Upper Tribunal

(Immigration and Asylum Chamber)

Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 March 2015	

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Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT OF THE UPPER TRIBUNAL

MR C M G OCKELTON, VICE-PRESIDENT OF THE TRIBUNAL

UPPER TRIBUNAL JUDGE RINTOUL

Between

NASROLAH AMIRTEYMOUR (1)

TAWA TIJANA & RADEEYAH OLAMIDE JAMIU (2)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GENTJANA IZVIRA (1)

HF & AN (2)

(ANONYMITY ORDER MADE)

Respondent

Representation :

For Mr Amirteymour: Mr M Biggs, Counsel, instructed by EU Migration Services

For Ms Tijana and Miss Jamiu: Mr K Mak, Solicitor, MKM

For Ms Izvira: Ms C Fielden, Counsel, instructed by Abbott solicitors

For Ms HF and Ms AN: Mr Eaton, Counsel, instructed by Hoole & Co solicitors

For the Secretary of State: Mr Shilliday, Presenting Officer

Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.

DECISION AND REASONS

Introduction

1.
These appeals have been heard together as they raise a question relating to the right of appeal under regulation 26 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The questio n is: can a Human Rights challenge to removal be brought in such an appeal when no notice under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") has been served and where no EEA decision to remove has been made ?

The parties

2.
As these appeals come before us as a result of grants of permission to the Secretary of State in two cases, and to the opposing parties in the other cases, we refer to the Secretary of State as the respondent for the sake of clarity, and to the other parties as claimants.

Outline of the appeals

Appeal 1 – Mr Amirte y mour

3.
Mr Amirteymour is a citizen of the USA . He has a daughter aged 9 who is a British Citizen. His application for a residence card as confirmation of his right of residence as her primary carer was refused on 21 February 2014. His appeal against that decision was refused by the First-tier Tribunal on the basis that he did not meet the requirements of the EEA Regulations and on the basis that his removal would not be in breach of article 8 of the European Convention on Human Rights ("ECHR"). Permission to appeal was granted on all grounds.

Appeal 2 Tijana & Olumide

4.
Ms Tawa Tijana is the mother of Miss Olumide. Ms Tijana is a citizen of Nigeria as is her daughter but she has a younger daughter, Roheemot Koffi who is a French Citizen. The appeal to the First-tier Tribunal was against a decision by the respondent of 18 July 2013 to refuse to issue residence cards to Ms Tijana and Miss Olumide respectively as the primary carer of an EU national and as the dependant of such a person. The appeal was dismissed on the basis that the requirements of the EEA Regulations were not met; permission to appeal was sought on the basis that the First-tier Tribunal had not addressed the ground of appeal that removal of the claimants would be in breach of article 8 ECHR.

Appeal 3 – Izvira

5.
Ms Izvira is a citizen of Albania who appealed against the respondent's decision of 3 July 2013 to refuse to issue her with a residence card confirming her right of residence as the primary carer of a

British Citizen child. Her appeal to the First-tier Tribunal was at first unsuccessful but, following an appeal to the Upper Tribunal, it was remitted to the First-tier. Her appeal was then dismissed on the basis that she did not meet the requirements of the EEA Regulations, but was allowed on article 8 ECHR grounds. The respondent was granted permission to appeal against that decision; there is no cross-appeal.

Appeal 4 – HF and A N

6.
Ms HF is the mother of Ms AN who is a minor. Both are citizens of Gambia . On 25 October 2013 the respondent revoked their residence cards which had confirmed their right of residence as the spouse and dependant of an EEA national who had been exercising Treaty Rights and refused to issue them with residence documents confirming their retained rights of residence as the former spouse and child of an EEA national who had been exercising Treaty Rights here. Their appeals were dismissed under the EEA Regulations, but the First-tier Tribunal allowed their appeals on article 8 ECHR grounds. The respondent was granted permission to appeal on all grounds; there is no cross-appeal. There is in place in respect of this appeal an anonymity order made by the First-tier Tribunal.

Points common to all the refusal letters

7.
The refusal letters in the individual cases did not expressly tell the appellants to leave, but did advise them that if they did not do so, they might be subject to removal action. They also state d that the Immigration Rules now set out the requirements for those seeking leave to enter or remain on the basis of their right to respect for private or family life by defining the criteria to be fulfilled in order to qualify for this right to remain. It is also stated that anyone wishing to rely on family or private life established in the United Kingdom under Article 8 of the Human Rights Convention must make an application using the relevant prescribed form and upon payment of the relevant fee. There is also an express reminder that the application has been assessed solely on the basis of the EEA Regulations.

