**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Ahmad (scope of appeals) [2018] UKUT 84(IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 14 November 2017**

**Decision & Reasons Promulgated**

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**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT**
**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**SHAHBAZ AHMAD**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Mold, Counsel, instructed by MTUK Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

*(1) A notice of removal window (Form RED.0004 (fresh)) is not an EEA decision for the purposes of the Immigration (European Economic Area) Regulations 2006. The notice cannot accordingly be appealed under those Regulations. Even if it could constitute a decision, the notice of removal window will constitute an EEA decision only if it concerns a person's removal from the United Kingdom under regulation 19 of those Regulations.*

*(2) Section 85(1) of the Nationality, Immigration and Asylum Act 2002 does not enable the Tribunal hearing an appeal in the United Kingdom to treat that appeal as including an appeal which has been certified under section 94 as clearly unfounded and which, as a result, can be brought only once the appellant is outside the United Kingdom.*

*(3) A statement made by an appellant under section 120 of the 2002 Act in response to a One-Stop notice is a statement made to the Secretary of State or an Immigration Officer. Accordingly, a statement made only in a ground of appeal to the Tribunal is not a statement under that section.*

## DECISION AND REASONS

1. The appellant, a citizen of Pakistan, was born on 15 January 1973. He claims to have arrived in the United Kingdom unlawfully in December 2001. He subsequently claimed asylum unsuccessfully and his ensuing appeal was dismissed, following a hearing in August 2003.

2. After becoming appeal rights exhausted in December 2003, the appellant remained in the United Kingdom unlawfully. On 28 July 2014, he applied for an EEA residence card. That application was refused on 15 December 2015.

3. On 17 March 2016, the appellant made a further such application. This was refused on 13 September 2016.

4. The appellant appealed against that refusal. This appeal ("the residence card appeal") has the reference EA/12374/2016.

5. In his grounds of appeal to the First-tier Tribunal, dated 6 October 2016, in respect of the residence card appeal, the appellant contended that the respondent's decision was not in accordance with the Immigration Rules or the Immigration (European Economic Area) Regulations 2006. Furthermore, the appellant stated that the decision was incompatible with his Article 8 rights.

6. It was not until August 2017 that the residence card appeal came before a Judge of the First-tier Tribunal, for substantive consideration. By that time, a number of other things had happened.

7. On 5 July 2017, the respondent served on the appellant a "notice of removal window" (Form RED.0004 (fresh)). The notice of removal window included (or was accompanied by; it matters not) a One-Stop Notice under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The power to serve this One-Stop Notice derives, in the present case, from section 120(1)(c), which covers the situation where "a decision to … remove [the appellant] has been or may be taken".

8. Section 120(2) provides that the serving of the One-Stop Notice requires the recipient to provide a statement, setting out his or her reasons for wishing to remain in the United Kingdom, and any other grounds on which he or she should be permitted to remain, together with any grounds on which he or she should not be removed from or required to leave the United Kingdom. The provision is to set out in the Appendix to this decision, together with other relevant legislation.

9. On 4 July 2017, the appellant made an application to the respondent for leave to remain in the United Kingdom, on Article 8 grounds. He said that he was married to

a British citizen who was present and settled in the United Kingdom. He had been living together with his wife in Chobham, Surrey, until he had been detained whilst reporting on 3 July 2017. His wife had established an internet café business in Spain, which required her to travel to that country. The appellant also made further submissions as to why his removal would constitute a disproportionate interference with his Article 8 rights.

10. On 12 July 2017, the respondent refused to grant the appellant leave to remain. Additionally, the respondent certified the appellant's human rights claim, pursuant to section 94 of the 2002 Act, on the basis that it was clearly unfounded.

11. On 14 July 2017, the appellant filed a notice of appeal with the First-tier Tribunal. The notice purported to challenge a refusal decision dated "13/09/2016" – that is to say, the residence card decision – and one dated "12.07.2017" – which is, as we have seen, the date of the certification of the appellant's human rights claim.

