Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06125/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 21st December 2018	**On 31st January 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Karnik, instructed by R & A solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as SE. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. SE, a Nigerian citizen, appealed a decision of the SSHD refusing, for reasons set out in a decision dated 14th June 2017, to issue him with an EEA family permit as the adopted child of OE, a Spanish national and his

wife BE, a British Citizen. It is accepted by the respondent that OE is exercising Treaty Rights and has a permanent right of residence in the UK; that SE was adopted in accordance with Nigerian law on 15th September 2015; that Nugent Adoption approved SE's adoptive parents as suitable for intercountry adoption for him and the Department of Education confirmed that the parents had been assessed and approved as eligible and suitable to be adoptive parents in accordance with Part 4 Adoption Agencies Regulations 2005.

2. The family permit was refused because an adoption under Nigerian law is not recognised under the Adoption (Recognition of Overseas Adoptions (Order) 2013 and so the appellant was not a family member for EEA purposes.

3. The appeal was dismissed by First-tier Tribunal Judge Mark Davies for reasons set out in a decision promulgated on 4th April 2018 which, in summary, found that because the adoption of SE in Nigeria was not recognised as meeting the requirements of the Adoption (Recognition of Overseas Adoptions) Order 2013, he could not meet the requirements of regulation 7 Immigration (European Economic Area) Regulations 2016. Although pleaded – albeit badly - the First-tier Tribunal judge refused to hear argument that the decision to refuse a permit breached Article 8, stating that Article 8 was not engaged.

4. Permission to appeal was sought on the following grounds:

> "The Immigration Judge erred in law by failing to consider Article 8 during the hearing.
>
> The Immigration Judge did not consider the fact that the appellant in this case had completed fully the adoption process both in Nigeria and here in the United Kingdom and as such qualifies to be considered under Article 8 as well as under the regulations."

5. Permission to appeal was granted by UTJ Kebede on the grounds that it was arguable the judge had failed to consider Article 8 which had been pleaded in the grounds of appeal to the First-tier Tribunal and was considered by the ECM. She did not limit the grounds of challenge.

6. Before me, Mr Karnik sought to expand the grounds of appeal to include a challenge to the refusal under the EEA regulations, in so far as permission may not have been granted, and for an extension of time for the ground to be argued: *SM (Algeria) v ECO* [2018] UKSC 9 had not been brought to the attention of the First-tier Tribunal judge; it is not *acte clair* that a child in the appellant's position is not to be regarded as a direct descendant of his adoptive parents and thus it was wrong for the First-tier Tribunal to reach the finding that the child was not a direct descendant for the purposes of the EEA Regulations.

7. Mr Tan opposed the amendment/expansion: first any such application was well out of time and secondly the appellant had had ample time in which to formulate the grounds more precisely. He however confirmed that if I were

to grant the amendment/expansion then he did not require an adjournment to enable him to make submissions.

8. I allowed the amendment/expansion of the grounds. *SM* should have been brought to the attention of the First-tier Tribunal judge; although UTJ Kebede did not specifically grant permission on the Regulations decision, it was pleaded (albeit sparsely) in the application for permission and she did not limit the grounds.

Error of Law

9. The respondent, at the date of the appeal, did not have copies of the documents that had been submitted with the application. A copy of the covering letter of application for the residence permit was not before the First-tier Tribunal Judge (although a copy was provided to me). I did not take that letter into account in deciding whether there was a material error of law.

10. The grounds of appeal to the First-tier Tribunal were:

> "The decision is not in accordance with the Immigration Rules. The Rules do not exclude Nigeria as a country where adoption should not be accepted. The Entry Clearance Officer has failed to apply the Immigration Rules appropriately on this occasion especially when the previous refusal is considered alongside."

11. I had a copy of the record of proceedings made by the First-tier Tribunal judge, which is stated in bold in capital letters to have been typed verbatim onto a laptop computer in the hearing room. I read relevant extracts from the record to both parties who did not object or disagree with the contents (I should note that neither Mr Karnik nor Mr Tan appeared below, but the notes accorded with whatever record they each had).