8.
It is to be noted that in none of these appeals did the respondent serve a notice under section 120 of the 2002 Act.

The Hearing

9.
These appeals were, as can be seen from the consideration of the individual facts of the application set out below, directed to be heard together at different stages. The respondent has been permitted to amend her grounds of appeal (where she is the appellant) to include a reference to FK (Kenya) v SSHD [2010] EWCA Civ 1032. We asked the parties to serve written submissions on that decision after the hearing on 31 March 2015 which was confined to oral submissions.

The Respondent ’s case

10.
The respondent submitted that an appellant may only pursue grounds of appeal which are related to the underlying decision under challenge and, as refusals of residence documents do not require detailed consideration of article 8 ECHR matters, the extent to which ECHR matters can be considered within an EEA appeal will be limited. She submit ted that it is established law, relying on Patel and o thers v Secretary of State for the Home Department [2013] UKSC 72 and AS (

Afghanistan) v SSHD [2013] EWCA Civ 1469, that when the Secretary of State has chosen not to serve a section 120 notice an appellant is restricted to the scope of his original application. As the consideration of an application for a residence document and an assessment of whether an applicant enjoys article 8 rights are inherently different, an appellant cannot raise article 8 ECHR matters within the scope of his appeal.

11.
The respondent accepted that limited human rights considerations may be raised in an EEA appeal, but only to the extent that the failed EEA application may place the appellant at risk of removal., that being limited, pursuant to JM (Liberia) [2006] EWCA Civ 1402, to consideration of any issues which would follow from the likely removal of the appellant from the United Kingdom. That, it is submitted, is not is not an exception to the first submission above.

12.
The respondent submitted also that when considering whether a removal of an appellant would entail a breach of the ECHR, the Tribunal should first ask whether the removal of the appellant is likely . We do, however, note that the ground of appeal set out in section 84 (1) (g) of the 2002 Act requires a consideration of removal as a consequence of an immigration decision, not whether it is likely. She submits that is not the case as the respondent is not currently considering removal directions and, here, had invited the submission of an article 8 application which would have a suspensive effect .

13.
In addition, the respondent further submitted that there is a distinction between the detailed provisions for the protection of article 8 rights set out in the Immigration Rules (“the Rules”) and the much more limited consideration permissible under section 84 (1) (g) of the 2002 Act which, it is said, does not permit an appellant to advance detailed, rule-based arguments which should properly be pursued under a separate application under the relevant Rules.

14.
In addition, the respondent submitted that the statutory jurisdiction of the Tribunal in EEA cases does not permit considerat ion of matters relating to the Rules, the ground s of appeal in sections 84 (1) (a) and 84 (1)(f) being unavailable in an EEA appeal. Accordingly, the Tribunal ’s duties pursuant to section 6 of the Huma n Rights Act 1998 require it to note that the respondent has established within the Rules a detailed regime for consideration of Article 8 matters.

15.
The respondent submitted that JM (Liberia) can be distinguished as all the claimants here are overstayers. Unlike the appellant in that case, there are no adverse consequences to the claimants from not being able to raise article 8 in an appeal; there is and has been nothing to prevent them from making an application under the Immigration Rules at any stage. That requirement is not, it is submitted, disproportionate and a fee-waiver can be requested.

16.
It is also submitted that, contrary to the claimant’s sub missions, paragraph GEN 1.9 of A ppendix FM of the Immigration Rules does not permit Human Rights claims to be raised in an appeal under the EEA Regulations

17.
The respondent does accept, however, that the situation is different where a “one-stop” notice has been served pursuant to section 120 of the 2002 Act.

The Claimants' case

18.
The claimants' case as set out in their skeleton arguments and oral submissions can be summarised as follows. It is submitted that, relying on JM Liberia a proper construction of section 84 (1) (g) of the 2002 Act requires a wide interpretation, and that a full right of appeal on article 8 issues is permitted, as was held in Ahmed (Amos; Zambrano; reg 15A (3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC), the appeals to the Court of Appeal in that matter (reported as NA (Pakistan) v SSHD [2014] EWCA Civ 995 and as SSHD v NA (Pakistan) [2015] EWCA Civ 140) not disputing that interpretation. It is further submitted that Lamichhane v Secretary of State for the Home Department [2013] EWCA Civ 260 can be distinguished both on its facts and in light of Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 which, it is submitted, is authority for a wider interpretation of both sections 85 (2) and 120 of the 2002 Act. It is also submitted that a proper construction of section 85 (4) permits article 8 to be raised in an EEA appeal, an appellant being entitled by virtue of the right of appeal under the EEA regulations to rely on any of the grounds of appeal set out in section 84 (1) of the 2002 Act.

19.
It is also submitted that, contrary to the respondent's submissions, paragraph GEN 1.9 of Appendix FM of the Immigration Rules does permit a human rights claim made in the notice of appeal in an appeal under the EEA Regulations to be considered.

