The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/15819/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination issued**
On March 6, 2015	**On March 9, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR YAKUB OLAITAN OLANIGAN
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

Appellant	Ms Everett (Home Office Presenting Officer)
Respondent	Mr Amin (Solicitor)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant is a citizen of citizen of Nigeria and applied on January 28, 2014 for a residence card as the former husband of an EEA national exercising treaty rights pursuant to Regulations

10(5), 10(6) and 15(1)(f) of the Immigration (European Economic Area) Regulations 2006.

3. The respondent considered his application but refused it on March 24, 2014. There was no consideration under article 8 ECHR and no removal direction was issued.

4. The appellant appealed on April 1, 2014, under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the 2006 Regulations.

5. The matter came before Judge of the First-tier Tribunal Fitzgibbon QC (hereinafter referred to as the "FtTJ") on November 14, 2014 and in a decision promulgated on November 27, 2014 he refused the appeal under the 2006 Regulations but allowed the appeal on article 8 human rights grounds.

6. The respondent lodged grounds of appeal on December 2, 2014 submitting the FtTJ had erred by dealing with the article 8 claim in circumstances where no application had been formally made.

7. On January 14, 2015 Judge of the First-tier Tribunal Grant-Hutchinson gave permission to appeal finding there were arguable grounds that the FtTJ had erred.

8. The matter came before me on the above date and the parties were represented as set out above. The appellant was in attendance.

ERROR OF LAW SUBMISSIONS

9. Ms Everett submitted the FtTJ had erred in two areas. Firstly, she submitted that the FtTJ had no jurisdiction to decide an article 8 appeal but even if I found he did, she submitted that the FtTJ erred because he failed to consider the appellant's failure to meet the Regulations or his precarious status when dealing with proportionality.

10. With regard to the first point Ms Everett argued no section 120 notice (one stop notice) had been issued and in such circumstances the grounds of appeal must be linked to the application before the Tribunal. This was an appeal on EEA issues and article 8 issues were not a part of the decision. This was an appeal under the 2006 Regulations and as the refusal letter pointed out if the appellant wished to argue human rights then he would have to submit an application on the correct form and with the correct fee. She submitted the FtTJ erred in dealing with the article 8 appeal.

11. With regard to the second ground of appeal Ms Everett submitted the FtTJ had regard to all the issues advanced on the

appellant's behalf but no regard had been had to the fact his status had been precarious ever since he and his wife separated in 2011. The FtTJ was wrong to find the appellant had an expectation he would be allowed to stay because he was only here for such period as his spouse exercised her treaty rights.

12. Mr Amin submitted there was no error on either ground and relied on the Rule 24 response filed (undated). The FtTJ explained in paragraph [12] of his determination why he was able to consider the article 8 appeal. He explained it was his duty to consider the article 8 appeal because Regulation 10 of the 2006 Regulations encouraged family life. Whilst there had not been a section 120 notice in this case the respondent was at risk of removal if his appeal failed and the Tribunal should consider all rights of appeal. With regard to the second ground of appeal Mr Amin submitted the FtTJ considered all the pertinent facts and reached a finding open to him. There was no error in law. _

13. I reserved my decision after hearing these submissions.

ERROR OF LAW ASSESSMENT

14. It is common ground that the Secretary of State did not serve with the Notice of Immigration Decision a notice pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002 which is a requirement for a person to state his reasons for wishing to enter or remain in the United Kingdom, any grounds on which he should be permitted to enter or remain in the United Kingdom, and any grounds on which he should not be removed from or required to leave the United Kingdom.

15. In the current appeal before me the FtTJ dealt with the issue of jurisdiction in paragraph [12] of his determination. He noted the appellant had not applied under article 8 but had done so in his grounds of appeal. The FtTJ then noted that the provisions of GEN 1.9 of Appendix FM of the Immigration Rules provided that for family life claims the requirement to make a valid application will not apply when article 8 is raised in an appeal. However, he noted that this only applied to family life claims and not private claims but he felt able to extend it to private life as this was consistent with the "one stop" policy and the decision of JM v SSHD [2006] EWCA Civ 1402. He also placed reliance on an unreported decision of Fateh Bouzidi (IA/05937/2012).

16. Dealing with the unreported decision I am satisfied no weight should have been placed on this because there is no evidence that there had been any compliance with Guidance Note 2011 No 2 and in particular paragraph [4] which states "…By the terms of the Senior President's Practice Direction 11 unreported

decisions of the Chamber may not be cited as authority without permission of the judge that will only be granted sparingly where there is good reason to do so."