12. According to the Record, the First-tier Tribunal judge:

- Informed the appellant's representative that he cannot argue an Article 8 appeal under EEA Regulations;
- That he, the judge, had 'totally failed' to appreciate the appellant's case;
- That the appellant's representative 'totally fails' to appreciate that he cannot argue Article 8;
- The respondent in submissions relied upon the Entry Clearance Officer's decision and the Entry Clearance Manager's decision, that as an EEA decision the Immigration Rules do not apply;
- The appellant's representative relied upon his handwritten skeleton argument, prepared on the day of the hearing which said, *inter alia*, the sponsors had complied with the advice of adoption agencies, the ECO appeared to have considered and been satisfied that the sponsor/appellant met paragraph 316A Immigration Rules; the

appellant relies upon paragraph 309B of the Rules and s83 Adoption and Children Act 2002 and thus regulation 7 is engaged.

13. The First-tier Tribunal judge did not permit the appellant's representative to make submissions regarding Article 8 even though (albeit in badly formulated grounds of appeal) the Immigration Rules were raised as an issue and, as per Sales LJ in *Amirteymour* [2017] EWCA Civ 353[1] [33] "the Immigration Rules have always covered many if not most cases in which a right to enter or remain could be established under Article 8… and a common way in which a claim based on Article 8 arises is as an adjunct to a claim based on the Immigration Rules themselves." Upon receipt of the grounds, the ECM considered and reviewed the decision of the ECO under Article 8. The First-tier Tribunal judge gave no reasons for refusing to hear the Article 8 appeal.

14. It was not argued that the First-tier Tribunal judge had erred in concluding that adoptions completed under Nigerian law were recognised. As First-tier Tribunal Judge Davies said, the appellant's 'adoptive' parents appear to have been misinformed that his Nigerian adoption order was recognised under Adoption (Recognition of Overseas Adoptions) (Order) 2013.

15. It was accepted that the appellant had not made a paid application for entry clearance to be issued in accordance with the Immigration Rules. The decision the subject of appeal states

> "You have applied for an EEA family permit to accompany [OE] to the United Kingdom as his adoptive child. I have considered your application under regulation 7 of the Immigration (European Economic Area) Regulations 2016.
>
> …
>
> You are entitled to appeal against this decision under regulation 36 of the Immigration (European Economic Area) regulations 2016 …
>
> The appeal must be brought on the ground t hath the decision breaches your rights under the EU Treaties in relation to entry to, or residence in, the United Kingdom …"

Ground 1- was there a human rights appeal that was not considered?

16. Mr Tan submitted that *Amirteymour* was a complete answer: in an appeal under the EEA Regulations it was not possible to introduce a new human rights claim in an appeal before the First-tier Tribunal; if an applicant wished to make a claim for leave to remain based on human rights a relevant application has to be made to the SSHD to rely upon those rights.

17. Mr Amirteymour had, whilst in the UK, applied for a derivative residence card as confirmation of his right of residence under EU law as a primary carer. He also sought to rely on Article 8 but had not made an application under the relevant immigration rules (Appendix FM). In refusing the

[1] A concept established in numerous earlier as well as subsequent cases

derivative residence card, the SSHD had observed that Mr Amirteymour had not made an application under the relevant Immigration Rules, that refusal of the derivative residence card did not require him to leave, that if he had no alternative basis for staying in the UK, he should make arrangements to leave. No removal directions were made. The Upper Tribunal considered the rights of appeal under Regulation 26 of the EEA regulations; whether a human rights challenge to removal could be brought in such an appeal when no s120 notice had been served and where no EEA decision to remove had been made. The Court of Appeal confirmed that the Upper Tribunal was correct in concluding that in an appeal under regulation 26 of the EEA Regulations against a decision to refuse to issue a derivative residence card where no removal directions have been issued and no s120 notice given, the Tribunal has no jurisdiction to entertain a case based on the Immigration Rules or on Article 8 outside the Immigration Rules (paragraph 21).

