Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26055/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 27 January 2015	**On 28 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department
[No anonymity direction made]

Appellant

and

Ayman Yafawi

Claimant

Representation:

For the claimant: In person, unrepresented
For the appellant: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Ayman Yafawi, date of birth 27.10.65, is a citizen of Palestine.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Ransley promulgated 19.9.14, allowing, on human rights grounds, the claimant's appeal against the decision of the Secretary of State, dated 18.6.14, to refuse his application for an EEA Permanent Residence Card as confirmation of a right to reside in the UK, pursuant to the Immigration (EEA) Regulations 2006. The Judge heard the appeal on 16.9.14.

3. First-tier Tribunal Judge French granted permission to appeal on 17.11.14.

4. Thus the matter came before me on 27.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Ransley should be set aside.

6. At 44 of the decision of the First-tier Tribunal Judge Ransley found that the claimant failed to discharge the burden of proof that the sponsor had been exercising Treaty rights as a worker in the UK during the necessary 5-year period, and thus that the claimant does not qualify for a permanent residence card under regulation 15.

7. In essence, the grounds of application for permission to appeal to the Upper Tribunal complain that as: the appeal was against the refusal to issue a permanent residence card; there was no application for leave to remain on the basis of family or private life; article 8 had not been raised in the grounds of appeal to the First-tier Tribunal; no removal decision had been made; article 8 ECHR did not fall for consideration in the First-tier Tribunal appeal and thus the judge misdirected herself in law in finding the decision disproportionately interferes with the appellant's article 8 rights.

8. A further ground of appeal is that the article 8 assessment was flawed in that it failed to take into account that the claimant and his family could, if they so choose, return to Germany, the nationality of his wife and child, and where they were living prior to coming to the UK. Neither the claimant nor his family members had any right to life and education in the UK per se, and article 8 does not entitle the family to choose their country of residence.

9. In granting permission to appeal, Judge French considered the human rights point 'moot' but having regard to the fact that there was no removal decision and the decision letter invited the claimant to submit an article 8 application, found the issue arguable.

10. The refusal decision, which does not include a section 120 one-stop warning, explains that immigration rules, Appendix FM and paragraph 276ADE, set out the requirements for those seeking leave to enter or remain on the basis of article 8 private and family life. This requires a separate chargeable application on the specified form FLR(M) for the partner or parent route, or FLR(O) for the private life route. "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. Additionally, it is pointed out that a decision not to issue a residence card/permanent residence card does not require you to leave the UK if you can otherwise demonstrate that you have a right to reside under the Regulations."

11. I note that the grounds of appeal to the First-tier Tribunal do not raise any article 8 ECHR private or family life claim. It appears to have been raised for the first time in the skeleton argument of the claimant's reprsentative, Ms Solanki, at the First-tier Tribunal appeal hearing. She submitted that the claimant's removal would breach his

article 8 rights. For the Secretary of State, Mr Townsend submitted that as no removal directions had been made against the claimant article 8 did not fall to be decided in the First-tier Tribunal appeal. At §49 the judge recognised that there was no removal decision but considered that the issues relating to article 8 "are to be decided on a hypothetical basis." What that means is far from clear, as there was nothing hypothetical about the decision a few paragraphs later to "conclude that a decision to remove the appellant would be disproportionate by reference to article 8(2) of the ECHR" and to proceed to allow the appeal on human rights grounds.

12. In FK Kenya) v SSHD [2010] EWCA Civ 1302, Lord Justice Sullivan observed, "Question (iii): family life. Before dealing with this question I would observe that it is 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. If and when a removal decision is made the appellant will be able to appeal against that decision and as part of that appeal he will be able to include Article 8 grounds in his appeal. It will of course be for the Secretary of State to decide whether to deport the appellant as a person who has committed criminal offences or whether he should be removed under the Immigration Rules. It will be for the Tribunal at the stage of any appeal against such a decision to weigh the relevant factors as they exist at that time. It seems to me therefore that it was at best premature for the Tribunal to be asked to consider the Article 8 issue in this appeal." As it happens, in that case the appellant had asked the Immigration Judge to consider the Article 8 issue and Lord Justice Sullivan said that "the appellant can hardly complain now that that is what the Immigration Judge proceeded to do," the appellant appealing the decision.

13. In line with the cases of Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260 and Jaff (s.120 notice; statement of "additional grounds") [2012] UKUT 00396(IAC), in the absence of a section 120 notice, there is no jurisdiction for the Tribunal to consider 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. 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. It follows that there was no basis for the Tribunal to consider article 8.

14. I also adopt the observations of Lord Justice Sullivan in FK (Kenya) as being apposite to this case. There was no removal decision. The application was for a permanent residence card, which was refused. The decision did not alter the status quo at all. I find it difficult to understand in those circumstances how the decision could be said to be disproportionate.

15. In fact, carefully read, Judge Ransley's decision was not that the decision of the Secretary of State was disproportionate, but that "a decision to remove" the appellant would be disproportionate. As there was no such decision, there was no basis for allowing the appeal on human rights grounds. I fail to see the purpose of the judge considering the matter on a hypothetical basis when there was no removal decision and any such decision in the future would engender the right of the claimant to appeal and raise private and family life claims pursuant to article 8 ECHR.

16. I further find that the article 8 assessment was flawed for the reasons cited in the grounds of appeal. In particular, the judge failed to take into account that the claimant and his family had previously lived in Germany, the nationality of his wife and children. They came to the UK from Germany in 2008. The judge found that the claimant had no right to a permanent residence card (without deciding whether he was entitled to a non-permanent residence card), and as not British but German citizens they had no right to reside or remain or take advantage of education and other benefits of life in the UK, except in accordance with EU free movement law and in particular under the Immigration (EEA) Regulations 2006, as amended. There was apparently no evidence as to why they could not continue family life in Germany, where they had previously enjoyed family life. The considerations at §51 of the decision failed to take these matters into account, thereby rendering any article 8 assessment rather one-sided, so that it amounted to an error of law.

17. It is also relevant to point out that the claimant was and remains in possession of an EEA residence card, and thus he was not being asked to leave. What he sought, which was refused, was a permanent residence card, which requires a 5-year period of exercising Treaty rights by the EEA national spouse.

18. Further, the judge failed entirely to consider the family and any private life claim under Appendix FM and paragraph 276ADE before going on to consider article 8 ECHR. Neither did the judge consider, as she was required to do, the public interest considerations under section 117B of the 2002 Act. In the circumstances, it is clear that even if there was any merit in going on to an article 8 assessment, it was flawed and amounted to clear errors of law.

19. There has been no appeal against the decision of the First-tier Tribunal that the claimant did not meet the requirements of regulation 15 for a permanent residence card and that part of the decision remains unchallenged. In fact, Mr Yafawi told me that he had 'withdrawn' his appeal and made a fresh application for an EEA residence card.

Conclusion & Decision:

20. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: Date: 27 January 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 27 January 2015

Deputy Upper Tribunal Judge Pickup