12. The grounds of appeal, however, drafted by Mr Mold, stated that the appeal lay "against the notice of removal window dated 5 July 2017".

13. On 18 July 2017, a Duty Judge of the First-tier Tribunal caused a letter to be sent to MTUK Solicitors, in which it was stated that the "July 2017 decision is certified as clearly unfounded, with reference to section 94 of the 2002 Act. Consequently, the Tribunal has no jurisdiction to admit or to consider that appeal".

14. Subsequently, a decision was taken that the Judge hearing the residence card appeal, which was listed for 11 August 2017, would also consider, as a preliminary issue, whether a right of appeal lay against the notice of removal window.

15. At that hearing, the First-tier Tribunal Judge addressed the preliminary issue. He noted that Mr Mold, on behalf of the appellant, relied upon regulations 2 and 26 of the Immigration (European Economic Area) Regulations 2006, in submitting that a right of appeal did lie in respect of the notice of removal window.

16. Mr Mold drew attention to the definition of "EEA decision" in regulation 2. Such a decision is there defined as "a decision under these Regulations that concerns –

> "…
>
> (c) a person's removal from the United Kingdom … ."

17. Mr Mold submitted to the Judge that the notice in Form RED.0004 concerned the appellant's removal from the United Kingdom. The Judge did not agree. His reasoning was as follows:-

> "10. I am satisfied that Mr Mold's submissions in relation to a right of appeal against the notice of removal window are misconceived for two reasons. First, I find that the notice is not a decision "made under the regulations". As the Home Office guidance makes clear,

> "normally **Protection or Human Rights claimants without leave** will receive a fresh notice starting the 3 month removal window (RED.0004 (fresh)) when they are appeal rights exhausted (ARE) and they become removable. **Vulnerable group** will receive a further notice by way of removal directions (IS 151D) or limited notice of removal (IS 151G)".

11. The appellant became appeal rights exhausted in December 2003 and has been liable to being removed since then. The RED.0004 notice of removal window is served because the appellant is deemed to be removable and has nothing to do with the EEA regulations and is not an EEA decision.

12. Secondly, I find that the RED.0004 notice of removal window is not a decision which is concerned with a person's removal from the United Kingdom. The notice is just that and it is not a decision. The fact that the appellant has been notified of a removal window is a pre-curser (sic) to his eventual removal. Accordingly, the notice is not concerned with his removal from the United Kingdom, rather it concerns his potential removal, if at all.

13. For the above reasons, I find that there is no right of appeal against the issuance of a RED.0004 notice of removal window. Accordingly, there is no valid appeal in front of me in relation to the issuance of the notice."

***Discussion***

***(1) The challenge to the notice of removal window***

18. Before the Upper Tribunal, Mr Mold submitted that the Judge had erred in law in those conclusions. Mr Mold said that the respondent's *Guidance - General Instruction: Immigration returns, enforcement and detention - arranging removal* Version 1.0 26 April 2017 contained nothing to suggest that Form RED.0004 (fresh) could be used only in a case of protection or human rights claims. According to Mr Mold, the Judge had erred in concluding that the notice of removal window did not "concern" the appellant's removal from the United Kingdom. In Mr Mold's submission, it plainly did. This could be seen from the fact that the notice stated the appellant "will be given further notice of when you will be removed". The second box in the Form also made provision for the recipient to be told he would not be removed after a certain date, without further notice.

19. For all these reasons, according to Mr Mold, the notice of removal window constituted an EEA decision, falling within regulation 2. This meant that regulation 26 operated to give the appellant a right of appeal against the EEA decision.

20. The Upper Tribunal rejects these submissions. The reason why the notice of removal window does not constitute an EEA decision, within the meaning of regulation 2, is not to do with whether the notice concerns a person's removal from the United Kingdom. Plainly, the notice of removal window does concern removal.

