Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37330/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 October 2015	**On 16 October 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

And

Parves Uddin
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr A Barrett, instructed by Novells Legal Practice
For the respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Afako promulgated 20.5.15, allowing, on human rights grounds, the claimant's appeal against the decision of the Secretary of State to refuse to issue a derivative right of residence card as confirmation of a right of residence in the UK as the extended family member of an EEA national, pursuant to the Immigration (EEA) Regulations 2006. The Judge heard the appeal on 16.4.15.

2. First-tier Tribunal Judge Simpson granted permission to appeal on 30.7.15.

3. Thus the matter came before me on 15.10.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out herein, I find there were such clear errors of law in the making of the decision of the First-tier Tribunal that the decision of Judge Afako should be set aside and remade by dismissing the appeal.
5. Judge Afako found that the appeal failed, as the appellant could not meet the requirements of regulation 15A(4A). There is no appeal or cross appeal against that part of the decision and it must stand.
6. However, the judge went on to consider the appellant's circumstances outside the regulations under article 8 ECHR. For the reasons explained herein, the judge was in error in doing so, as there is no right of appeal on human rights grounds in an EEA regulations appeal, as has been held in a number of cases, including Patel & others v SSHD [2014], and most recently the decision of the Upper Tribunal in Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC), which latter decision was promulgated after the appeal hearing before Judge Afako.
7. In short, an application for an EEA residence card is an application for recognition of an existing right under EEA law and is different to and distinct from an application for leave to enter or leave to remain under the Immigration Rules and in consequence the grounds of appeal are limited. The decision refusing to issue such a document does not change the appellant's status and unless it is accompanied by a section 120 notice or a removal decision does not give rise to an appeal on the basis of human rights.
8. Unless and until the Secretary of State makes a removal decision in the appellant's case, his right to remain in the UK on human rights grounds does not arise, even though he may have no legal status or leave to remain in the UK, and he is not entitled to raise such in any grounds of appeal against the refusal to issue the EEA residence card he sought. He may only pursue grounds of appeal which relate to the underlying decision under challenge and may not use the appeal procedure to in effect make an entirely different application to the First-tier Tribunal the merits of which have not been considered, or decision made in respect of such, by the Secretary of State. Until there is a removal decision the raising of human rights is entirely premature. However, it was and remains open to the appellant to apply for leave to remain on the basis of his private and/or family life, but as the Court of Appeal made clear in Weiss [2010] EWCA Civ 803, that would require the submission of a valid application pursuant to Rule 34, on the correct form and paying the correct application fee.
9. It follows that the scope of any appeal against the decision of the Secretary of State is limited to that of his original application. There is no valid right of appeal on human rights grounds and thus the decision of the First-tier Tribunal Judge to allow the appeal on that basis was in error and cannot stand.
10. Given that there has been no appeal or cross appeal against the decision to dismiss the appeal under the EEA Regulations, there is no outstanding issue capable of being a valid ground of appeal. The appeal should have been dismissed in its entirety in the First-tier Tribunal.

Conclusions:

11. 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 set aside the decision.

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

Signed

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. 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.

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

Deputy Upper Tribunal Judge Pickup