18. Paragraph 22 of *Amirteymour* refers to the difference between an application for a derivative residence card which is based upon directly effective rights under EU law and an application for leave to enter or remain under the Immigration Rules and/or Article 8. Sales LJ held

> "27. In my judgment, the natural meaning of the phrase "may appeal under these Regulations against an EEA decision", as used in regulation 26(1), is that the appeal rights thereby created is in respect of an EEA decision and is to proceed by reference to grounds of claim and grounds of appeal of a kind recognised as creating entitlements under the Regulations themselves (recognising, as they do, entitlements under EU law). This interpretation means that it is not within the jurisdiction of the FTT in this case to allow the appellant to introduce into his appeal under regulation 26 a claim directed to the exercise of the Secretary of State's discretionary powers under the 1971 Act and based upon Article 8.
>
> 28. … It might arguably be acceptable to introduce on appeal against an EEA decision, subject to the Tribunal's procedural rules and the overriding objective, some new matter going to an entitlement under EU law and the EEA Regulations, since those were the Regulations which the Secretary of State had been asked to apply when making her decision under appeal, and hence it might be within the jurisdiction of the Tribunal under regulation 26(1) to allow this (although I express no concluded view about this). But it would be a recipe for procedural chaos and potentially unfair to the Secretary of State to allow an applicant who applies to the Secretary of State under EEA Regulations to change his case completely on an appeal under regulation 26 so as to rely on a new claim which does not depend upon any entitlement under the regulations at all, as has happened in the present case. That would subvert to an unacceptable degree the intended decision making process, which is supposed to begin with the Secretary of State first having an opportunity to decide whether such a case (here, the appellant's case based on Article 8) is made out or not, followed by an appeal in respect of that "immigration decision.

> 29. … Regulation 26(2) to (3A) therefore indicate that the jurisdiction of the Tribunal under regulation 26(1) was indeed confined to arguments based on the EEA Regulations.
>
> 30. Where a person applies to the Secretary of State for some right or benefit under the EEA regulations based upon entitlements under EU law, such as a derivative residence card, if the Secretary of State made reference in her decision to Article 8 (say, by mistake or because the applicant had referred to article 8 in the course of filling in his application form under regulation 18A) as well as to his entitlements under the EEA Regulations, that would be irrelevant surplusage. The Article 8 section of the decision in such a case would not form part of the relevant "EEA decision" and there would be no right of appeal under regulation 26 in respect of that section of the decision. This being so, it would be very odd to infer an intention on the part of the drafter of regulation 26(1) that the Tribunal should nonetheless have jurisdiction to exercise its own discretion to allow an appellant to introduce such a distinct Article 8 claim at a later stage, on the appeal to the Tribunal….(….if the Secretary of State did happen to address Article 8 arguments in her decision letter in such a case, it might be possible to say that the Secretary of State had waived the requirement for an application form to be completed in respect of her exercise of her residual discretion under the 1971 Act by reference to Article 8 and that she had then made two decisions, an "EEA decision" in relation to entitlements under the EEA Regulations and an "immigration decision" within the scope of s82(1) of the 2002 Act, with distinct rights of appeal under regulation 26(1) and under s82(1) respectively …"

19. Mr Karnik submitted that *JM* [2006] EWCA Civ 1402 established that even where article 8 was not raised in an application but was subsequently raised during the course of an appeal then once the human rights point was properly before the Tribunal, the Tribunal was obliged to deal with it. *JM* was not an appeal brought under the EEA Regulations but was an appeal (with a rather convoluted background) that was initially brought against the refusal of a protection claim. *JM* was decided (as was *Amirteymour*) when the "old" statutory appeal regime which enabled an appeal to be brought against an immigration decision, defined as including a decision to remove a person from the UK. The grounds upon which such a decision could be appealed included that the decision was unlawful under s6 of the Human Rights Act 1998 as being incompatible with the person's Convention Rights. *Amirteymour* (in [43]) noted that in *JM* a s120 notice had been served: it was held that *JM* was entitled to raise human rights arguments regarding his right to remain in the UK.

