Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/21974/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
08 September 2015	**On 02 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PAKEENTHIRAN ELADCHUMANAN

Respondent

Representation:
For the Appellant: Ms Atinbolu, instructed by Duncan Lewis & Co
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-Tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

1. The Claimant in this case is a Sri Lankan national born on 11 July 1978. He entered the UK in 2000 and claimed asylum and was removed to Germany in 2001. He re-entered the UK in the same year. He is married to a British Citizen and has two children who are also British Citizens. On 15 January 2014 he applied for a derivative residence card on the basis that he was a third country national on whom a British Citizen was dependent in the UK on the basis of the Court of Justice of the European Union judgment in *Ruiz*

Zambrano (C-34/09). The Secretary of State refused that application as it was concluded that the Claimant's children would be able to reside in the UK or another EEA state if he were forced to leave the UK. The Secretary of State concluded that their mother could look after them. The application was refused under regulation 15A of the European Economic Area Regulations 2006 (as amended) ("the EEA Regulations").

2. The Claimant appealed that decision and the appeal was heard on 3 February 2015 by First-tier Tribunal Judge O'Rourke. At that hearing the Claimant conceded through his counsel that he could not meet the requirements of regulation 15A of the EEA Regulations. The Claimant relied on Article 8 of the European Convention of Human Rights. He also relied on paragraph EX.1 of the Immigration Rules.

3. The First-tier Tribunal allowed the appeal finding that the Claimant satisfied the requirements of paragraph EX.1. He found that was not reasonable to expect the children to leave the UK and it would not be reasonable to expect the children to relocate to Sri Lanka. Having allowed the appeal under the Immigration Rules the Tribunal did not find it necessary to consider Article 8 outside the Rules.

4. The Secretary of State sought to appeal that decision on the basis that the First-tier Tribunal had failed to give adequate reasons for findings on material matters. The Secretary of State argues in the grounds for permission to appeal that the Tribunal had failed to provide adequate reasons as to why the Claimant met the requirements of paragraph EX1; there was no requirement for the Claimant's children to leave the UK as they were British Citizens and it was his wife's choice whether she and her children remained in the UK or relocated with him. Further, section 117B of the 2002 Act provided that little weight should be given to a relationship formed at a time when a person's immigration status was unlawful. They could return to Sri Lanka where they were both originally from and continue their family life there.

5. Permission to appeal was granted by First-tier Tribunal Judge De Haney on the basis that the Judge's analysis at paragraph 14 of his decision was arguably inadequate to come to the findings he did.

6. The appeal now comes before the Upper Tribunal to determine whether the First-tier Tribunal made an arguable error of law and if so, what to do about it.

7. I heard submissions from both representatives. Mr Melvin sought to extend his grounds to include the point that the finding Article 8 was not arguable. The refusal letter stated that there were no directions for removal and it was purely an EEA decision. If the Claimant wished to make an application on another basis he had a right to do so. It was conceded by the Claimant that he could not meet the relevant part of the EEA Regulations. The Judge considered the appeal fell to be dismissed under the EEA Regulations. The Judge had given brief consideration to the Immigration Rules. The Appellant had never had leave to remain. The Judge considered paragraph EX1 as a

free standing provision. His findings were scant. He found that there was an unstable political situation in Sri Lanka. Mr Melvin submitted that his findings were simply insufficient and it was not argued that British citizens were required to leave. There was no engagement of EX1. The Judge found that there would be an insurmountable obstacles. The finding was almost irrational. He asked me to find that there was a material error of law in the decision.

8. There was no R24 notice on the Court file but Ms Atinbolu said that one had been sent. I asked her to ensure that her solicitors wrote to the Tribunal confirming this. She submitted that the findings of fact were made at paragraph 11 and the conclusions were at paragraph 14. The Judge accepted the evidence that was given by the Appellant and his wife and said at paragraph 14 (i) that it was not reasonable for them to return. Given their nationality they could not be reasonably be expected to leave. The Secretary of State argued that it was a choice. With regard to section 117B (6), having found that it was unreasonable the Judge was then bound to find that there was no public interest in their removal. The Secretary of State did not take issue with the facts as found. There was sufficient reasoning there to explain why the Judge had arrived at the conclusion made. That finding was sustainable.