20.
It is submitted also that human rights grounds may be considered in an EEA appeal even if they have not been raised with the respondent as part of the application, given that EU law asserts that it recognises the importance of ECHR rights, the Charter of Fundamental Rights of the European Union overlapping substantially with the ECHR. Further, and in the alternative, the respondent is failing in her duty with respect to article 8 as imposed by section 6 of the Human Rights Act 1998.

21.
With regard to the option of being able to make an application under the Immigration Rules, it is submitted that this is not a sufficient alternative given the disproportionate cost of doing so, and the lack of any right of appeal under the Rules if leave to remain is refused.

22.
In reply to the r espondent's skeleton argument , the claimant s , relying primarily on Mr Biggs's skeleton argument, noted that it is accepted that article 8 ECHR grounds can be raised in an appeal under regulation 26 of the EEA Regulations, even if these had not been relied upon when making an application giving rise to the EEA decision, and it is submitted that the effect of a refusal to issue documents under the 2006 Regulations places an appellant in the same position as the appellant in JM (Liberia) who had been refused a variation of leave. It is also submitted that article 8 issues are quite separate from the substance of an EEA decision.

23.
The claimants also submitted that the respondent's proposition that there need only be a "light touch" review is inconsistent with JM (Liberia) and that once the ground set out in section 84 (1) (g) is relied upon, the Tribunal is to conduct a full, article 8 analysis which, it is said, involves a consideration of whether the proposed interference is in accordance with the law, a question which requires an analysis of the Rules which are material to proportionality. Further, it is submitted that paragraph

GEN 1.9 (a) (iii) of the Rules applies such that, in any event, no formal application for leave to remain on human rights grounds is required.

The Legislative Framework

24.
Our analysis of the law is based on the provisions in force at the dates of the hearings before the First-tier Tribunal. There have been substanti al changes to the appeal rights under the EEA Regulations which took effect on 6 April 2015. These changes are subject to transitional provisions set out in regulation 6 of the Immigration (European Economic Area) (Amendment) Regulations (SI 2015/694) to the effect that the changes to paragraphs 26 and Schedules 1 and 2 of the EEA Regulations have no effect in relation to an appeal against an EEA decision where that decision was taken before 6th April 2015. It is important to recognise that the principal Act, the Immigration Act 1971 places EEA nationals in a separate p osition from those who require leave to enter and remain. For convenience, we have assembled all relevant statutory provisions in Schedule 1 to this judgment.

Discussion

25.
In all of these cases, the action of the respondent has been to refuse to issue documentation sought as confirmation of the right of residence under EU law. She has not taken action to remove any of the claimants, but has reminded them that they have no right to be here, and has advised them that if they wish to remain here on some other basis, then the appropriate applications should be made using the correct application forms and procedure, and, on payment of any appropriate fee.

26.
As can be seen from section 3 of the Immigration Act 1971 , there is a distinct difference drawn in the system of immigration control between those who require leave to enter and those who do not. By operation of section 7 of the 1988 Act, those having a right to enter or reside under European Law do not (absent any exclusion or deportation order) require leave to enter or remain. A right to enter or remain (and the conditions placed on that) depends on an action taken by the Secretary of State or an Immigration Officer. In contrast, a right to enter or reside under European Law does not. The issue of a grant of leave to enter or remain by the Secretary of State is, unless it is withdrawn or otherwise nullified by her subsequent actions, determinative. However, the issue of confirmatory documentation under EU law is not determinative of a right. While it may be indicative, it is not conclusive. The right to reside confirmed by a registration document valid for five years does not confer the right to remain for five years if the holder ceases to exercise Treaty rights. Possession of a residence card is not a condition precedent to accessing and benefiting from the associated rights that flow from a right of residence conferred by European Law.

27.
That is not to say that the mechanisms for considering applications and enforcement are separate. There is in the case of the latter a reliance on the existing statutory scheme, a person who no longer has a right of residence under EU law becoming once again subject to immigration control (see also paragraph 5 of the Rules). The respondent did not set up an entirely separate system for both, but equally did not enact that a decision to issue a document (or the acquisition of a right or residence under EU law) was a grant of leave under the Immigration Act 1971.

28.

The distinction between the Rules and the EEA regulations is expressly made at the beginning of the Rules of which paragraph 5 provides:

Save where expressly indicated, these Rules do not apply to a European Economic Area (EEA) national or the family member of such a national who is entitled to enter or remain in the United Kingdom by virtue of the provisions of the Immigration (European Economic Area) Order 1994. But an EEA national or his family member who is not entitled to rely on the provisions of that Order is covered by these Rules.

Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules.