20. Mr Karnik also submitted that *TY* (Sri Lanka) [2015] EWCA Civ 1233 was not authority for the proposition that a public authority can decline to consider article 8 where it has been raised in relation to a decision which potentially interferes with that right. *TY* considered whether the Tribunal had jurisdiction to consider a claim for asylum/leave to remain on human

rights grounds in an appeal brought against a decision to refuse a derivative right of residence under the EEA Regulations[2]. Jackson LJ held:

> "27. Since there is no section 120 one stop notice, the appellant is confined to the subject matter of the original decision. That is a decision that the appellant does not fulfil the requirements of the EEA Regulations. That decision was unquestionably correct. However strong or weak the appellant's claims may be under the provisions of the Refugee Convention and ECHR, those provisions could not entitle the appellant to receive a residence card under the EEA Regulations.
>
> …
>
> 34. … the crucial feature of JM was that the Secretary of State served a section 120 one stop notice: see last sentence of [23]. That has two consequences. First, if M's appeal to the AIT failed the Secretary of State would be able to proceed to removal without giving M any opportunity to raise human rights arguments or to appeal on human rights grounds. Secondly, M was fully entitled to advance all his arguments under ECHR and the AIT was obliged to consider them. The AIT filed to do so, because it misconstrued s84(1)(g) of the 2002 Act. Accordingly, the Court of Appeal allowed M's appeal. The present case differs from JM in a crucial respect, namely that there was no one stop notice under s120.
>
> 35. It is impossible to say that the Secretary of State's decision to withhold a residence card (a decision which is correct under the EEA Regulations) will or could cause the UK to be in breach of the Refugee Convention or ECHR. The UK will only be in breach of those Conventions if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or the tribunals incorrectly reject."

21. Mr Karnik submitted that an "entry clearance" case is fundamentally different to a case where a person is exercising or seeking to exercise EU rights whilst in the UK. He submits that *JM* established that when a human rights issue is before an authority, the authority is seized of that issue and is required to determine it. He pursues the submission (which was not pursued by Ms Jegarajah in *TY*) that, through Recital 31 of Directive 2004/38[3] and, for example *Dereci (European Citizenship*) [2011] EUECJ C-256/11, there is an obligation under Community law to give effect to the right to respect for family life. He relied upon *Akrich (Free movement of persons)* [2003] EUECJ C-109/01 [61]:

> "…
>
> Where a national of a member state married to a national of a non-member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first

[2] The statutory appeal framework in TY was the "old" framework.

[3] "This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union"

> mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must non the less have regard to the right to respect for family life under Article 8 of the Convention, provided that the marriage is genuine."

22. Mr Akrich was subject to a deportation order signed in the UK. He and his wife, a British Citizen, had resided in Ireland where she had exercised Treaty Rights. She then returned to the UK. Mr Akrich applied to revoke the deportation order and for entry clearance to the UK. After an interview, the Secretary of State refused to revoke the deportation order and, refused the application for entry clearance on the grounds that the application did not fall within Case C-370/90 *Singh* [1992] ECR I-4625 (Surinder Singh: 'exercise of EU rights for 6 months in a different member state and then return'). Mr Akrich appealed both decisions. The Tribunal referred the following to the ECJ:

> "Where a national of a Member State is married to a third country national who does not qualify under national legislation to enter or reside in that Member State, and moves to another Member State with the non-national spouse, intending to exercise Community law rights when returning to the Member State of nationality together with the non-national spouse:
>
> (1) Is the Member State of nationality entitled to regard the intention of the couple, when moving to the other Member State, to claim the benefit of Community law rights when returning to the Member State of nationality, notwithstanding the non-national spouse's lack of qualification under national legislation, as a reliance on Community law in order to evade the application of national legislation: and
>
> (2) If so, is the Member State of nationality entitled to refuse:
>
> (a) To revoke any preliminary obstacle to the entry of the non-national spouse into that Member State (on the facts of this case an outstanding deportation order); and
>
> (b) To accord the non-national spouse a right of entry into its territory."

