Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02351/2014
IA/02368/2014
IA/02373/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 September 2014	**On 8 October 2014**

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE KEBEDE

Between

EM
SM
JM
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Khan, Counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 19 October 2012 the principal appellant. EM, made an application for an EAA residence card as the primary carer of an EEA national child who is exercising free movement rights in the UK as a self-sufficient person. EM and JM are the mother and stepfather of RF, who is a Portuguese national and has lived with them in the UK since 2006. They lived together as one family together with their son, SM. EM is his primary carer. His father, a Portuguese national, also lives in the UK and we are told that RF has strong ties with him.

2. The application was made under the Immigration (European Economic Area) Regulations 2006, specifically Regulation 15A, but the application also raised the appellant's Article 8 rights. The application was refused by letter dated 16 December 2013. In that refusal letter the respondent noted that the appellants have stated that they wished to rely on family and private life established in the UK under Article 8 ECHR. The letter then went on to point out that no valid application for Article 8 consideration had been made and consideration had not been given as to whether or not their removal from the UK would breach Article 8 of the ECHR. That decision was appealed and came before Judge Caswell in the First-tier Tribunal.

3. The grounds of appeal before the First-tier Tribunal included an additional ground to the effect that the respondent had failed to consider Article 8 of the European Convention on Human Rights and the appellant wished the Tribunal to consider the family ties involved in this matter in order to reach a reasonable decision akin to the five step process in Razgar.

4. Judge Caswell came to the conclusion that the application under Regulation 15A had been correctly refused and refused the appeal on that ground.

5. In respect of Article 8 she considered the Article 8 ground but concluded that no Article 8 appeal had properly been made before her and she refused that part of the appeal as well.

6. When the matter came before us we pointed out to Mr Bramble that the Rule 24 response included the following. “The FtTJ declined to determine the appeal in respect of Article 8. If it was raised as a ground of appeal then the FtTJ ought to have considered Article 8. However it may be that it would not have made any difference to the outcome of the appeal.” We asked Mr Bramble whether or not that meant that he was conceding that there had been an error of law. He informed us that he had now departed from what was contained in the Rule 24 response. In doing so he referred us to two cases, R (on the application of) Weiss v Secretary of State for the Home Department [201] EWCA Civ 803, and Rabindrer Jung Lamichhame v Secretary of State for the Home Department [2012] EWCA Civ 260. He pointed out that no one-stop notice had been served by the Secretary of

State under Section 120. These authorities, he said, were effectively binding upon us.

7. For the appellants Mr Khan conceded that on the face of it Weiss was against him but he went on to submit that the Article 8 ground had been raised by the appellants in both the application and the grounds of appeal. As we understood it he was submitting that in effect this ought to be seen as equivelant in some way to the Section 120 process.

8. Secondly, he submitted, that in any event, given that there was a young child involved here the interests of justice demanded that we consider the Article 8 issue. He suggested that it ought to be looked at by us or possibly, and preferably, remitted back to the Secretary of State to consider the Article 8 issues.

9. We note that in Weiss at paragraph 9 of the judgment of Lord Justice Longmore in dealing with a similar issue said this:

> "The first difficulty is that no application for indefinite leave to remain on the grounds of continuous residence has ever been made. There is a prescribed form for such applications and the Regulation which I have set out in that prescribed form have been made under Section 31A of the Immigration Act 1971 which provides (1) if a form is prescribed for a particular kind of application under this Act any application of that kind must be made in the prescribed form. (2) If procedural or other steps are prescribed in relation to a particular kind of application under this Act these steps must be taken in respect of any application of that kind. (3) Prescribed means prescribed in Regulations made by the Secretary of State."

10. It is clear that there was in this case no application under Article 8 to the Secretary of State. Accordingly the procedural steps have not been complied with.

11. In Lamichhame at paragraph 41 Lord Justice Stanley Brunton said:

> "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."

12. We accept that these authorities are binding upon us and accordingly we are of the view that the decision of First-tier Tribunal Judge Caswell must be upheld. In any event, we consider that the impact of Article 8 has to be seen in the context of the decision which was being made. This was a refusal of an application for a residence card. It was not a decision about a right to remain. That point is made in the decision letter where the

respondent says: “Additionally it is pointed out that a decision not to issue a residence card does not require you to leave the United Kingdom if you can otherwise demonstrate that you have a right to reside under the Regulations.”

13. Accordingly we shall refuse the appeal. It remains open to the appellants now to make the appropriate application under Article 8 to the Secretary of State should they so wish.

LORD BOYD OF DUNCANSBY
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber