



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07879/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2019

Decision & Reasons Promulgated
On 26 November 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS LOVELY UWADIAE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr A Ariyo instructed by Apex Solicitors

DECISION AND REASONS

1. The Secretary of State appealed against the decision of the First-tier Tribunal promulgated on 25 June 2019. I shall refer to the parties as they were described before the First-tier Tribunal.
2. The appellant had appealed against the Secretary of State's decision taken to remove her from the United Kingdom in accordance with Section 10 of the Immigration and Asylum Act 1999 which applied by virtue of Regulations 23(6)(a)/23(6)(c) pursuant to Regulation 26(3) and 32(2) of the EEA Regulations. The First-tier Tribunal however had allowed the appellant's appeal on human rights grounds.

3. At the outset of the decision the First-tier Tribunal Judge stated:-

“The respondent’s decision notice makes clear that, inter alia, that the appellant can appeal the decision on the grounds that it is unlawful because it is incompatible with the appellant’s rights under the ECHR; the decision breaches the appellant’s rights as a member of an EEA national and that the appellant’s removal would breach the UK’s obligations under the Refugee Convention or would be incompatible with the appellant’s rights under the ECHR”.

4. The judge identified that the appellant’s notice of appeal indicated that the appellant appealed under each of the above heads, but neither party’s representative was in a position to identify what it was that the appellant was appealing or the grounds that were being advanced, let alone clearly identify the issues that he was being asked to resolve.

5. The judge stated:-

“Nevertheless, I have determined this appeal in accordance with the avenues of appeal that were available to the appellant and the evidence which was before me. I allow this appeal on the basis that the appellant’s removal would be a breach of the UK’s obligations under Article 8 of the ECHR. It follows that I do not need to consider the appellant’s other avenues of appeal”.

6. The Secretary of State contended that the judge had made a material misdirection on law in considering and allowing the appeal on human rights grounds because the appeal was made under the 2016 EEA Regulations and the judge therefore did not have jurisdiction to determine the appeal on the basis that she did.

7. In addition, it was submitted that the judge had failed to adhere to the guidance provided by the Upper Tribunal in **Quaidoo (new matter: procedure/process) [2018] UKUT 00087 (IAC)** when determining the new human rights issue raised by the appellant and the judge did not appear to take into account that no consent was provided by the Secretary of State to determine the new matters raised.

8. A detailed skeleton argument was submitted by Ms Uwadiae’s representatives. It submitted that the respondent’s decision was factually wrong because the appellant had appealed against the decision to remove her from the United Kingdom in accordance with Section 10 of the Immigration and Asylum Act 1999. The notice of immigration decision informed her that she was a person liable to removal because her right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 had ceased. The matter of the appellant’s appeal against the refusal to recognise her rights of residence had been dealt with by the First-tier Tribunal in a previous determination on 5 December 2017 prior to the issue of the notice of immigration decision taken.

9. It was contended that the decision to remove on 4th December 2018 was the substance of the appellant’s appeal and that which the appellant was

challenging that decision on human rights grounds. Mr Ariyo relied on the fact that prior to the decision under challenge to remove the appellant the respondent had undertaken an assessment of the factors in relation to her private and family life and that further to Regulation 36 of the EEA Regulations the appellant may appeal against an EEA decision as defined by Regulation 2(1) of the EEA Regulations. It was submitted that the appellant was still entitled to rely on human rights grounds and the Tribunal did have jurisdiction to consider those grounds. Mr Ariyo referred to paragraph 34 of the case of **Amirteymour [2017] EWCA Civ 353**.

10. Mr Clarke pointed out that the First-tier Tribunal had no jurisdiction to hear this appeal in the way that it did and as such the second ground of appeal in relation to the new matter was in effect redundant. It was open to the appellant to make a further human rights claim.

Analysis

11. As set out in **Munday (EEA decision: grounds of appeal) [2019] UKUT 00091 (IAC)**:-

“(1) In an appeal against an EEA decision under the Immigration (EEA) Regulations 2016, the sole ground of appeal is that the decision breaches the appellant’s rights under the EU Treaties in respect of entry to and residence in the UK (sched 2, para 1).

(2) Consequently, in such an appeal an appellant may **not** rely on human rights grounds in the absence of a s.120 notice and statement of additional grounds in which reliance is placed upon human rights or there has been an additional decision to refuse a human rights claim”.

12. The notice of immigration decision was clearly taken by virtue of Regulation 23(6)(a), 23(6)(c) pursuant to Regulation 26(3) and Regulation 32(2) of the EEA Regulations 2016:-

“23. (6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –

(a) that person does not have or ceases to have a right to reside under these Regulations;

...

(c) the Secretary of State has decided that the person’s removal is justified on grounds of misuse of rights under regulation 26(3).

...

26. (3) The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so.

...