23. It is useful to consider the discussion in *Akrich* which led to the conclusion relied upon by Mr Karnik:

> "46. By its questions, which it is appropriate to examine together, the referring tribunal is essentially seeking to ascertain the scope of the judgment in *Singh* in regard to a situation such as that at issue in the main proceedings.
>
> 47. In that judgment the Court held that Article 52 of the EEC Treaty (which became Article 52 of the EC Treaty and is now, after amendment, Article 43 EC) and Council Directive 73/148 must be interpreted as requiring a Member State to grant leave to enter and remain in its territory to the spouse, of whatever nationality, of a

national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the EEC Treaty (which became Article 48 of the EC Treaty and is now, after amendment, Article 39 EC) and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the State of which he or she is a national. Under the operative part of that judgment, the spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and remained in another Member State.

48. The same consequences flow from Article 39 EC if the national of the Member State concerned envisages a return to that Member State in order to work there as an employed person. Consequently, where the spouse is a national of a non-Member State he must enjoy at least the same rights as would be granted to him by Article 10 of Regulation No 1612/68 if his or her spouse entered and resided in another Member State.

49. However, Regulation No 1612/68 covers only freedom of movement within the Community. It is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community.

50. In order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

51. That interpretation is consistent with the structure of the Community provisions seeking to secure freedom of movement for workers within the Community, whose exercise must not penalise the migrant worker and his family.

52. Where a citizen of the Union, established in a Member State and married to a national of a non-Member State with a right to remain in that Member State, moves to another Member State in order to work there as an employed person, that move must not result in the loss of the opportunity lawfully to live together, which is the reason why Article 10 of Regulation No 1612/68 confers on such spouse the right to install himself in that other Member State.

53. Conversely, where a citizen of the Union, established in a Member State and married to a national of a non-Member State without the right to remain in that Member State, moves to another Member State in order to work there as an employed person, the fact that that person's spouse has no right under Article 10 of Regulation No 1612/68 to install himself with that person in the other Member State cannot constitute less favourable treatment than that which they enjoyed before the citizen made use of the opportunities afforded by the Treaty as regards movement of persons. Accordingly, the absence of such a right is not such as to deter the citizen of the Union from exercising the rights in regard to freedom of movement conferred by Article 39 EC.

54. The same applies where a citizen of the Union married to a national of a non-Member State returns to the Member State of which

he or she is a national in order to work there as an employed person. If the citizen's spouse has a valid right to remain in another Member State, Article 10 of Regulation No 1612/68 applies so that the citizen of the Union is not deterred from exercising his or her right to freedom of movement on returning to the Member State of which he or she is a national. If, conversely, that citizen's spouse does not already have a valid right to remain in another Member State, the absence of any right of the spouse under Article 10 aforesaid to install himself or herself with the citizen of the Union does not have a dissuasive effect in that regard.

55. As regards the question of abuse mentioned at paragraph 24 of the *Singh* judgment, cited above, it should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 *Levin* [1982] ECR 1035, paragraph 23).

56. Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the *Singh* judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.

57. Conversely, there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

58. That said, where the marriage is genuine and where, on the return of the citizen of the Union to the Member State of which he is a national, his spouse, who is a national of a non-Member State and with whom he was living in the Member State which he is leaving, is not lawfully resident on the territory of a Member State, regard must be had to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'). That right is among the fundamental rights which, according to the Court's settled case-law, restated by the preamble to the Single European Act and by Article 6(2) EU, are protected in the Community legal order.

59. Even though the Convention does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular,

> proportionate to the legitimate aim pursued (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42).
>
> 60. The limits of what is 'necessary in a democratic society' where the spouse has committed an offence have been highlighted by the European Court of Human Rights in *Boultif* v *Switzerland*, judgment of 2 August 2001, *Reports of Judgments and Decisions* 2001-IX §§ 46 to 56, and *Amrollahi* v *Denmark*, judgment of 11 July 2002, not yet published in the Reports of Judgments and Decisions, §§ 33 to 44.

24. Although there have been amendments to the EEA regulations since the cases relied upon were decided, those changes do not fundamentally affect the rights recognised under the Regulations.