21. The Tribunal agrees with Ms Isherwood that the notice of removal window is, in reality, no more than a statement of a person's liability to removal from the United

Kingdom. That liability arises from the fact that the person in question falls within the ambit of section 10 of the Immigration and Asylum Act 1999, as being a person who requires leave to remain in the United Kingdom, but does not have it. The notice of removal window is not, therefore, a EEA decision, as defined by regulation 2.

22. In any event, even if the notice of removal window could be said to constitute a decision, in the present case, it is manifestly not made under the 2006 Regulations, as required by the definition in regulation 2 (see paragraph 16 above). Our reasons for so finding are as follows.

23. Regulation 19 contains powers of removal in respect of EEA nationals and their family members. There is no suggestion that, in the present case, the respondent has decided to remove the appellant pursuant to the powers of regulation 19. The appellant cannot, in any case, fall within regulation 19(3), as he is not the family member of an EEA national. The appellant's wife is, as we have seen, a British citizen.

24. Mr Mold relied upon a passage in paragraph 34 of the judgments of the Court of Appeal in Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353 as supporting his interpretation of "EEA decision" in regulation 2. In paragraph 34, Sales LJ, having set out his reasons for concluding that, in the absence of a section 120 notice, an appeal under the EEA Regulations cannot raise human rights issues, noted that section 84(1)(c) and (g) of the 2002 Act (as then in force) contemplated as a permissible ground of appeal that the decision is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's human rights:-

> "However, those paragraphs only apply in so far as such a ground of appeal might be relevant to an appeal "against an EEA decision". In my opinion they are made to apply because an "EEA decision" under the EEA regulations may concern "a person's removal from the United Kingdom" (see the definition of "EEA decision" in regulation 2(1)), in that if he is refused some EU entitlement to remain in the UK the decision made by the Secretary of State might be to the effect that he has no EU right to be in the UK and that accordingly she now sets removal directions to have him removed. In such a case, by virtue of the definition of "EEA decision" he is afforded an opportunity to raise his Convention rights against removal on his appeal to the FtT under regulation 26(1)."

25. These remarks of Sales LJ are plainly *obiter*. As is clear from the judgment of the Court of Appeal in Ahmed v Secretary of State for the Home Department [2016] EWCA Civ 303, where the respondent concludes that a person has no EU right to be in the UK; for example, because his marriage is regarded as one of convenience, the respondent may act under section 10 of the 1999 Act to remove the person concerned. The respondent does not – indeed cannot – use the power of removal contained in the 2006 Regulations (see above) because that person does not fall within the terms of regulation 19. The respondent is not seeking to remove the person as an EEA national or the family member of such a national.

26. In any event, there is no indication that, in making these *obiter* remarks, the Court in Amirteymour had heard argument on the matter.

27. Whilst it is true that regulation 9 (Family members of British citizens) provides a mechanism whereby a person who is a family member of a British citizen will fall to be treated, for the purposes of the Regulations, as if the British citizen were an EEA national, that is not the case with the appellant.

28. The First-tier Tribunal Judge considered the application of regulation 9 at paragraphs 15, 16 and 21 of his decision. The appellant's case was that his wife had gone to Spain in order to pursue a business there. The appellant had remained in Chobham, staying in residential premises that his wife leased from the local authority. There was no suggestion that the appellant had ever been to Spain, whether with his wife or otherwise. The appellant accordingly failed to satisfy regulation 9(2)(b): see Appendix.

29. In those circumstances, the Judge was, we consider, entirely correct to hold that regulation 9 was not satisfied. We shall return to this issue in the context of the residence card appeal. For the moment, however, this finding – which the appellant has not seen fit to challenge in the context of the notice of removal window – itself disposes of Mr Mold's case that a right of appeal exists against the notice of removal window.

30. For these reasons, the Upper Tribunal concludes that the First-tier Tribunal Judge's decision as regards EA/06549/2017 contains no material error of law.