29.
Although it was not the case in the past, the scope of the Rules made under the 1971 Act now covers claims for protection under the Refugee Convention and the Human Rights Convention. There are, under the Rules, specific provisions as to how, for example, a claim that the applicant or applicants must be granted leave to remain on the basis of human rights, primarily Article 8 ECHR. That is achieved through the use of specified forms and by operation of paragraph 34 of the Rules, as well as the various Immigration Fees Orders and Regulations which require a prescribed form accompanied by a fee.

30.
A right of residence under EU law (which includes a derivative right) is thus of a different legal species from a grant of leave. The exercise of the former does not require an act to be taken by the Secretary of State. There is no requirement to obtain a residence document and there are, under law, no penalties for not doing so. While we accept that in many cases where documentation is sought as confirmation of the rights of a non-EEA national under EU law it may be difficult to assert those rights absent such a document, we conclude that the possession of a residence document is not a compulsory prerequisite. We reject Mr Biggs' arguments, unsupported by authorities or sufficient evidence, to the contrary. The position of those requiring is leave is entirely different. The possession of valid leave, if required under the law, is a compulsory prerequisite. There is no right of residence or access to the rights flowing from a grant of leave until and unless it is granted.

31.
Rights granted under EU law and leave granted under the Rules or Immigration Acts are conceptually and legally distinct. Any assertion of a right to leave to remain or under the Human Rights Act is thus made on a different juridical basis. But that is not to say that the mechanisms for decision making and enforcement are entirely distinct.

32.
Turning to the appeals structure within the EEA Regulations, there is under regulation 26, as set out above, an appeal to the First-tier Tribunal, against an EEA decision as defined in regulation 2 of the EEA Regulations which provides, so far as is relevant to these appeals, as follows:

"EEA decision means" a decision under these Regulations that concerns -

(a) a person's entitlement to be admitted to the United Kingdom ;

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card;

(c) a person's removal from the United Kingdom ; or

(d) the cancellation, pursuant to regulation 20A, of a person's right to reside in the

United Kingdom .

33.
There is no appeal against a decision that an EEA national (or a member of the family of such a person) has no right to reside, although a finding on that issue will invariably be required in assessing whether a decision of the type in (b) or (c) will be necessary.

34.
A clear distinction is drawn here between a decision regarding documentation and a decision to remove. That follows both the structure of the Citizenship Directive and the EEA Regulations (see regulations 19 and 20). Unlike decisions regarding documentation, decisions to remove are also subject to specific procedural safeguards (see articles 30 and 31 of the Citizenship Directive).

35.
The right of appeal under Regulation 26 is subject to a number of qualifications set out in regulations 26(2) to 26 (5) and also at regulation 27 where the right of appeal from within the United Kingdom is limited. These restrictions are not relevant to these appeals.

36.
We turn next to Schedule 1, paragraph 1 of the EEA Regulations which provides that certain of the provisions of the 2002 Act have effect in relation to an appeal under the regulations as if (emphasis added) it were an appeal against an immigration decision under section 82(1) of that Act . That is not the same as providing that an EEA decision is an immigration decision under the 2002 Act which could have been done. It was thus evidently not the intention so do to.

37.
The clear intent is to provide that the provisions of the 2002 Act apply to something which is clearly not an immigration decision under the 2002 Act and in fact is not a decision of the type made under the 1971 Act. The fact that section 84 (1) (d) permits EEA rights to be raised in an appeal against that decision does not alter that.

38.
It is notable that the permissible grounds of appeal against an EEA decision expressly exclude grounds (a) and (f) indicating a clear intent that questions arising under the Rules cannot be raised, consistent with the two-fold system described above.

39.
That raises a significant issue. Since July 2012, when Appendix FM and paragraph 276ADE were incorporated into the Rules, much of the system for consideration of Human Rights , in particular article 8, is now operated under the Rules. The changes and the new regime is summarised by Underhill LJ in Singh & Khalid [2015] EWCA Civ 74) at [1]:

1.

These two appeals concern aspects of the changes made to the Immigration Rules by a Statement of Changes (HC 194) promulgated on 13 June 2012 and taking effect from 9 July 2012, and by a further Statement of Changes (HC 565) promulgated on 5 September 2012 and taking effect the following day. The changes were multifarious, but we are concerned only with those addressing the approach to be taken to applications for leave to enter or remain on the basis of an applicant's private or family life. I set out the relevant changes in detail below, but it will be convenient to give an overview at the start. I will refer to the Rules incorporating the changes made by HC 194 as "the new Rules" and to the previous version as "the old Rules".

2.
Under the old Rules leave to enter or remain as a family member of a person settled in the UK was regulated by Part 8, which is entitled "Family Members". There was no recognition of a right to enter or remain on grounds of private life as such, but Part 7 ("Other Categories") did provide for leave to remain on grounds of long residence. If an applicant could not establish a right to remain on the basis of one of the particular provisions in those parts, which were tightly defined, they could seek to rely on the right to respect for private and family life derived, via the Human Rights Act 1998, from article 8 of the European Convention of Human Rights. Such applications were generally referred to as being made "outside the Rules".

