Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33986/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3rd January 2018	**On 05th January 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

LOVONA OBUMNEKE OKOROAMA
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Ms K Reid instructed by AR Ralph solicitors

DETERMINATION AND REASONS

1. Ms Okoroama's application for a permanent residence card was refused by the respondent for reasons set out in a decision dated 13th May 2014. Her appeal against that decision was dismissed by First-tier Tribunal judge Munonyedi under the 2006 EEA regulations but allowed on human rights grounds, by consent, to the extent that it was remitted to the secretary of State for consideration of her human rights claim. A minute by the presenting officer who appeared before the First-tier Tribunal states that although the decision by the judge in connection with the permanent residence card was correct, because the decision was a removal decision, her human rights should have been considered.

2. An application for a permanent residence card on the basis of retained rights of residence was refused on 22nd October 2015. A letter accompanying that decision headed "Reasons for Refusal" refers to the remittal by the First-tier Tribunal and considers whether the application raises any exceptional circumstances which might warrant a grant of leave to remain outside the Immigration Rules consistent with the right to respect for family and private life. The SSHD concluded there were no such reasons and informed Ms Okoroama that if she wished to pursue an application for leave to remain on Article 8 grounds then she should make a paid application in accordance with the Immigration Rules. It is difficult to reconcile this with the disclosed minute.

3. Ms Okoroama exercised her right of appeal against this refusal of a permanent residence card and included in her grounds of appeal that the SSHD had failed to consider Ms Okoroama's rights under Article 8 and thus the decision was not in accordance with the law.

4. The appeal came before First-tier Tribunal Judge Ghaffar on 4th April 2017; the SSHD was not represented. Counsel for Ms Okoroama submitted before Judge Ghaffar that the concession before First-tier Tribunal Judge Munonyedi amounted to an acceptance of a s120 notice having been served and therefore the respondent was obliged to consider the case under the Immigration Rules as well as outside the Rules. Judge Ghaffar found that service of a s120 notice could be inferred, the parties had agreed that the human rights aspect of the claim would be considered and there is in any event a decision to remove.

5. The SSHD sought, and was granted, permission to appeal on the grounds that following the amendment to the 2006 EEA Regulations, the only ground of appeal available to Ms Okoroama was that the decision breaches her rights under the EU Treaties but that in any event the SSHD had considered her Article 8 rights and that the fact that she did not consider it explicitly under the Rules does not render the decision unlawful given she had not paid the relevant fee or made the relevant application[1]. Judge Ghaffar did not make a decision on the refusal of the residence card and there was no application for permission to appeal by Ms Okoroama, it being accepted, it seems, that the decision by Judge Munonyedi stood in that regard.

6. Ms Willocks- Briscoe submitted that Judge Ghaffar had failed to make any human rights findings or to consider the evidence relied upon in Ms Okoroama's human rights claim; Ms Reid did not dissent. Ms Okoroama's appeal was not only against the decision to refuse a permanent residence card based upon retained rights of residence (which played little part in the instant proceedings) but was against the human rights claim made pursuant to the s120 notice. Judge Ghaffar failed to make any findings on the human rights claim; it is inadequate to allow an appeal merely because of a failure by the SSHD to engage with evidence.

[1] See also *Ahsan* [2017] EWCA Civ 2009 at [14]

7. There is a material error of law by Judge Ghaffar who failed to address the appeal before him and I set aside the decision to be remade. Given the complete lack of any findings by Judge Ghaffar on the human rights claim, I remit the appeal to the First-tier Tribunal for full rehearing on the human rights claim. Although the mechanism by which the appeal came before the First-tier Tribunal was through the refusal of the permanent residence card, that decision is not challenged. The challenge is to the human rights appeal decision and it is that which is remitted to the First-tier Tribunal for hearing.

8. Although not explored at the hearing before me there are some issues that the First-tier Tribunal may already be aware of but which may bear repeating:

    a. The reference to decisions not being in accordance with the law does found a right of appeal;
    b. Ms Okoroama has not, so far as I can see from the papers before me, been served with a removal decision. Even if she had a removal decision, that does not found an appeal; it is the refusal of a human rights claim that founds an appeal.

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 remit it to the First-tier Tribunal to be remade.

Date 3rd January 2018

Upper Tribunal Judge Coker