Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA037382015

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 13th April 2016	**On 23rd May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS ATTIA FATIMA USMAN RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms Ashika Fijiwala (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Roopnarine-Davies, promulgated on 26th August 2015, following a hearing at Taylor House on 3rd August 2015. In the determination, the judge allowed the appeal of the Appellant "to the limited extent that the Respondent's decision was not in accordance with the law, the application

remains outstanding with the Respondent and the Appellant awaits a lawful decision."

Grounds of Application

2. The grounds of application state that, to the extent that the Appellant's application was for a derivative residence card under EEA law, the judge erred in law in allowing the appeal to the extent that the Secretary of State had failed to have regard to Article 8 and Section 55 BCIA 2009, because these issues were not before the judge, in circumstances where no Section 120 notice had been served.

3. On 18th January 2016, permission to appeal was granted.

Submissions

4. At the hearing before me on 13th April 2016, there was no attendance by the Appellant, and no representation by anyone on her behalf. Nor was there any explanation given for this non-attendance at what was a matter listed before this Tribunal by way of oral hearing. On the other hand, Ms Ashika Fijiwala, appeared as Senior Home Office Presenting Officer, on behalf of the Respondent Secretary of State. Ms Fijiwala submitted that the judge was wrong to have allowed the appeal on the limited basis that she did quite simply because the Appellant had appealed the Respondent's refusal letter on 10th January 2015 to issue a derivative residence card under Regulation 15A(4a), 15A(7), and 18(a) of the Immigration (European Economic Area) Regulations 2006.

5. The Respondent Secretary of State had determined that there was insufficient evidence to show that the Appellant's British citizen children would be unable to remain in the UK or the EEA if she was forced to leave. There was no human rights claim before the Tribunal to be determined and no Section 170 notice issued. Ms Fijiwala directed my attention to the case of **Amirteymour [2015] UKUT 00466** where the Tribunal determined that, 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 the removal in an appeal under the EEA Regulations.

6. That decision had subsequently been upheld in **TY (Sri Lanka) [2015] EWCA Civ 1233**, where the Court of Appeal heard argument that, "by reason of Schedules 1 and 2 to the EEA Regulations the Appellant had a right to advance his asylum and human rights claims in the context of his appeal against the EEA decision" but Lord Justice Jackson held that,

> "I do not think that that is the effect of the statutory provisions. The Appellant would only have such a right if the Secretary of State had served a One-Stop Notice pursuant to Section 120 of the 2002 Act and paragraph 4(8) of Schedule 2 to the EEA Regulations" (see paragraph 26).

7. Ms Fijiwala further submitted that no removal directions had been issued against the Appellant.

Error of Law

8. I am satisfied that the making of the decision by the judge involved the making on an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision and re-make the decision (see Section 12(2) of **TCEA [2007]**). My reasons are as follows. Given what has been established in **Amirteymour [2015] UKUT 00466** and in **TY (Sri Lanka) [2015] EWCA Civ 1233**, the appeal could not have been allowed on the basis of a human rights challenge in circumstances where no Section 120 of the 2002 Act notice had been given and the appeal could not have been allowed under Section 55 of the BCIA either. I note that there are no removal directions in this case.

Re-Making the Decision

9. I have re-made the decision on the basis of the findings of the original judge, the evidence before her, and the submissions I have heard today. I dismiss this appeal for the reasons already given by the judge in the determination. First, the judge held that the Appellant's husband, being a British citizen husband, "shares equal responsibility for the children," and he would be in a position to care in practice for the children. The judge held that, "requiring the Appellant to leave the UK would not lead to a denial of the genuine enjoyment of the children's rights as a British citizen" (see paragraph 6). Second, the main issue before the Tribunal being the EEA Regulations, the judge held that, "the appeal fails under the 2006 Regulations" (see paragraph 10). It is, of course, open to the Appellant to make a fresh application.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st May 2016