25. A residence permit issued under the EEA regulations, which implement EU law, are declaratory of *rights* under EU law; they are not a grant of permission to enter or remain in the UK but the manifestation of a right. A person either has that right (at the time the permit is issued) or does not and that right exists according to the Directive, as implemented into UK law through the Regulations. Leave to enter/remain in the UK under the Immigration Rules within the statutory framework established to enable such a grant to be made is however a grant of leave that continues to exist unless and until it is curtailed or expires. Such leave is granted according to a framework established and approved by Parliament. That framework sets out the particular criteria that have to be met in order to be given that leave to enter or remain. Although in practical terms they may be seen by a lay person to be the same creature, they are not. The first is a *right*, enshrined in EU law; the second is a discretion of the UK government to enable entry and stay in the UK of particular categories of individuals, albeit a discretion the exercise of which is moderated through Immigration Rules and policies established through a statutory framework.

26. Mr Karnik is correct that where the Tribunal is seized of an Article 8 issue, the Tribunal is required to determine it. This is well established. But the issue here is 'is the Tribunal seized of an Article 8 issue?'. If the answer to that is 'yes', then First-tier Tribunal judge Davies erred in law in not determining it. If the answer to that is 'no' then there is no material error of law.

27. That the appeals brought in *JM*, *TY* and *Amirteymour* were brought by appellants in the UK and this appeal relates to an appellant not in the UK is not, in my view, of any import. This appeal has been brought against an EEA decision. *Akrich*, as can be seen from the discussion set out above (although not fully reflected in the paragraph relied upon by Mr Karnik) makes a clear distinction between appeals brought under the Regulations and the separate requirements that can be imposed by a Member State to control the lawful entry and stay in its country. Such controls as are implemented must not contravene the rights of freedom of movement and reference to Article 8 is referenced in *Akrich* in that regard – see paragraphs 58 and 59. *Akrich* makes plain that where a non-Member State spouse was not lawfully in the Member State the absence of a right

under Article 10 of 1612/68 does not have a dissuasive effect (see paragraphs 53 and 54).

28. The EEA Regulations give effect to the framework of EU law. If an application is refused and the appeal dismissed under that framework, that is the end of the matter. Community law gives effect to the concept of family unity. If there is no family as defined in the EU framework, or there is some other reason that a person falls out with the framework, then the application (and appeal) fails. That a person may be able to request an exercise of discretion, including consideration of the proportionality of the decision, is not provided for in the Regulations. Member States may exercise their discretion differently, that is a matter for them.

29. As paragraph 57 of *Akrich* makes clear, there would be an abuse of the facilities afforded by Community Law if Community Law was invoked in order to circumvent the provisions relating to the entry and stay of non-Member State nationals; this is further explained in paragraph 59. This does not mean that consideration of Article 8 is an integral part of the consideration of whether a person is entitled to a residence permit. Whether a person is entitled to a residence permit is determined by whether that person meets the EU law criteria. That there may be circumstances in which Article 8 becomes a relevant consideration is not, as submitted by Mr Karnik, during the course of an appeal against the refusal of the permit, but during consideration of an application for leave to enter within the statutory framework where, if a person does not meet the criteria in the Immigration Rules, consideration should be given to whether the individual's circumstances are such as to render the decision to refuse entry clearance or leave to remain a disproportionate interference in the right to family life.

30. In the case of Mr Akrich, who was subject to a deportation order, the ECJ drew attention to the considerations that should be taken into account in determining if, separate from the Regulations, an application for the revocation of the deportation order and any subsequent grant of leave to remain/entry clearance, they were such as to enable such a grant to be made. That is not consideration under the EEA regulations appeal but consideration under the statutory framework implemented by the Member State, in that case the UK.

31. The appeal structure of the Regulations does not refer to article 8 ECHR or the wide discretion afforded to Member States to grant permission to enter or remain in their country under their national framework. The Regulations set out the framework within which family unity is to be maintained without interfering with the freedom of movement of the national of the Member State. The Regulations do not provide rights but deliver what the EU framework requires to deliver to enable freedom of movement. The Regulations do not set out to consider Article 8 but to give effect to EU law.

32. There is no obligation in the structure of an appeal under the EEA regulations to undertake an article 8 consideration; such consideration

only arises if there has been an application for leave to enter the UK in accordance with the UK's immigration framework.