***(2) The residence card appeal***

31. We turn to the residence card appeal. As we have already observed, the Judge correctly found that the appellant could not fall within the ambit of regulation 9. The Judge nevertheless dealt with submissions made on behalf of the appellant by reference (it seems) to the judgment of the Court of Justice of the European Union (as it now is) in the case of Carpenter v the Secretary of State for the Home Department [2002] EUECJ C-60/00.

32. The facts of Carpenter were essentially as follows. Mrs Carpenter, a national of the Philippines, overstayed her leave in the United Kingdom. She married Mr Carpenter, a British citizen, who ran a business from the United Kingdom, selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals. Mr Carpenter's business was established in the United Kingdom. A significant proportion of that business, however, was conducted with advertisers established in other Member States and as a result Mr Carpenter used to travel to those States for the purposes of his business.

33. Mrs Carpenter resisted deportation proceedings brought against her by the Secretary of State on the ground that -

> "since her husband's business required him to travel around in other Member States, providing and receiving services, he could do so more easily as she was looking after

his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services" (paragraph 17).

34. The Immigration Adjudicator who heard Mrs Carpenter's appeal was satisfied that the marriage was genuine and that she played an important part in the upbringing of her step-children. He accepted that she could be "indirectly responsible for the increased success of her husband's business". The Immigration Adjudicator, however, dismissed the appeal because, although Mr Carpenter travelled to other Member States to provide services, since he remained resident in the United Kingdom, he could not be considered to be exercising any freedom of movement within the meaning of Community law.

35. In its submissions to the Court, the United Kingdom government pointed out that since Mr Carpenter had not exercised his right to freedom of movement, Mrs Carpenter could not rely on the cases of Singh [1992] ECR 1-4265 or Asscher [1996] ECR 1-3089.

36. At paragraph 30 of its judgment, the Court noted that Mr Carpenter's right freely to provide services guaranteed by Article 49 EC "may be relied on by a provider as against the state in which he is established if the services are provided for persons established in another Member State".

37. So far as concerned a person in the position of Mr Carpenter, who had not established himself in another Member State, the Court, at paragraph 36, held that –

> "the answer to the question referred to the Court therefore depends on whether, in the circumstances such as those in the main proceedings, a right of residence in favour of the spouse may be inferred from the principles or other rules of Community law."

At paragraph 39, the Court noted that the "separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises the fundamental freedom". The Court went on to explain how, in the circumstances of this case, deporting Mrs Carpenter would constitute a violation of Article 8 of the ECHR. In this regard, the Court noted that the marriage was genuine "and that Mrs Carpenter continues to lead a true family life [in the United Kingdom], in particular by looking after her husband's children from a previous marriage".

38. The Court's conclusion was summarised as follows:-

> "46. In view of the foregoing the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding in the circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country."

39. It is manifest that, on the facts of the present case, Carpenter has no application. On the contrary, the uncontested facts show that the present case is not one where the

national of the Member State (here, the United Kingdom) has left that State and become established in another State, providing services there. The First-tier Tribunal Judge found as follows:-

> "17. Oral evidence was given by the appellant and his UK citizen wife in accordance with their witness statements, signed at the hearing. Whilst an application had been made to the Irish Naturalisation and Immigration Services in 2004, on the basis of the appellant living with his current wife in Ireland, it was confirmed that the current application is solely in relation to the wife's residency in Spain.
>
> 18. The appellant's wife went to Spain in November 2013. The appellant was unable to go with her to Spain because he had no visa. Instead, the appellant looked after his wife's house in Chobham and also looked after the cat. In his wife's absence, the appellant couldn't leave the council property, as his wife would have lost her council tenancy.
>
> 19. The appellant's wife returned to the UK in September 2016 after her business partner died. Also, the appellant's wife had inherited her mother's house and had decided to use that money to set up another business in Spain."

40. Regulation 9 of the 2006 Regulations thus governs the position of the appellant. As we have seen, the appellant cannot come within the terms of regulation 9. It is, we find, not possible for the appellant, in the light of that failure, to seek to rely upon the case of Carpenter.

