Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01757/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 1st November 2018	**On 29th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR S I U
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Muhammad (Counsel)
For the Respondent: Mr A Tan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Bircher, promulgated on 21st May 2018, following a hearing at Manchester on 24th April 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Nigeria, a male, and was born on 17th November 1988. He appealed against the decision of the Respondent Secretary of State to refuse his application for a derivative residence card, such decision being dated 1st February 2018.

The Appellant's Claim

3. The essence of the Appellant's claim is that he had first visited his mother in the UK at Christmas 2013 and returned back to Nigeria. He then returned to visit again on 6th February 2015, and discovered that his mother's health had deteriorated considerably. This is because she was looking after her two nieces who had been living in Spain with their own mother, who was undergoing serious psychological decline, as well as looking after her own daughter. The Appellant's mother had already bought the Appellant a return ticket back to Nigeria, but on this occasion, the Appellant did not return back to Nigeria, but assumed a role in the emotional and practical care of all three children, namely, his two cousin sisters and his own sister. The Appellant felt he had no alternative but to remain in the UK to help his mother with the care of all three children, but particularly his sister. He had put forward evidence that he was heavily involved in the day-to-day care of the children. He was responsible for taking them to school, collecting them from school, and to take them for medical appointments, as well as Sunday school, together with other extracurricular activities.

The Judge's Findings

4. At the hearing before Judge Bircher, it was quickly determined that the Appellant could not satisfy the criteria of Regulation 15A(7) of the 2006 EEA Regulations because he was not a direct relative, being the brother of the child upon whom he seeks to rely for his derivative residence card. He was not a legal guardian of his sister either. Accordingly he could not succeed on this basis (paragraph 30).

5. The judge however, then went on to consider whether the Appellant could succeed on human rights grounds, and in a detailed and thorough analysis of the **Razgar** principles (from paragraphs 16 to 20) together with the interplay with Section 117A of the Immigration Act 2014, it was concluded that the Appellant could stay in the UK on the basis of his Article 8 rights. The judge gave cogent reasons for why this was the case (paragraphs 21 to 24).

6. The appeal was allowed.

Grounds of Application

7. The grounds of application state that the judge erred in law because it has been well-established since the Court of Appeal decision in **Amirteymour v SSHD EWCA Civ 353** that human rights cannot form part of an EEA

appeal. Therefore, the judge should not have considered and allowed this EEA appeal on the basis of the Appellant's human rights.

8. Second, the judge overlooked the fact that the relevant Immigration Rules at paragraph 320(1) was not considered and under the carer concession, the Appellant should have sought to find alternative arrangements. The judge has not made any reference to paragraph 276ADE and did not consider Article 8 in the Rules, before turning to Article 3 outside the Rules, as it was incumbent upon her to do. The approach to Article 8 was accordingly misconceived.

9. A Rule 24 response was thereafter entered to the effect that, firstly, this was a case where the Appellant was not represented and appeared, in person, whereas the Respondent was represented by a legal representative. Second, whilst it is true that the judge did not expressly refer to paragraph 276ADE(1)(vi) it was not incumbent upon him to do so in terms because what he did do was to come to the view that the circumstances here were clearly exceptional and then to have considered Article 8 meticulously by taking a step by step approach under **Razgar**. Third, that the Court of Appeal guidance in **Amirteymour** is not applicable because this was a case where there had been a Section 120 "One-Stop Notice" and so the Appellant was allowed to raise the Article 8 issue separately from the EEA part of the claim. Finally, there was a favourable finding by the judge on the issue of proportionality and it would be wrong to interfere with it.

Submissions

10. At the hearing before me on 1st November 2018, Mr Tan, appearing as Senior Home Office Presenting Officer, on behalf of the Secretary of State, submitted that the Rule 24 response was fundamentally misconceived as there had never been a Section 120 notice at all. Therefore, **Amirteymour** stood to be applied. In an EA appeal reference could not be made to human rights arguments in order to decide the claim. The judge had plainly come to the right view on the EEA Regulations and held that the Appellant would not succeed under Regulation 15. However, it was wrong for her to go on and deal with Article 8 arguments thereafter. Indeed, the judge herself did not refer to a Section 120 notice and there was no record of it ever having been served on the Appellant.

11. For his part, Mr Muhammad, most properly and commendably stated that it would be wrong for him to say that there had been a Section 120 notice, when he had no knowledge of its existence himself, not having appeared before the Tribunal below. Indeed, as far as he was aware, there had not been a Section 120 notice. Mr Muhammad plainly acted with utmost probity and professionalism in making this clarification known to the Tribunal. However, he then went on to say that, nevertheless, the judge had before her a human rights situation where Article 8 fell to be applied, and had gone on to deal with the issue as she saw fit, and the decision should not be interfered with.

12. In reply, Mr Tan submitted that the refusal letter always maintained, that the Appellant could not succeed under the EEA Regulations, and the only way forward for the Appellant would now be to make a fresh human rights claim, and this was the position in which this Tribunal found itself to be equally, because allowing the appeal on a basis which was not permissible, was not something that the First-tier Tribunal should have engaged in during the hearing below.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are precisely those given by Mr Tan, and indeed agreed upon by Mr Muhammad. This is a case where there was no Section 120 notice. It was not open to the judge to consider human rights arguments in an EA appeal. The strictures in **Amirteymour** applied given the judgment of the Court of Appeal. It was wholly wrong for the drafter of the Rule 24 response to first suggest that it had never been claimed that Section 120 had not been served, because the implication of so stating is that it had been served. It was equally wrong to say that the Appellant would plainly succeed if the decision was set aside, and upon a reconsideration, because this simply does not follow. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing the appeal of the Secretary of State.

14. An anonymity order is made.

15. The appeal of the Secretary of State is allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated

Deputy Upper Tribunal Judge Juss 23rd November 2018