33. Mr Karnik submitted that the covering letter with the application for the residence permit constituted an application under Article 8. I stated at the hearing before me that I would not take that letter into account in deciding whether there had been an Article 8 application because it was not before the First-tier Tribunal judge either in the respondent's bundle or the bundle of documents relied upon by the appellant. For completeness however, I have considered whether there was an application. The letter said:

> "Now that they have complied with the adoption process both in the United Kingdom and in Nigeria, we would urge you also to consider Section 55 of the Nationality Immigration and Asylum Act 2002 (sic). It is in the best interest of this child to join his adoptive parents in the United Kingdom. Article 8 is therefore engaged on this occasion."

34. I assume the writer of the letter meant s55 Borders, Citizenship and Immigration Act 2009. The statutory duty under s55 does not apply to children overseas although UK Border staff working overseas must adhere to the spirit of the duty, as laid out in "Every Child Matters, Change for Children" guidance issued in November 2009. Other than fleeting reference to s55, the thrust of the submissions before me on behalf of the appellant were that in accordance with Article 8 the child should have been granted entry clearance; there was no submission that somehow there was a duty under s55 which amounted to an application.

35. Mr Karnik also referred to the review by the Entry Clearance Manager, which referred to Article 8, as indicative of there having been an Article 8 application. That was, in the words of Sales LJ in *Amirteymour*, "irrelevant surplusage". Furthermore, the Entry Clearance Manager conducted a review; he did not make an appealable decision.

36. There is a misconception as to what constitutes an application under Article 8. First there has to be an application which is framed in accordance with the criteria in the Rules. That application is treated by the Secretary of State as a human rights claim and is considered in the context of the Immigration Rules and statutory framework. If the applicant does not meet the criteria in the Rules (which are generally congruent with the UK's obligations under the ECHR), consideration is given to whether there is something other than 'fits' within the Rules which would render refusal of the application disproportionate. In this case, there has been no application, paid or unpaid, framed as meeting the requirements of the Rules – it is accepted that the appellant does not meet the requirements of the Immigration Rules. A statement that Article 8 "is engaged" is not and cannot be considered to be an application for leave to enter, even if Article 8 could 'be engaged' for an individual who is not within the jurisdiction. There cannot be a statutory appeal arising out of such a statement. For a statutory appeal to ensue, there would have to be a waiver by the Secretary of State that, contrary to the statutory scheme, that phrase

amounted to an application for leave to enter. That has plainly not happened.

37. In conclusion therefore, there was no human rights appeal and Article 8 could not be considered within the appeal brought under the EEA regulations. There was no material error of law by First-tier Tribunal judge Davies in refusing to hear argument on Article 8.

Ground 2: *SM (Algeria)* had not been brought to the attention of the First-tier Tribunal and had it been the outcome would or could have been materially different.

38. *SM (Algeria)* was handed down on 14th February 2018. The First-tier Tribunal hearing took place on 23rd March 2018. *SM (Algeria)* considered two questions, one of which concerned the position of a third country national who had been placed in the legal guardianship of European Union Citizens under the Islamic "kefala" system in her own country. The First-tier Tribunal held that the child did not qualify under the Immigration Rules for entry clearance and nor did she fall within the definitions of 'family member', 'extended family member' or adopted child of an EEA national under the EEA Regulations 2006. The Upper Tribunal upheld the First-tier Tribunal decision that she did not fall within the definition of 'family member' but allowed the appeal on the basis that she came within the definition 'extended family member' and returned the case to the SSHD for her to exercise the discretion conferred upon her by regulation 12(2) of the 2006 EEA Regulations. The Court of Appeal allowed the ECO's appeal and (correctly the Supreme Court held) observed that the real question was not whether the child fell within either definition but rather was she a 'direct descendant' within the definition of 'family member' in article 2.2(c)[4] of the Directive or whether she fell within 'any other family members…who in the country from which they have come are dependents or members of the household of the Union Citizen having the primary right of residence' - article 3.2(a)[5] of the Directive.