41. In any event, even if the fundamental point of distinction between the present case and that of Carpenter was not present, the Court in that case made it plain that its findings were fact specific: see paragraph 46 of its judgment. Although the appellant challenges the finding of the First-tier Tribunal Judge that the relationship between the appellant and his wife was not, in fact, genuine, even if that challenge was made out, this would not affect the fact that there is a substantial difference between, on the one hand, the circumstances of Mr and Mrs Carpenter, living together in the United Kingdom with Mrs Carpenter helping to look after Mr Carpenter's step-children, and on the other, the circumstances of the present case, as put forward by the appellant.

42. In the present case, the appellant's wife had established herself in business abroad, where she lived for years on end. The appellant was not named in the council tax notice in relation to his wife's address in Chobham. It appears that the tenancy was in her name alone. The appellant's case was, in fact, that he was living in the property in order to assist his wife in the highly questionable enterprise of maintaining her council tenancy, in circumstances where she did not live at the property. As for the cat, any suggestion that it could play any material part in giving the appellant derivative EEA rights would, in the circumstances, be absurd.

43. There is, accordingly, no material error of law in the decision of First-tier Tribunal Judge that the appellant could not succeed in his residence card appeal, absent any issue regarding Article 8 of the ECHR.

*(3) Article 8 and the residence card appeal*

44. Mr Mold's final set of submissions was that the Article 8 arguments of the appellant should have been addressed by the Judge in the residence card appeal.

45. This set of submissions depends on a close analysis of regulation 26(7), paragraph 1 of Schedule 1 to the 2006 Regulations, section 85 of the 2002 Act and section 120 of that Act: see the Appendix.

46. Mr Mold began by pointing out that regulation 26(7) states that the provisions of or made under the 2002 Act, referred to in Schedule 1, have effect for the purposes of an appeal under the Regulations, in accordance with that Schedule. Paragraph 1 of Schedule 1 has the effect that the sole permitted ground of appeal under section 84 of the 2002 Act is that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

47. Section 85 governs the matters to be considered in an appeal. In an EEA appeal, paragraph 1 of Schedule 1 provides that the references to a section 120 statement (One-Stop Notice) in section 85 include references to a statement under that section, as applied by paragraph 4 of Schedule 2 to the Regulations.

48. Accordingly, Mr Mold said that section 85 of the 2002 Act applies to the appellant's EEA appeal. This had two consequences, according to Mr Mold. First, section 85(1) required the First-tier Tribunal Judge to consider the respondent's refusal of 12 July 2017 of the appellant's human rights claim (which, as we have said, was certified under section 94). Secondly, Mr Mold submitted that, in any event, the appellant had made a statement under section 120 of the 2002 Act and the First-tier Tribunal Judge was required to consider the matters raised in that statement.

49. So far as concerns section 85(1), Mr Mold is right to say that, even though the refusal of the human rights claim was certified, the appellant has a right of appeal, albeit that the certification means the right is not exercisable until the appellant has left the United Kingdom. However, this takes the appellant's case nowhere. Section 92 provides in terms that a claim certified under section 94 must be brought from outside the United Kingdom. Accordingly, the effect of sections 92 and 94 was that the appellant could not pursue before the First-tier Tribunal Judge an appeal against the refusal of his human rights claim. Section 85(1) has to be read in that light.

50. As we have seen, the notice of removal window included a One-Stop Notice under section 120 of the 2002 Act. Mr Mold submitted that the appellant's grounds of appeal to the First-tier Tribunal in respect of the residence card appeal constituted a statement for the purposes of section 120(2). Accordingly, regardless of sections 92 and 94, Mr Mold said the service of the One Stop Notice meant that the appellant could, in fact, advance his human rights appeal before the Judge.