17. I indicated to Mr Amin during his submissions that he needed to explain why he believed the FtTJ was entitled to deal with the article 8 claim and whether a section 120 notice was required.

18. I referred him to the Court of Appeal decision of Lamichhane v SSHD [2012] EWCA Civ 260 in which the Court posed the question, "May the Tribunal consider additional grounds advanced by an appellant if no section 120 notice has been served, and if so is it under a duty to do so?" The Court of Appeal answered that question as follows-

> "41. I conclude, therefore, that the Secretary of State's contentions as to the effect of section 85(2) are well-founded, and an appellant on whom no section 120 notice has been served may not raise before the Tribunal any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against. The answer to question above is No."

The Court went on to find at paragraph [43]-

> "In my view, section 85(2) is a statutory extension of the jurisdiction of the Tribunal in cases in which there has been a statement made by the appellant under section 120. It follows that the Tribunal has no jurisdiction to consider or to rule on 'any matter ... which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against' if there has been no section 120 notice, and therefore no statement under that section. This conclusion is consonant with my conclusion as to the effect of section 96(1) as it now is. If it were otherwise, an appellant might not know whether he could raise any new ground in his appeal until the hearing of his appeal, and the test in section 96(1)(c) becomes unworkable."

19. In this appeal Ms Everett argued that because no section 120 notice had been served he could not raise additional grounds of appeal and therefore the only ground of appeal open to him was under section 84(1)(d) of the 2002 Act which allowed a right of appeal where "the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom."

20. In response, Mr Amin submitted that following the decision of JM the Tribunal had to deal with any ground raised. However,

the decision of JM can perhaps be distinguished from Lamichhane because no section 120 notice was issued in the latter case whereas in the former case such a notice was issued.

21. I have also considered the effect of Section 86(2) of the Nationality, Immigration and Asylum Act 2002 because this states:

> "The Tribunal must determine –
>
> (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
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> (b) any matter which section 85 requires it to consider."

22. However, this presupposes the Tribunal has jurisdiction to hear such a ground of appeal. By way of analogy, the right of appeal on visit visas was removed except on human rights grounds. I pose the question, "Would the Tribunal consider grounds of appeal under the Immigration Rules if they were raised in the grounds of appeal?" The answer is of course no so why should the Tribunal consider grounds that cannot be advanced especially when the Court of Appeal has indicated grounds of appeal cannot be expanded beyond the application itself.

23. Ms Everett further submitted the appellant was at no risk of removal. He had applied for a residence card. This card, if granted, would confirm his legal status to remain. If his application failed there was no removal direction in place. In fact, the refusal letter advised the appellant where he could make an article 8 claim. Ms Everett submitted that even if an article 8 claim could be made there would be no interference because he was not at risk of removal. Mr Amin countered this argument and submitted the appellant had no basis to remain and therefore his right to remain would be at risk and there would be an interference with his right to remain here.

24. Having considered the arguments put forward today I am satisfied the FtTJ erred in considering the article 8 claim. The appellant only applied for a residence card. The refusal of that application did not carry a removal decision or any risk of removal. There was no section 120 notice issued and as the Court of Appeal made clear in Lamichhane without such a notice the Tribunal should only deal with grounds arising out of the application. Neither family nor private life flow from an application under Regulation 10 of the 2006 Regulations.

25. The arguments advanced by Ms Everett are persuasive on both levels. Firstly, I distinguish JM from this appeal because in that case there was a section 120 notice whereas in this appeal there is not. The Court of Appeal, whilst not dealing with a

human rights claim, made it clear that unless there is such a notice then the grounds of appeal are limited. Secondly, even if there is jurisdiction to consider article 8 applying the test set out by Lord Bingham in Razgar [2004] UKHL 00027 I am satisfied that there is no interference because there is nothing preventing the appellant continuing to live here.

26. I find that the Tribunal had no jurisdiction to deal with the article 8 grounds of appeal and I set aside that decision. There was no jurisdiction to hear the human rights appeal so I do not propose to address Ms Everett's second ground of appeal.

DECISION

27. There was a material error. There was no jurisdiction to hear the article 8 appeal and I set aside that decision. The effect of this decision is the appellant's appeal remains dismissed under the 2006 Regulations and it remains open to him to make an article 8 application to the appropriate body.

28.  The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

 As I have dismissed the appeal I reverse the original fee decision and I make no fee award

Signed: Dated:

Deputy Upper Tribunal Judge Alis