32. (2) Where a decision is taken to remove a person under regulation 23(6)(a) or (c), the person is to be treated as if the person were a person to whom section 10(1) of the 1999 Act(21) applies, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly”.

13. It is clear that the decision was taken under the relevant Regulations and there is confirmation in the authority of Munday that the grounds of appeal are restricted. Further to Regulation 26(3):-

“The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so”.

That is the proportionality assessment that the Tribunal should have undertaken.

14. With regard to the consideration of Amirteymour, Upper Tribunal Judge Grubb in Munday sets out at paragraphs 80 and 81 as follows:-

“80. At the time of Amirteymour, Schedule 1 to the 2006 Regulations read across into appeals under the 2006 Regulations the more extensive grounds of appeal found in the (then) s.84(1) of the NIA Act 2002 with the exception of paras (a) and (f). These grounds included, therefore, that the decision was unlawful as it breached the individual rights under the ECHR or that his removal in consequence of the decision would breach his rights under the ECHR. Despite, therefore, the broader range of grounds then read across from s.84(1) (with the exception of paras (a) and (f) concerned with claims based upon the Immigration Rules) the Court of Appeal, nevertheless, interpreted the legislative structure when an appeal was brought against an ‘EEA decision’ as not permitting reliance upon Art 8 of the ECHR or indeed any other human rights ground. In the light of the amended terms of Schedule 2, para 1 to the 2016 Regulations, in the absence of a s.120 notice and statement in response, it is, in my judgment, impossible to see how an individual in an appeal under those Regulations can rely upon his or her human rights. The necessary ground is simply not part of the legislative framework applicable to that individual’s appeal.

81. That the ‘sole’ ground of appeal under the 2016 Regulations against an ‘EEA decision’ is the EU ground, appears to mean that, **even when there is an EEA removal decision, an individual cannot rely upon any of the ‘other’ grounds in s.84 in the absence of a s.120 notice.** To that extent, the more restrictive wording of para 1 to Sched 2, which was not in effect at the time of Amirteymour, may eliminate one of the two situations envisaged by Beatson LJ (under the earlier unamended provisions of the 2006 Regulations) where an individual was not restricted to the EU ground in an appeal against an ‘EEA decision’.”

15. Although Mr Ariyo submitted that the Secretary of State had considered human rights in her GCID Notes there was clearly no human rights claim made and thus no decision and, as pointed out in **Munday**, an appeal against an EEA decision can only be brought and maintained on the basis of the decision being contrary to EU law. The grounds so limited do not contemplate a right of appeal based upon the decision being contrary to Section 6 of the Human Rights Act 1998.
16. I realise that the notice of rights of appeal given to the appellant did not appear to reflect the provisions which were amended in the Nationality, Immigration and Asylum Act 2002 and which came into effect on 20 October 2014 and which significantly changed the appeal provisions that were previously contained within Part 5 of the Act. Section 82 now sets out the rights of appeal against three decisions:-
 - (1) the refusal of a protection claim – Section 82(1)(a);
 - (2) the refusal of human rights claim – Section 82(1)(b); and
 - (3) a decision to revoke a person’s protection status – Section 82(1)(c).
17. The fact is that the appellant’s right to appeal stemmed from Regulation 36 of the 2016 Regulations which incorporate certain of the appeal provisions in Part 5 of the Nationality, Immigration and Asylum Act 2002. By virtue of Regulation 36(10) the provisions in the Nationality, Immigration and Asylum Act 2002 referred to in Schedule 2 to the 2016 Regulations have an effect in any appeal under the 2016 Regulations.
18. It is important to note that Section 82(1)(b) creates a right of appeal against a decision to refuse a human rights claim. The right of appeal **only** arises if a human rights claim has been refused and that pre-supposes that a human rights claim has been made. There is no evidence that there was any human rights claim made in this particular appeal. I accept that there was a previous decision made by the respondent on 13 January 2016 refusing to issue a permanent residence card and that decision was considered by the First-tier Tribunal on 8 December 2017, but at no point has the appellant submitted any representations in response to a Section 120 notice or made a human rights claim.
19. As pointed out at the hearing, in this instance there is no right of appeal against a removal decision outside the EEA Regulations and specifically Regulation 32(2) makes particular reference to the application of Section 10(1) of the 1999 Act in accordance with Regulation 23(6)(a) or (c). It would appear however that the decision is not caught by Regulation 37 such that the appellant has an in country right of appeal.
20. The judge adopted an incorrect approach to the appeal, understandably perhaps because of the defect in the notice of immigration decision and the notice of appeal, but nonetheless, the appropriate findings under the correct

provisions should be made. I set aside the decision and remit the matter to the First-tier Tribunal for consideration under the Immigration (European Economic Area) Regulations 2016 rather than in relation to Article 8 of the European Convention on Human Rights.

21. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.
22. No anonymity direction is made.

Signed *Helen Rimmington*

Date 26th November 2019

Upper Tribunal Judge Rimmington