39. The Supreme Court held that there was little doubt but that the child would fall within article 3.2(a) of the directive is she does not fall within article 2.2(c). her discretion. In paragraphs 17 to 21 the Supreme Court set out the various considerations to be taken into account including the necessity for an extensive examination of the personal circumstances, that UK legislation relating to foreign adoptions is clearly relevant but not determinative, that s55 Borders, Citizenship and Immigration Act 2009 was relevant and that decision makers would have to bear in mind that the purpose of the Directive is to simplify and strengthen the right of free movement and residence for all Union Citizens.

[4] 2.2 'Family member' means … (c) the direct descendants who are under the age of 21 …

[5] 3.2 without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host member state shall, in accordance with its national legislation, facilitate entry and residence for the following persons: (a) any other family members irrespective of their nationality, not falling under the definition in point 2 of article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence …

40. The Supreme Court said

> 28. We therefore cannot consider it acte clair that [this child] is *not* to be regarded as a direct descendant of her guardians for the purpose of article 2.2(c). … We are also concerned that an automatic right of entry for "kefalah" children might lead to some of them being placed in homes which domestically would have been rejected as unsuitable.
>
> …
>
> 33. Thus, the Court refers the following three questions to the Court of Justice of the European Union for a preliminary ruling:
>
> > (1) Is a child who is in the permanent legal guardianship of a Union citizen or citizens, under "kefalah" or some equivalent arrangement provided for in the law of his or her country of origin, a "direct descendant" within the meaning of article 2.2(c) of Directive 2004/38?
> >
> > (2) Can other provisions in the Directive, in particular articles 27 and 35, be interpreted so as to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such?
> >
> > (3) Is a member state entitled to inquire, before recognising a child who is not the consanguineous descendant of the EEA national as a direct descendant under article 2.2(c), into whether the procedures for placing the child in the guardianship or custody of that EEA national was such as to give sufficient consideration to the best interests of that child?

41. The First-tier Tribunal Judge did not consider whether the appellant could be treated as an extended family member, restricting the consideration to whether the appellant was a direct descendant.

42. In the light of *SM (Algeria*), the First-tier Tribunal judge erred in law in failing to consider if the appellant was an extended family member.

43. I set aside the decision of the First-tier Tribunal judge in so far as the appeal was dismissed under the EEA Regulation appeal.

Remaking of the appeal under the Regulations.

44. Mr Karnik submitted that in line with *SM*, the appellant can and should be treated as a family member and recognised as such by EU law. He submits that the evidence before the First-tier Tribunal was such that it was sufficient to meet the requirements of EU law to be found to be a direct descendant for the purpose of article 2.2(c). In [25] of *SM,* Lady Hale draws attention to the contrast between article 2.2(b) which relates the concept of registered partnership to the laws of the Member State and article 2.2(c) which does not reference national laws, indicating that direct descendant should be given a "uniform interpretation throughout the Union".

45. It is correct that in this appeal, in contrast to that in *SM*, there is evidence if suitability. Nevertheless, the appellant does not meet the requirements of the Immigration Rules[6] and cannot therefore be said to meet the member States national requirements. This is the very question that has been referred to the ECY by the Supreme Court. I cannot find that the evidence before me is such that the appellant meets the requirements of article 2.2(c).

46. On the other hand, the appellant does, it seems, meet the requirements of article 3.2(a) in the light of *SM*. The application for a family residence permit in this appeal was made under the 2016 EEA Regulations. There is no appeal to the Tribunal where an extended family member permit is refused, as pointed out by Mr Tan. Although the *vires* of the Regulations is the subject of challenge, the position at present is that there is no appeal. I cannot therefore allow this appeal on the basis that this child falls within article 3.2(a) and that the Secretary of State is therefore required to undertake "an extensive investigation" into the personal circumstances of the appellant.

47. I remake the appeal and dismiss it.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law under the EEA Regulations.

I set aside set aside the decision made under the EEA Regulations.

I re-make the decision in the appeal by dismissing it

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 14th January 2019

Upper Tribunal Judge Coker

[6] It is not clear from the papers before me how much time one or other parent has in fact spent with the child in Nigeria.