



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

Appeal Number: IA/02159/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16th January 2015**

**Decision & Reasons
Promulgated
On 23rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR NADESU SATHEESWARAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Paramjorthy of Counsel

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASON

1. The Appellant is a citizen of Sri Lanka whose date of birth is recorded as 29 July 1981. He made application for an EEA Residence Card as a “family member”. On 18 October 2013 the application was refused. The Appellant appealed and on 15 September 2014 his appeal was heard by Judge of the First-tier Tribunal Naphtine sitting at Hatton Cross. Though not making specific reference to it, following the guidance of the Upper Tribunal in **Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 79 (IAC)**, Judge Naphtine found that the Appellant had failed to establish the requisite dependency or membership of household to come within the requirements

of Regulation 8 of the Immigration (European Economic Area) Regulations 2006 and dismissed the appeal. No issue was taken with that, however Judge Napthine did not address human rights.

2. Not content with the Decision, by Notice dated 13 October 2014, the Appellant made application for permission to appeal to the Upper Tribunal on the basis that the Judge should have gone on consider whether the decision of the Respondent amounted to interference in the Appellant's Article 8 ECHR rights. On 28 November 2014 Judge of the First-tier Tribunal Levin granted permission thus the matter comes before me.
3. At the commencement of the hearing I indicated my view of the law relating to this appeal which was, in short, that there was no error because absent any decision to remove the Appellant, it could not be argued that there was any interference. Without conceding the point, Mr Paramjorthy told me that the appeal was brought very much on instructions and having heard the reasons which I had given for my preliminary view he would not want to make any submissions.
4. The majority of appeals come before the First-tier Tribunal in consequence of immigration decisions. They are set out in section 82(1) of the Nationality, Immigration and Asylum Act 2002. However the right to appeal an EEA decision is provided for by Regulation 26 of the 2006 Regulations. An EEA decision is defined in the general interpretation section (regulation 2) and does not include human rights. One also needs also to look to Regulation 26(7) which makes reference to the 2002 Act and Schedule 1 to the 2006 regulations which allows for appeals on human rights grounds.
5. However one should not lose sight of what is being appealed when an appeal is brought on human rights grounds. Article 8 provides as follows:
 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
6. In a case in which an Applicant seeks what is in essence declaratory relief, in this case a declaration that he is entitled to a Residence Card, which in the event is refused by the Secretary of State, one is bound to ask what right is being interfered with. The mere declaration interferes with none of the Appellants rights. It would be different, of course were it the case that a decision had been made to remove or deport the Appellant. Such a decision can arise in consequence of an EEC decision where a person is to be removed or deported in consequence of a decision arising from the

provisions of Regulations 19-21 or where a person has failed in their claim to a derivative right pursuant to Regulation 15A which has resulted in a decision to remove under the Immigration Act 1999. But in this type of appeal the decision to grant relief or not does not necessarily lead to removal and in actual fact no decision to remove was made in this case; the appellant was simply informed that he should leave voluntarily.

7. I am reinforced in my view that there can be no appeal on human rights grounds in a case such as this by the fact that the decision to issue a Residence Card pursuant to Regulation 17(4) is discretionary: the application **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340(IAC)**. In refusing the application the Secretary of State has refused to exercise her discretion on the basis of the application made i.e. the pursuit of a claimed EEA status. He is not left in limbo as he can make application to regularise his stay on human rights grounds, even outside the rules. What decision the Secretary of State then takes is a matter for her. If she decides to remove the Appellant then he may well have a right of appeal which he can exercise.
8. The guidance in the case of **JM v SSHD [2006] EWCA Civ 1402**, requires mention. In that case Laws LJ stated that once a human rights point was properly before the Tribunal it should deal with it. For the reasons I have stated however, on the facts of this case, the issue of human rights was not properly before the Tribunal. The Appellant had not applied for leave to remain on human rights grounds. No decision was made that was, without more, capable of interfering in his rights. In the circumstances the Judge did not err and the appeal to the Upper Tribunal falls to be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.

Signed

Date 10th February 2015

Deputy Upper Tribunal Judge Zucker