51. Again, Mr Mold relied upon the judgment in Amirteymour:-

> "36. In my view, the only situation in which the Tribunal has jurisdiction to consider a general case based on Article 8 (not concerning a decision to remove the

appellant) in an appeal pursuant to regulation 26(1) is where the Secretary of State or an immigration officer serves a notice under section 120 of the 2002 Act - sometimes called a "one stop notice": see AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076; [2011] 1 WLR 385, para. [3] - requiring the appellant to set out the entirety of his case as to why he says he is entitled to remain in the UK. Paragraph 4(8) of Schedule 2 to the EEA Regulations provides that section 120 shall apply "if an EEA decision has been taken or may be taken" in relation to the individual concerned. Paragraph 1 of Schedule 1 provides that section 85 of the 2002 Act applies in relation to an appeal pursuant to regulation 26(1). Section 85(2), read as adjusted for that context, provides that "if an appellant under regulation 26(1) makes a statement under section 120, the Tribunal shall 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"; and in my view for this purpose the reference to grounds of appeal listed in section 84(1) is to be taken to be a reference to all the grounds of appeal in that provision, including also paragraphs (a) and (f).

37. The object of a "one stop notice" under section 120 is to make the applicant bring forward his whole case regarding his claim to be allowed to remain in the UK so that it can be considered in one go in all its aspects, either by the Secretary of State or (after the Secretary of State has taken a relevant decision) by the Tribunal on an appeal which is on foot in respect of such a decision. Where such a notice is served, the Tribunal has jurisdiction to consider all claims made in response to it, whether or not they were raised before the Secretary of State at the time she made the relevant decision against which the appeal is brought: see AS (Afghanistan); Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260; [2012] 1 WLR 3064, [43] (Stanley Burnton LJ); and Patel v Secretary of State for the Home Department [2013] UKSC 72; [2014] AC 651 at [44] (Lord Carnwath JSC) and [67]-[70] (Lord Mance JSC). The effect of para. 4(8) of Schedule 2 to the EEA Regulations and para. 1 of Schedule 1 to the EEA Regulations (read with section 85(2) and (3) of the 2002 Act) is to enable the Secretary of State to require the applicant for a decision regarding his entitlements under the EEA Regulations to bring forward all the immigration claims on which he seeks to rely and incorporate them into his application to be considered in one go as part of that application or, where the Secretary of State has already made an adverse EEA decision in his case, to require the applicant to bring forward all the immigration claims on which he seeks to rely and incorporate them in his appeal against that decision, to be considered in one go by the Tribunal.

38. The claims which might be asserted in response to a section 120 "one stop notice" could include claims based on the Immigration Rules as well as claims based on Article 8 or other Convention rights. In my opinion, where this occurs the Tribunal's jurisdiction in relation to an appeal against an EEA decision brought pursuant to regulation 26(1) will be expanded to cover all the claims raised by the appellant in his response to the section 120 notice, including both the claims based on the Immigration Rules and general claims based on Convention rights. It is only by giving this effect to the section 120 notice that the object which it is intended to have, to ensure that all immigration claims by that appellant are dealt with in one go through a simplified and truncated procedure, can be achieved. The effect given to a section 120 notice by para. 4(8) of Schedule 2 and by para. 1 of Schedule 1 (read with section 85(2) and (3)) in the context of an EEA

> decision and an appeal against an EEA decision therefore includes an expansion of the claims which are to be regarded as included in the relevant application made under the EEA Regulations and of the jurisdiction of the Tribunal to consider such claims on an appeal against a relevant EEA decision. Accordingly, for example, if in answer to a section 120 notice served in the course of an appeal against an EEA decision the applicant for leave to remain puts forward a claim based on the Immigration Rules, the Tribunal determining that appeal will also have jurisdiction to determine that claim, notwithstanding the fact that para. 1 of Schedule 1 to the EEA Regulations states that the grounds of appeal in section 84(1)(a) and (f) of the 2002 Act relating to the Immigration Rules do not apply in respect of an appeal pursuant to regulation 26(1). Service of a notice under section 120 confers jurisdiction on the Tribunal in any appeal then on foot to deal with all claims made in response to the notice.
>
> 39. No procedural unfairness to the Secretary of State arises from treating the Tribunal's jurisdiction as being expanded in this way. Such an expansion of jurisdiction only occurs when the Secretary of State or the relevant immigration official opts to serve a section 120 notice. By opting to serve such a notice they take the risk of an expansion of the claims to be addressed in existing proceedings in order to secure the benefit of being able to deal with all claims definitively and promptly in a single set of proceedings: see Patel v Secretary of State for the Home Department at [69] (Lord Mance JSC)."

