument. Nor had there been a Section 120 notice issued.
4. The refusal letter stated that it was open to the appellant to make a separate application for family or private life.
5. The Judge upheld that contention and concluded that there could be no Article 8 argument at this stage and accordingly dismissed the appeal.
6. On 4th September 2014, the Upper Tribunal Judge granted the appellant permission to appeal. He noted that the respondent was entitled to refuse the application under the 2006 Regulations and to refuse to engage with the private life claim as a separate process was to be followed in making an Article 8 claim, which the appellant had not pursued. Accordingly there was no such application before the respondent to be decided.
7. However, the Judge noted that “landscape had changed”. Although there was no section 120 notice and no removal decision, she had pleaded the Article 8 claim in her grounds and s.86(2) of the Nationality, Immigration and Asylum Act 2002 required the Judge to determine “any matter raised as a ground of appeal.”
8. On that basis, the Judge arguably erred in refusing to determine the appeal on human rights grounds.
9. However, in granting the appeal, the Upper Tribunal Judge noted that on the other hand, Regulation 25(1) of the 2006 Regulations provides that a human rights claim has the meaning given in s.113(1) of the 2002 Act. That section provides that a human rights claim means a claim made by a person that to remove him from or require him to leave the UK would be unlawful under s.6 of the Human Rights Act 1988. Here, there was no expressed intention to remove the appellant. In granting permission to appeal, the Judge stated that the apparent tension between these provisions would benefit from considered argument.

10. Mr Hersi, who had not represented the appellant at the hearing before the First-tier Tribunal Judge adopted the grounds of appeal. He contended that the 2006 Regulations entitled the appellant to pursue a human rights appeal.
11. On behalf of the respondent, Mr Kandola submitted that there was no tension between the provisions. The appellant had an appeal right under the 2006 Regulations and she failed on the merits. Section 113(1) did not apply in this case as there had been no decision to remove the appellant from the UK.

Assessment

12. In the reasons for refusal letter dated 12th November 2013, the respondent stated at page 3 that as the appellant appeared to have no alternative basis of stay in the UK, she should now make arrangements to leave. If she failed to do so voluntarily, her departure may be enforced. In that event, the respondent would first contact her again and she would have a separate opportunity to make representations against the proposed removal.
13. It was also stated at page 4 that Regulation 26 of the 2006 Regulations conferred a right of appeal against the decision. This did not however mean that if she chose to appeal, she would be entitled to remain in the UK whilst the appeal is being considered.
14. This is repeated in the notice of immigration decision itself, in which the respondent refused to issue a permanent residence card. It is again stated that if she did not make a voluntary departure, a separate decision may be made at a later stage to enforce her removal. Any such decision and associated appeal rights would be notified separately.
15. There is no further notice of decision that has been issued to the appellant since the date of the decision appealed against. In particular, no further notice of decision has been issued in the attempt to enforce her removal from the UK.
16. Regulation 25 (1) of the 2006 Regulations provides that 'Human Rights Claim' has the meaning given in section 113(1) of the 2002 Act. As noted section 113 provides that a human rights claim means a claim made by a person that to remove him from or require him to leave the UK would be unlawful under s.6 of the Human Rights Act 1988.
17. The appellant's grounds of appeal raised "family and private life" claims.
18. Although neither party referred to or relied on any relevant authority, I have had regard to the Court of Appeal decision in **JM (Liberia) v SSHD**

[2006] EWCA Civ 1402. Once a person's appeal against a refusal to vary his leave is dismissed he must leave the UK. If he does not he commits a criminal offence [17]. In that case the refusal has given rise to an imminent potential thereof of removal and thus as submitted in **JM** a potential violation of ECHR rights [24].

19. Further, in **Ahmed (Amos; Zambrano; reg 15A(3) (c) 2006 Regs) [2013]UKUT 00089 (IAC)** the Upper Tribunal had regard to the submission at paragraph 43 that the decision at issue – refusal of a permanent residence card – was not a removal decision. It held that ‘it would appear’ on **JM** 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 the appellant's removal to Pakistan.
20. I find from the reasons for refusal and from the notice of immigration decision dated 12th November 2013 that the respondent has stated that the appellant had no basis of stay in the UK under the 2006 regulations. She had no alternative basis of stay here and she should make arrangements to leave if she failed to make a voluntary departure. A separate decision may be made at a later date to enforce her removal.
21. I find that although no decision has been made to enforce her removal from the UK, the notice of decision in stating that she should now make arrangements to leave the UK with the threat of a subsequent enforcement decision to remove her from the UK falls within the definition of a human rights claim. It is evident that the appellant has in the circumstances “required her” to leave the UK. She consequently is entitled on the authorities referred to make a human rights claim within Regulation 25(1) read with section 113 (1) of the 2002 Act.
22. I find that the First-tier Tribunal Judge had jurisdiction to consider the Article 8 appeal, which had been raised in her grounds. Section 86(2) of the 2002 Act required the Judge to determine “any matter raised as a ground of appeal.”
23. I accordingly find that the making of the decision by the First-tier Tribunal Judge involved the making of an error on a point of law. Accordingly, I set aside the determination.
24. As there has not been any decision made by the First-tier Tribunal relating to the Article 8 claim, it is agreed that this would be an appropriate case to remit to the First-tier Tribunal.
25. Having considered the Senior President's Practice Direction in this respect, I find that this is an appropriate case for remittal to the First-tier Tribunal for the human rights claim of the appellant to be determined as

she not had the opportunity of having that claim determined by the First-tier Tribunal.

Decisions

The decision of the First-tier Tribunal involved the making of a material error of law and is set aside.

The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made.

No anonymity order made.

Signed

Dated: 9/11/2014

Deputy Upper Tribunal Judge Mailer