9. The question was to whether there was jurisdiction to consider Article 8. The Judge set out the claim at paragraph 8 and proceeded to determine it within the Rules. That was legally correct. It was a ground that was properly raised by the Judge and he was bound to consider it. The Upper Tribunal concluded in *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 that Article 8 was not arguable in a residence document appeal where there were no directions for removal. That appeared to go contrary to *Dereci and others (European Citizenship)* [2011] EUECJ C-256/11. This was considered in *Ahmed v SSHD* [2013] UKUT 89 and was approved by the Court of Appeal in *NA (Pakistan) v SSHD* [2014] EWCA Civ 995. The Upper Tribunal said that jurisdiction in *NA* was not an issue and therefore that *NA* and *Ahmed* were not conclusive. This was a matter that was considered by the CJEU in *Dereci* and it was made clear that the decision on EU residence rights must incorporate family life. If the situation was not covered by EU law the Court must undertake that consideration in the light of Article 8 of the ECHR [72]. In *Amirteymour* the Claimants were exclusively arguing their case under the EEA Regulations and Article 8 was a fall-back position. The First-tier Tribunal acknowledged that he was unable to argue EEA points. If the literal interpretation was accurate in the present case it would mean that by denying that an application had been made it would prevent this appellant from ever arguing an Article 8 point. This was not a point that was entirely new. The IS96 was in the Appellant's bundle. The Claimant had been served a notice that he was an illegal entrant and therefore it must be contained within any decision that denial of this route of residence meant that the Appellant must leave the UK. Article 8 was properly before the First-tier Tribunal and he was right to decide the case in the way that he did.

10. Mr Melvin said that he did not agree with Ms Akinbolu's point in relation to *Dereci*. It was clear that the point had been settled by the Upper Tribunal as

to whether paragraph 72 of *Dereci* was relevant. The Presidential panel had considered everything. The IS 96 notice was not a decision to remove the Appellant. The Appellant had ignored the laws of UK for 12 years. He could not meet the EEA Regulations. The decision was inadequately reasoned. There was no jurisdiction to consider paragraph EX.1 of the Immigration Rules. He asked me to re-determine the appeal today and find that the appeal fell to be dismissed.

11. I decided to reserve my decision in relation to the error of law and asked for representations concerning the appropriate forum if I were to hold that I had jurisdiction. Mr Melvin submitted that if I agreed with him that there was an inadequacy of reasons there would be a need to consider further oral evidence.

12. I reserved my decision in relation to whether there was an error of law.

Decision

13. The Upper Tribunal held in the case of *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 that where no notice under section 120 of the 2002 Act had been served and where no EEA decision to remove had been made, an appellant could not bring a Human Rights challenge to removal under the EEA Regulations.

14. It is common ground that no section 120 notice has been served and no EEA decision to remove the Appellant has been made in this case. Ms Akinbolu argues, notwithstanding, that in the light of the decision in *Dereci and others (European Citizenship)* [2011] EUECJ C-256/11, consideration of the right to respect of family and private life is an inherent part of any consideration of an EU right of residence, whether in reliance on the ECHR directly, or through its incorporation in the EU its incorporation in the EU Treaties and Charter of Fundamental rights.

15. The Upper Tribunal in *Amirteymour* comprehensively examined the legislative framework and case law in relation to the question of whether the refusal of a residence document gives rise to a right of appeal under Article 8 ECHR either within or outside the Immigration Rules. It was concluded that there was no right of appeal against the decision under the Immigration Rules and hence an appellant could not rely on the provisions of Appendix FM. It was further concluded that there was no right of appeal on Article 8 grounds outside the Rules. The Upper Tribunal specifically considered the cases of *Ahmed (Amos; Zambrano; reg 15 A (3) (c) 2006 EEX Regs)* [2013] 00089 which went on appeal to the Court of Appeal in both *NA (Pakistan) v SSHD* [2014] EXCA Civ 995 and *SSHD v NA (Pakistan)* [2015] EWCA Civ 140. The Upper Tribunal notes at paragraph 65 that no issue was taken by the Court of Appeal as to the jurisdiction to consider human rights arguments.

16. The Upper Tribunal held at paragraph 74 that if a claimant is not entitled to confirmation of a right of residence under EU law then he is no different position to an overstayer who can make a human rights application which may or may not be successful. I do not consider it to be the *ratio* of *Dereci* that Article 8 must be considered within the ambit of a residence document

appeal notwithstanding the fact that no decision to remove has been made. It is clear from the Upper Tribunal's decision that the Claimant is not barred from making a human rights claim but he must do so by way of a further application.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and re-make it by dismissing it on all grounds.

No anonymity direction is made.

Deputy Upper Tribunal Judge L Murray Date: 01 October 2015