Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/45327/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2015	**On 9 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE

Appellant

and

NICHOLAS ROMULAR PUVIRANJAN
(No anonymity Order made)

Respondent

Representation:
For the Appellant: Ms J Isherwood Home Office Presenting Officer
For the Respondent: Ms A Heller, of counsel, instructed by Waran & Co Solicitors

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but for convenience I will refer to the original appellant herein, a citizen of Sri Lanka born on 3 June, 1951, as the appellant.
2. The appellant states he entered the United Kingdom in May 2007. He applied for asylum but this application was refused. He made two applications for a residence card under the Immigration (European Economic Area) Regulations 2006 in 2012 which were both refused. On 13 June, 2013 he made a further application as a dependent under the regulations which has resulted in the appeal proceedings herein.

The application was refused on 16 September, 2013. The appellant claimed to be dependent on his sister before he had come to the United Kingdom and that he was dependent on her in this country.

3. The appellant appealed and his appeal came before First-tier Judge Beach on 15 July, 2014. The judge found there was insufficient evidence to establish the claimed dependency and dismissed the appeal under the regulations. There has been no challenge to that aspect of the decision.

4. The judge went on to consider the appeal under article 8. She concluded that the appellant could not make out his case under the immigration rules and considered whether there were arguably good grounds for considering his claim outside the rules. She found that the appellant lived with his sister and her family in the United Kingdom and had two other sisters in this country. He had a close relationship with her and was financially dependent upon her. He had formed a private life in the UK and Article 8 was engaged.

5. In paragraph 45 of decision of the judge considered whether the respondent's decision was proportionate. She accepted that it was likely that the appellant's sister would be able to provide the appellant with some financial support in Sri Lanka. She noted the appellant had not lived in Sri Lanka for a considerable period of time. It was unclear when the appellant had left Sri Lanka (1977 or 1997) but even taking the later date he had been out of his home country for 17 years and was now aged 63. While there might be other extended family members in Sri Lanka this did not mean that they were in a position to assist the appellant. He would be at some disadvantage on return and would have no housing, employment or family support. The decision of the respondent was not proportionate. The judge allowed the appeal on article 8 grounds.

6. The respondent appealed the decision. In the initial grounds it was argued that the judge had erred in concluding as she did. It was argued that the appellant had social and cultural ties with Sri Lanka and could re-establish himself with the financial assistance provided by his sister. The judge had failed to take into account the effect of section 19 of the Immigration Act 2014, the determination being promulgated on 11 August, 2014.

7. These initial grounds have been overtaken by subsequent developments. On 20 November, 2014 the Secretary of State applied to vary the grounds of appeal arguing that the First-tier Tribunal had no jurisdiction to determine the appeal on article 8 grounds, relying on Lamichane v Secretary of State [2012] EWCA Civ 260 at paragraph 39 where Lord Justice Stanley Burnton stated as follows:

> “I can now turn to section 85(2). The reference to "a statement under section 120" is a statement made in response to a notice served under that section. There can be no such statement if no section 120 notice has been served. It is implicit in section 85(2) that in the absence of such a statement the Tribunal shall not consider "any matter raised in

> the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against". Given the conclusion I have reached on section 96(1), this does disadvantage the appellant, in that if his leave has expired in order to rely on his new ground he must either stay in this country unlawfully, or make his application from outside this country. Against that, if he stays in this country and the Secretary of State serves removal directions, he will have a right of appeal under section 82(2)(g) against the decision of the Secretary of State on his new ground."

8. The hearing of the appeal was adjourned by agreement between the parties pending consideration being given to the issue by a Presidential panel of the Upper Tribunal.

9. As it turned out, the determination was published on the day of the hearing before me. Both parties had had sight of the decision and were content to proceed with the hearing. This decision is Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC), the headnote of which reads as follows:

> 'Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.'

10. Ms Isherwood relied on this decision and submitted that the First-tier Tribunal did not have jurisdiction to determine the Article 8 appeal as there had been no notice under s 120. There had been no challenge to the judge's decision on the appeal under the EEA Regulations.

11. Ms Heller acknowledged that the points she had raised in reply to the respondent's amended grounds were all dealt with by the panel and she accepted that the judge had not dealt with the amendments made by the 2014 Act. There was a material error of law. She accepted I was effectively bound by the Tribunal's decision.

12. I find as accepted the determination was materially flawed in law. I have no alternative but to allow the respondent's appeal on the basis that the First-tier Tribunal had no jurisdiction to deal with Article 8. As was pointed out by Ms Heller, however, by reference to what was said in paragraph 74 of Amirteymour, it is open to the appellant to make a human rights application if so advised.

13. The appeal of the Secretary of State is allowed.

Fee Award

The First-tier Judge made no fee award. In the circumstances I make no award.

I make no anonymity order

Signed

Upper Tribunal Judge Warr

25 August 2015