3.
The new Rules, by contrast, contain express provision, by new provisions inserted into Parts 7 (principally a new paragraph 276ADE) and 8 (principally a new "Appendix FM"), for applications made on the grounds of private or family life. It remains the case that an applicant may seek to rely on article 8 in a case falling outside these new provisions, but the intention was that the new Rules would properly reflect its requirements in the generality of cases, so that it should only be exceptionally that an applicant would have a valid claim under article 8 which fell outside their scope: I set out at para. 10 below the Secretary of State's explanation of her intention at paragraph GEN 1.1 of Appendix FM. It is now settled that the right course in any case where an applicant relies on his or her private or family life is to proceed by considering first whether leave should be granted under the relevant provisions of the new Rules and only if the answer is no to go on to consider article 8 in its unvarnished form (the so-called "two-stage approach"): see the line of cases which includes Izuazu (Article 8 – new Rules) [2013] UKUT 45 (IAC) and R (Nagre) v Secretary of State for the Home Department [2013] EWHC 7200 (Admin) to which I will have to refer more fully below. Thus article 8 claims "outside the Rules" are still possible, though the scope for their operation is reduced.

40.
The scope of “outside the rules ” considerations has thus been much reduced. There is a clear intention that, so far as is practicable, consideration of article 8 is to be carried out under the Rules. The respondent is entitled under the 1971 Act to put forward rules to that effect. It is also a clear policy established by the requirement to make applications on Human Rights grounds using prescribed forms and paying the relevant fees. There is, we accept, a partial exception to that by operation of GEN 1.9 of Appendix FM of the Rules, and we turn to that in due course.

41.
While we accept that the area covered by the Rules now covers areas previously dealt with by means of pol icies, if they were covered at all, the fact that the area has expanded to cover almost all areas covered by article 8 is not in principle a good reason effectively to ignore the clear provisions preventing it being argued in an EEA appeal that the decision was not in accordance with the Rules. It

is not suggested that, for example, appellants could argue that they met the requirements for leave to remain as Tier 4 Student migrants, or, formerly, the long residence rules.

42.
Any consideration by a court of article 8 issues must now commence with a consideration under the Rules, yet that is an analysis which could not be carried out in an EEA appeal, given that the grounds of appeal prohibit an analy sis of whether a decision was not in accordance with the Rules. While, arguably, a consideration of article 8 “outside the Rules” might not fall at that hurdle, it not an analysis that could properly be conducted; it would be an entirely artificial task to assess the article 8 issues “outside the rules .”

43.
We now turn to paragraph GEN 1.9 of the Rules which, as at the date of these appeals were lodged and decided, provided:

GEN.1.9. In this Appendix:

(a) the requirement to make a valid application will not apply when the Article 8 claim is raised:

(i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;

(ii) where a migrant is in immigration detention;

(iii) where removal directions have been set pending an imminent removal;

(iv) in an appeal; or

(v) in response to a (one stop) notice issued under section 120 of the Nationality, Immigration and Asylum Act 2002. And

(b) where the Article 8 claim is raised in any of the circumstances specified in paragraph GEN.1.9.(a) or is considered by the Secretary of State under paragraph A277C of these rules, the requirements of paragraphs R-LTRP.1.1.(c) and R-LTRPT.1.1.(c) are not met.

44.
It is submitted by the claimants that this permits Article 8 to be considered in an appeal when no formal application has been made. We do not accept that applies in an appeal under the EEA Regulations. Paragraph GEN 1.9 i s a provision of the Rules, not statute. It cannot alter the effect of the EEA Regulations which make it clear that section 84 (1) (a) does not apply. Further, the claimants’ interpretation of GEN 1.9 (iv) proceeds on the basis that “appeal” extends beyond an appeal against a decision under the Rules. We consider that cannot be its natural meaning.

45.
Appendix FM begins:

This Appendix applies to applications under this route made on or after 9 July 2012 and to applications under Part 8 as set out in the Statement of Changes laid on 13 June 2012 (HC 194), except as otherwise set out at paragraphs A277-A280.

46.

In this context, the requirement to have made a valid application simply disapplies the requirement to have done so from various provisions within Appendix FM, for example at R-LTRP.1.1 It does nothing more.

47.
In effect, the claimants' argument must be that the human rights appeals they raise are cases outside the Rules as otherwise they cannot raise the issue, given that section 84 (1) (a) does not apply.

48.
The grounds set out within section 84 of the 2002 act at sections 84 (1) (c) and 84 (1) (g) permit human rights to be raised but what the Tribunal is entitled to consider in assessing these grounds is qualified by operation of section 85 to 87 of the 2002 Act.