52. Again, we do not consider that the judgment in Amirteymour assists the appellant. That case says nothing about certification. It is certainly not authority for a proposition that the mere service of a One-Stop notice has any material effect on the respondent's power of certification under section 94.

53. In the present case, on 4 July 2017, the appellant had put forward his Article 8 case for remaining in the United Kingdom. On 12 July 2017, the respondent refused that claim and certified it. The One-Stop Notice issued on 5 July 2017 in connection with the notice of removal window reminded the appellant -

> "As you have previously been served with a notice under section 120 of the Nationality, Immigration and Asylum Act 2002, if your circumstances have changed so that you have a new reason for which to enter or remain in the United Kingdom, or grounds on which you should be permitted to enter or remain in the United Kingdom or grounds on which you should not be removed from or required to leave the United Kingdom, you must tell us about those reasons or grounds as soon as reasonably practicable."

This wording follows that in section 120(5) which requires P, in those circumstances, to "provide a supplementary statement to the Secretary of State or an Immigration Officer setting out the new circumstances and the additional reasons or grounds".

54. Even if the appellant had responded to the One-Stop Notice of 5 July 2017 by providing a statement under section 120 that raised Article 8 grounds, we do not consider that – given the certification of the human rights claim - the First-tier Tribunal Judge could have entertained an appeal which involved the claim which had been refused and certified: see paragraph 49 above.

55. In any event, we are satisfied that the reference to Article 8 in the appellant's grounds of appeal regarding the residence card decision did not constitute "a statement under section 120". We say this for two reasons. First, the contents of the grounds were inadequate. The grounds merely asserted, without giving any reasons, that "the decision is a breach of his Article 8 rights" (paragraph 18(2)). However, the clear effect of section 120(4) and (5) is that a statement in response to the notice will only have effect insofar as it constitutes a supplementary statement containing additional reasons or grounds. The appellant's bare reference to Article 8 does not meet this requirement.

56. The second reason is that any statement required to be made under that section has to take the form of a statement made to the respondent or an Immigration Officer, as the case may be. Section 120(5) makes this requirement express in the case of subsequent statements; that is to say, where a section 120 notice has been subsequently served. The requirement is, however, in our view inherent in the preceding subsections of section 120.

57. One of the essential purposes of section 120 is to provide a mechanism whereby the respondent can, where appropriate, respond positively to the statement, for example, by granting the person concerned international protection and/or lifting a threat of removal from the United Kingdom. This point emerges plainly from the judgment of Arden LJ in AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076: see esp. paras 37 to 39. There, the Court of Appeal was at pains to emphasise that although, in some circumstances, the respondent may not have had time to react to a section 120 statement by the time the appellant's appeal against a section 82(1) decision comes before the Tribunal, it was "unlikely that Parliament intended that the [Tribunal] will become a primary decision-maker" on a substantial scale. If a person could make a section 120 statement only in his or her grounds of appeal to the Tribunal, the scope for that Tribunal to become the primary decision-maker would be significantly expanded. Thus, the statement has to be given to the respondent or her Immigration Officer.

58. That this is the proper construction of section 120 is, we consider, underscored by the distinction drawn in section 85(2) between a "matter raised in the statement" and a "ground of appeal of a kind listed in section 84 against the decision appealed against". Thus, a section 120 statement, even though not formally repeated in the grounds of appeal, must be considered by the Tribunal. If, as the appellant contends, the grounds of appeal can themselves constitute the statement, one would have expected the statutory provisions to say so.

