



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/14921/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 5th December 2018**

**Decision & Reasons
Promulgated
On 10^h January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**MISS DHARMISTHA RAVJIBHAI PARMAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Harris, instructed by ATM Law, Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, appealed to the First-tier Tribunal against a decision by the Secretary of State dated 21st August 2015 to refuse her application for leave to remain outside the Immigration Rules. First-tier Tribunal Judge J S Burns dismissed the appeal in a decision promulgated on 13th September 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Hollingworth on 11th October 2018.

2. It is contended in essence that the First-tier Tribunal Judge erred in considering the wrong decision. The judge dismissed the appeal against a decision of the Secretary of State dated 7th March 2016 but it is contended that the appeal was in fact against a decision of the Secretary of State dated 28th August 2015.
3. The First-tier Tribunal dismissed the appeal based on a decision by the Secretary of State dated 7th March 2016 to refuse the Appellant's application for a derivative residence card in accordance with the Immigration (European Economic Area) Regulations 2006. The judge considered that refusal letter and noted that the representative for the Appellant had conceded that the Appellant could not qualify for a derivative right of residence as the relevant relative, a British citizen, is her uncle and not a direct relative within Regulation 15A(7). The judge noted that Counsel had conceded that the appeal under Regulation 26 must fail.
4. The judge went on to decide that, as the Appellant had not made a valid application for consideration of her private and family life, no Article 8 appeal lies against the refusal of 7th March 2016. The judge noted that there was reference in the papers to the appeal being made against the decision of the Secretary of State of 28th August 2015 but noted that the Presenting Officer had submitted that there was no in-country right of appeal against that decision as it had been certified as clearly unfounded. The judge said that he was unwilling to determine an Article 8 appeal in the absence of clear evidence that there was a right of appeal which had been validly exercised. The judge decided to treat this appeal as one against the decision of 7th March 2016 only and dismissed the appeal. The judge noted at paragraph 9 that, after the hearing, Counsel returned to the Tribunal room asserting that the Appellant appeared to have appeal rights against an earlier decision but the judge said that he made no decision about this and said "any valid appeal that the Appellant may have against any decision of the Respondent other than that dated 7.3.2018 will have to be presented and considered separately".
5. There is some confusion within the papers in relation to this appeal. The Respondent's bundle before the First-tier Tribunal and indeed before the Upper Tribunal contains the application for a derivative residence card and the decision dated 7th March 2016. However the Notice of Appeal contained in the Respondent's bundle states at Section 2F that it relates to a decision of the Home Office dated 28th August 2015. The Grounds of Appeal to the First-tier Tribunal contend that the Appellant has an in-country right of appeal against the decision of 21st August 2015.
6. In the file there is a direction made by a Duty Immigration Judge and issued on 2nd August 2016 stating that the Appellant seeks to appeal a decision of the Respondent refusing her leave to remain outside the Immigration Rules dated 21st August 2015. The directions state that the Appellant's representatives assert that the Respondent failed to state that she had a right of appeal against the decision as she was due the benefit

of transitional provisions in relation to appeal rights relating to the amendments to Section 82 of the Nationality, Immigration and Asylum Act 2002 because her application for the variation of her leave to remain was made before 6th April 2015. The Duty Judge considered that this appeared to be a correct statement of the law unless the Respondent filed submissions that persuade a Duty Judge that it is not. The Duty Judge noted that the Appellant's representative failed to submit Grounds of Appeal in relation to the decision itself and have only addressed jurisdictional matters. The directions required that Grounds of Appeal addressing the refusal itself must be supplied if the Appellant is to demonstrate that she has a right of appeal in accordance with Section 88(4) of the 2002 Act before its amendment following the coming into force of Schedule 9 of the Immigration Act 2015. A direction was issued to the Respondent to file any evidence or submissions which address the validity of the appeal within five days of the date on the notice and to the Appellant to file Grounds of Appeal in accordance with the direction with supporting reasons and any evidence upon which she relies within five days.

7. Ms Harris submitted a document entitled Grounds of Appeal which has handwritten at the top DJ/BF 0908016 which asserts that the decision is in breach of the Appellant's Article 8 rights. It appears that this was received by the Tribunal and the Tribunal went on to list the case for hearing.
8. Mr Lindsay submitted copies of two decisions at the hearing before me. The first was a decision of 23rd June 2015 refusing the Appellant's application for leave to remain on the basis of her private and family life. That decision was certified under Section 94(1) of the Nationality, Immigration and Asylum Act 2002 and it was stated that this was because the Appellant did not meet the requirements for leave to remain on the grounds of family life under Appendix FM or private life under paragraph 276ADE of the Immigration Rules and had not raised any exceptional circumstances, the Secretary of State concluded that the application was clearly without substance and could not succeed on any legitimate view and that the Appellant could not therefore appeal whilst in the UK. However Mr Lindsay accepted that the decision issued on 21st August 2015 refusing leave to remain outside the Immigration Rules was not certified.
9. It appears from the chronology set out above that the decision the subject of this appeal is the decision of 21st August 2015 and not the decision of 23rd June 2015 which was certified or the decision of 7th March 2016 which relates to the application for an EEA derivative residence card (the only decision letter contained in the Respondent's bundle).
10. In light of the fact that it appears from the chronology set out above that, as the Appellant responded to the directions issued on 2nd August 2016 and the Respondent did not, and, given that the appeal went on to be listed for hearing, the Appellant was treated as having heard a right of appeal against the decision of 21st August 2015 by the Tribunal.

11. At the hearing Mr Lindsay asked to be given further time to make specific submissions in relation to the issue raised in the directions served on 2nd August 2016 about whether the Appellant had a right of appeal against the decision of 21st August 2015. However he informed the tribunal after the hearing that he would not be making any further submissions.
12. In my view it is now clear from the chronology set out above that the appeal against the decision of 21st August 2015 has not been determined by the First-tier Tribunal and it is appropriate to set aside the decision of First-tier Tribunal Judge Burns which deals with the wrong decision by the Secretary of State and remit the matter to the First-tier Tribunal where the appeal against the decision of 21st August 2015 remains outstanding.

Notice of Decision

13. The appeal is allowed.
14. The appeal is remitted to the First-tier Tribunal where the appeal against the Secretary of State's decision of 21st August 2015 remains outstanding.
15. No anonymity direction is made.

Signed

Date: 21st December 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

As I have remitted the appeal because the substantive appeal remains outstanding before the First-tier Tribunal, the issue of a fee award too remains outstanding before the First-tier Tribunal.

Signed

Date: 21st December 2018

Deputy Upper Tribunal Judge Grimes