49.
We accept that the ground of appeal set out in section 84 (1) (c) is theoretically available in EEA appeals, but is of little assistance to an appellant challenging a decision with respect to documentation. In such a case, the appellant is only entitled to the document if he has established the relevant right of residence under EU law; a successful claim that he cannot be removed pursuant to article 8 could not entitle him to the document, as it could not give rise to a right under EU law.

50.
Turning to section 84 (1) (g) as applied by Schedule 1 of the EEA Regulations, we note that it is concerned with a situation where removal is as a consequence of the immigration decision, a phrase given a wide interpretation by the Court of Appeal in JM (Liberia) . That was not a case which concerned the EEA regulations; it concerned a situation whereby an appellant's application for leave to remain had been refused. As a consequence of that, if unsuccessful in an appeal, he would no longer have leave to remain. In these appeals, however, the claimants did not have leave to remain at the time of their applications. The decisions made to refuse residence cards did not alter their status. Accordingly, neither the factual matrix nor the reasoning in JM (Liberia) has any application to appeals of this nature. It is in that context that we turn to consider the parameters within which the Tribunal can consider appeals.

51.
The jurisdiction of the Tribunal is limited by sections 85 – 87. Of particular relevance are the provisions of section 85 of the 2002 Act which were considered in detail in AS (Afghanistan) in which the Court of Appeal held that the Tribunal has no jurisdiction to consider the new matters in the abse nce of a section 120 notice (per Stanley Burnton LJ in Lamichhane at [1]). In Lamic h hane , after analysing the various provisions, Stanley Burnton LJ (with whom Lewison LJ and Maurice Kay LJ agreed) addressed the question " May the Tribunal consider additional grounds advanced by an appellant if no section 120 notice has been served, and if so is it under a duty to do so? " and concluded [41]:

41. 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. The answer to question (c) above is No.

52.
Of relevance also to these appeals is the conclusion reached at [43]:

43. In my view, section 85(2) is a statutory extension of the jurisdiction of the tribunal in cases in which there has been a statement made by the appellant under section 120. It follows that the Tribunal has no jurisdiction to consider or to rule on "any matter … which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against" if there has been no section 120 notice, and therefore no statement under that section. This conclusion is consonant with my conclusion as to the effect of section 96(1) as it now is. If it were otherwise, an appellant might not know whether he could raise any new ground in his appeal until the hearing of his appeal, and the test in section 96(1)(c) becomes unworkable.

53.
The application of sections 85 – 87 of the 2002 Act was considered at length in Patel v SSHD [2013] UKSC 72. T he court did not refer expressly to Lamichhane although th at decision was considered by the Court of Appeal below in Patel v SSHD [2012] EWCA Civ 741 which chose to follow it. The issue in the appeal to the Supreme Court in Patel was whether the Secretary of State's failure to make a removal decision at the same time as or shortly after the decision to refuse leave to remain was unlawful (per Lord Carnwath JSC in Patel (SC) at [3]). It cannot therefore be argued that the decision in the latter disapproves of the decision in Lamichhane.

54.
Lord Carnwath JSC stated at [41]-[44]:

41 The broader approach of the majority seems to me to gain some support from the scheme of section 3C , under which (as is common ground) the initial application for leave to remain, if made in time, can later be varied to include wholly unrelated grounds without turning it into a new application or prejudicing the temporary right to remain given by the section. Thus the identity of the application depends on the substance of what is applied for, rather than on the particular grounds or rules under which the application is initially made. The same approach can be applied to the decision on that application, the identity or "substance" of which in the context of an appeal is not dependent on the particular grounds first relied on.

42 It is of interest that, at an earlier stage, the broader approach seems to have accorded with the reading of those responsible within the Home Office for advice to immigration officers. The Immigration Directorate's Instructions, issued in September 2006, noted that it was not possible under section 3C to make a second application, but continued:

"On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post decision, it would be open to the applicant to submit further grounds to be considered at appeal … Once an application has been decided it ceases to be an application and there is no longer any application to vary under section 3C(5). So any new information will fall to be dealt with during the course of the appeal rather than as a variation of the original application." (para 3.2 emphasis added)

43 The same approach is supported by the current edition of Macdonald's Immigration Law & Practice 8th ed (2010) para 19.22 (under the heading "The tribunal as primary decision maker"). The only implicit criticism made of the majority approach in AS is that it did not go far enough. They observe that even without a section 120 notice the tribunal should be free to consider any matter –

“… including a matter arising after the decision which is relevant to the substance of the decision regardless of whether a one-stop notice has been served. The ‘substance of the decision’ is not the decision maker's reasoned response to the particular application or factual situation that was before it but is one of the immigration decisions enumerated in section 82 and a ‘matter’ includes anything capable of supporting a fresh application to the decision maker…”

Whether or not such an extension of the majority's reasoning can be supported, that passage indicates that the broader approach in itself is not controversial.

