



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

Appeal Number: IA/52517/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 27 May 2015**

**Determination
Promulgated
on 3 June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

LIXIANG CHEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms L Kerr, of Katani & Co, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against a determination by First-tier Tribunal Judge Dennis, dismissing her appeal against refusal of a residence card under the Immigration (European Economic Area) Regulations 2006.
2. The first ground of appeal is directed against paragraph 15 of the determination where the judge said that Article 8 issues raised by the appellant were "not in issue" before him "as there are no removal directions in place". Ms Kerr argued that this ignores submissions which were based on the Immigration Rules Appendix FM paragraph Gen 1.9, on *Ahmed* [2013] UKUT 00089 (IAC) at paragraph 43, and on *JM (Liberia)* [2006] EWCA Civ 1402.
3. There is a second ground of appeal, based on alleged error in the judge's finding that he was not satisfied that the appellant's daughter is the biological daughter of an EEA national. While permission to appeal was

not restricted, the permission judge doubted whether that could sensibly be argued, and thought that the point was implicitly raised in the respondent's decision under appeal. The respondent's Rule 24 response maintains that the judge had good reason to doubt the nationality and parentage of the appellant's daughter. Ms Kerr did not press this ground, and I did not need to hear from Mrs Saddiq on it. The judge's finding was open to him and was reached for good reasons. The appellant's case would have failed on this issue alone.

4. In my opinion the judge did err by not dealing (even briefly) with the particular submissions made about Article 8, and by not disposing of that ground of appeal. It is not correct that absence of removal directions by itself means there is no Article 8 appeal available: *JM* settled that point.
5. However, the error is of no eventual significance, for the following reasons:
 - (i) A decision under the Regulations is not one in consequence of which removal can be directed, or which changes the appellant's immigration status. That distinguishes this case from *JM*.
 - (ii) In *Ahmed* the respondent agreed that the case should be looked at as if removal were a putative consequence (paragraphs 48 and 69). The Presenting Officer in this case made no such concession. *Ahmed* succeeded under the Regulations. The findings on Article 8 are in the alternative (paragraph 79). It is not an authority for considering appeals under the Regulations as if there were a substantive prospect of removal.
 - (iii) An appeal under the Regulations cannot be allowed on the grounds that the decision is not in accordance with the Immigration Rules (see regulation 26 and schedule 1, paragraph 1). The Rules are the starting point for any private and family life consideration, and aim at providing a complete code. The appeal could not be allowed under the Rules, even if their requirements were met. It would be absurd to allow on human rights grounds outside the Rules where a route inside the Rules is available.
 - (iv) The respondent's refusal letter invites the appellant to apply if she wishes on the basis of family and private life under Article 8 ECHR and the Immigration Rules. A requirement to apply under the Rules is not a disproportionate interference with private and family life.
 - (v) The respondent also says that as the appellant has no apparent alternative basis of stay her departure may be enforced, but she is advised that in such event she would be contacted again and would have a separate opportunity to make representations. Such procedure is not a disproportionate interference with private and family life.
 - (vi) Appendix FM paragraph GEN 1.9 provides that the requirement to make a valid application may not apply when the Article 8 claim is raised "in an appeal". In context, that means an appeal under the

Immigration Rules. It does not extend to an appeal taken under the Regulations.

- (vii) Although there was available to the appellant a right of appeal invoking Article 8, and the judge was bound to dispose of it, the decision raises no meaningful interference with Article 8 rights.
6. The determination of the First-tier Tribunal is **set aside**, but the decision substituted is as follows: the appeal is **dismissed** under the Immigration (European Economic Area) Regulations 2006, in relation to Article 8 of the ECHR, and on all other available grounds.
7. No anonymity direction has been requested or made.

A handwritten signature in black ink, appearing to read "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

1 June 2015
Upper Tribunal Judge Macleman