59. For these reasons, the First-tier Tribunal Judge was correct to find that, in the circumstances of the appellant's case, the appellant's residence card appeal did not require the Judge to address Article 8 of the ECHR.

***(4) Was Article 8 a "new matter"?***

60. In view of our findings, it is unnecessary for us to consider Mr Mold's submissions on whether Article 8 might constitute a "new matter" within the meaning of section 85(6). The Judge did not have the function of deciding the Article 8 issue, whether or not it might have constituted a "new matter".

61. Were we required to do so, however, we would find that the Article 8 issue would (assuming Mr Mold was correct in his other submissions) constitute a "new matter", with the result that the Judge could not have considered it unless the respondent had given him her consent (which was not forthcoming).

62. The reason why we come to this view is as follows. The bald assertion of Article 8 in the appellant's grounds of appeal of 14 July 2017 had not been previously considered in the context of "the decision mentioned in section 82(1)". For present purposes, that decision can only be the decision to refuse to give the appellant a residence card. There is no indication that the respondent has considered the appellant's Article 8 position in the context of that decision.

63. So far as concerns section 85(6)(b)(ii), since Mr Mold's case depends on the section 120 statement being the Article 8 grounds of appeal, the respondent had, manifestly, not considered that statement "previously" to the appeal hearing.

***Decision***

64. In conclusion, the decision of the First-tier Tribunal Judge does not contain a material error of law. The appellant's appeal is dismissed.

Signed Date: 19 January 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

# APPENDIX

## Nationality, Immigration and Asylum Act 2002

**85 Matters to be considered**

(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in [section 84] against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under [section 82(1)] against a decision [the Tribunal] may consider any matter which [it] thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

[(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a "new matter" if—

(a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.]

…

**120 Requirement to state additional grounds for application etc**

(1) Subsection (2) applies to a person ("P") if—

(a) P has made a protection claim or a human rights claim,

(b) P has made an application to enter or remain in the United Kingdom, or

(c) a decision to deport or remove P has been or may be taken.

(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which P should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in—

(a) P's protection or human rights claim,

(b) the application mentioned in subsection (1)(b), or

(c) an application to which the decision mentioned in subsection (1)(c) relates.

(4) Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and—

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P has leave to enter or remain in the United Kingdom only by virtue of [section 3C of the Immigration Act 1971] (continuation of leave pending decision or appeal).

(5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has—

(a) additional reasons for wishing to enter or remain in the United Kingdom,

(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or

(c) additional grounds on which P should not be removed from or required to leave the United Kingdom,

P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances

and the additional reasons or grounds.

(6) In this section—
"human rights claim" and "protection claim" have the same meanings as in Part 5;
references to "*grounds*" are to grounds on which an appeal under Part 5 may be brought (see section 84).

## Immigration (European Economic Area) Regulations 2006

**Regulation 2 (General interpretation)**

……

'EEA decision' means a decision under these Regulations that concerns –
…
(c) a person's removal from the United Kingdom …

**Regulation 9 (Family members of British citizens)**

9. – (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.

(2) The conditions are that –
(a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;

(b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person.
…

**Regulation 19 (Exclusion and removal from the United Kingdom)**

**…**
(3)… 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;

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or

(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2)

…

**Regulation 26 (Appeal rights)**

…

(7) The provisions of or made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that Schedule.

**SCHEDULE 1**

**Appeals to the First-Tier Tribunal**

**1.** The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal or Upper Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)–

section 84 (grounds of appeal, as though the sole permitted ground of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ) "an EU ground of appeal");

section 85 (matters to be considered), as though–

(i) the references to a statement under section 120 of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 4 of Schedule 2 to these Regulations; and

(ii) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;

section 86 (determination of appeal);
section 105 and any regulations made under that section; and
section 106 and any rules made under that section.