44 In the end, although the arguments are finely balanced, I prefer the approach of the majority in AS . Like Sullivan LJ, I find a broad approach more consistent with the “coherence” of this part of the Act. He noted that the standard form of appeal, echoing the effect of the section 120 notice, urged appellants to raise any additional ground at that stage, on pain of not being able to do so later, and observed:

“…it seems to me that appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward.” (para 99)

55.
The observations of Lord Carnwath JSC are, as Lord Mance and the other JJSC observed at [62] obiter, but they also favoured the majority view, adding at [65]:

65. The majority approach in AS does not mean that section 85(2) enables an appellant, who has sought leave to remain, to go outside the scope of a leave to remain application by adding or substituting an appeal under a different head of section 82(2), e.g. by asserting a wrongful refusal of entry clearance or of a certificate of entitlement: see sections 82(2)(b) or (c)). To that extent, it seems to me that the majority approach is not open to the criticism that it amounts to re-reading section 85(2) as if it used the words "against a decision of a kind listed in section 82(2)" or omitted the words "against the decision appealed against" altogether.

56.
We respectfully agree and would add that there is nothing either in this decision or, for that matter, the decision of the Court of Appeal in Patel (reported as Patel v SSHD [2012] EWCA Civ 741) which casts doubt on the decision of the Court of Appeal in Lamichhane .

57.
The primary submission with respect to section 85 (4), developed by Mr Biggs but relied upon by all the claimants, is that in an appeal under regulation 26 of the EEA Regulations, section 85 (4) of the 2002 Act is applicable, and thus entitles them to raise human rights arguments. Mr Biggs relies on the quotation from Macdonald ’s Immigration Law & Practice set out in the quotation of Lord Carnwath’s opinion set out above as authority for the proposition that in these appeals the “substance of the decision” which has to be considered “ is one of the immigration decisions enumerated in section 82”, and that this, by operation of Schedule 1 of the EEA Regulation includes a decision in respect of a residence document.

58.
That argument is, we consider flawed. Schedule 1 applies the relevant sections of the 2002 Act as if the decision were an immigration decision under section 82 (1) of the 2002 Act; it does not, as we

noted above, make it such a decision, nor do we discern either in the case law to which we have been referred or in the scheme of the legislation, any reason to take that approach. On the contrary; there is a clear policy of keeping decisions in respect of EU law (other than in cases of enforcement) outside the scheme of the 1971 Act.

59.
Mr Biggs seeks to rely on AS in support of his argument sat [2] where Arden LJ said :

We are concerned with grounds other than human rights grounds or grounds for seeking asylum. It is accepted that they can be raised in any event.

60.
This does not, however, assist his submissions. The appeal in AS arose from decisions to refuse leave to remain. Those were clearly immigration decisions within section 82 (1); both appellants had been served with notices under section 120 of the 2002 Act. The substance of the decision was inevitably a refusal of leave to remain.

61.
That is not to say that section 85 (4) has no effect in an EEA appeal. It permits a Tribunal to take into account evidence that an appellant is entitled to a residence card on a basis other than that on which the application was made or another type of card. For example, if by the time of an appeal, an appellant asserting a right of residence has accumulated five years' lawful residence and is thus entitled to a document as confirmation of permanent residence; a student may have taken up employment; the EEA spouse may have divorced the non-EEA national appellant. The underlying substance – a right of residence under EU law – remains the same, but it arises through a different route or routes.

62.
Neither in Patel in the Court of Appeal, or in the Supreme Court nor in Lamichhane , AS , or JM (Liberia) had the appellants initially sought confirmation of rights under EU law. The analysis in the cases is thus inextricably linked with the concept of leave under the Immigration Acts (see for example the discussion regarding section 3C (4) of the 1971 Act in AS) which, for the reasons set out above is entirely distinct from a decision to issue a residence card.

63.
A person asserting rights under EU law is not in the same position as a person seeking leave to remain, nor is he in the position of a person refused leave if confirmation of the right is denied. Many of the difficulties faced by an individual in the position of the appellant in JM (Liberia) do not apply here. We are not satisfied that an EEA national who had not, by definition, required leave to enter, could commit an offence under section 24 of the Immigration Act 1971. Further, the claimants here did not have leave to remain and would not be in worse a position than before the decision. There is also nothing in the legislation which prevents an EEA national or a dependant thereof from applying for leave to remain under the Immigration Rules at any stage either before applying for a residence document, contemporaneously with it, or subsequently. Section 3C of the 1971 Act simply does not apply when what is under consideration is an application for a residence document.

64.
Further, we note that in Patel in the Court of Appeal Stanley Burton LJ observed [53]-[54]:

53 Fourthly, I consider that the court in Mirza was over-impressed with the argument that the Secretary of State should deal very promptly with the question of a removal direction, as a person whose leave to remain has expired will be committing a criminal offence by remaining in the UK. Where a person makes an extension application after his or her leave to remain has expired, section 3C of the 1971 Act would not apply, so that such a person commits a criminal offence notwithstanding the fact that he or she has made an extension application. Thus, many people to whom the reasoning in Mirza and Sapkota would apply would be in breach of the criminal law anyway. Further, again applying the reasoning in those two cases, in many instances where the decision whether to make a removal direction could be made after the refusal of the extension application, the person concerned will be committing a crime, because the effect of section 3C of the 1971 Act will either not apply (as there will have been no appeal), or the time for appealing will have expired, before the removal direction will have been given.

54 In any event, the disadvantage to a person of having his or her remaining in the UK being criminalised can easily be overstated. Most obviously, at least in many cases (but, I accept, not in all) the problem can be rectified by the person concerned voluntarily leaving the UK . Further, the mere fact that a person is illegally in the UK does not prevent him or her exercising any rights of appeal against a refusal of an extension application or the making of a removal direction.

65.
In the appeal against refusal of residence documents to the Upper Tribunal in A hmed (Amos; Zambrano; reg 15A (3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC) which went on appeal to the Court of Appeal in both NA (Pakistan) v SSHD [2014] EWCA Civ 995 and SSHD v NA (Pakistan) [2015] EWCA Civ 140 it is evident that no issue was tak en by the Court of Appeal as to the jurisdiction to consider human rights arguments. The issues before it, and the primary basis on which the appeal was allowed in the Upper Tribunal, relates to EU law and the Court of Appeal made a preliminary reference to the ECJ. In the circumstances, we do not consider that this decision is authority for the proposition that the principles in JM (Liberia) apply to these appeals.

66.
As noted above, we received written submissions on the decision of the Court of Appeal in FK (Kenya) [2010] EWCA Civ 1302. We do not, however, consider that it is of much assistance. As Mr Biggs submitted, it appears that JM (Liberia) was not cited to the Court of Appeal, and the court did not specifically address the issue of jurisdiction. While Sullivan LJ appears to doubt whether the Tribunal should have considered the impact of a future removal, his views are obiter.

67.
In all of these appeals, the application made was, in substance, that the claimant had a right of residence under EU law and was, in consequence, entitled to a residence card as confirmation of this. They now wish to advance an entirely new case: that they are entitled to stay on the basis that any removal of them would be contrary to their rights pursuant to article 8 of the Human Rights Convention. That they could never as a result of an appeal on that ground obtain the residence card they initially sought cannot be ignored. There is fundamental difference between asserting a right to remain under EU law (and thus not requiring leave under the Immigration Acts) and asserting an entitlement to leave to remain because one is subject to that requirement. It is, in reality, entirely inconsistent.

68.

As Mr Biggs and the other claimants' representatives submitted, these appeals concern derivative rights. Whether the rights in question accrue to the non EEA nationals requires consideration of a hypothetical removal of that individual. But care has to be taken analysing how the right of residence arises. In Sanneh v SSWP [2015] EWA Civ 45 the Cour t held that the right accrues automatically; it is not dependant on a decision by the Secretary of State (see in particular Elias LJ at [170]). The decision being made by the Secretary of State is therefore still whether to issue documentation; it is not whether to remove the parent.

69.
There is, therefore, no real distinction to be made here between the issue of documentation as confirmation of a derivative right and as a right under EU law. There has been no decision to remove the applicant, nor is there any indication that this will occur.

70.
We do not, therefore, consider that JM (Liberia) applies to these appeals. We remind ourselves of what was said in Patel at [62] (see above). An application made for a residence document as confirmation of an existin g right and an application based on a claim that removal would be contrary to the United Kingdom's obligations under the Human Rights Convention are entirely different. To permit an appellant to do so would be precisely what the Supreme Court says section 85 (2) does not permit – the raising of an entirely different head of application outside the scope of the initial application.

71.
It is evident that, prima facie, the parent of a British Citizen child who is the sole carer may also seek leave to remain under Appendix FM of the Immigration Rules. There is, we consider, nothing to prevent such an application being made contemporaneously with an application for a residence card.

72.
While we note the submission that a requirement to make an application and pay a fee is disproportionate, this is without substance. The Secretary of State is unarguably entitled to charge for applications for leave to remain under the Immigration Rules , and if an applicant is destitute, he can apply for a fee waiver. There is no element of discrimination in such a case, as what is being asserted is not a right under EU law, b ut under domestic law; no submission was made to us that there is any relevant "social advantage" in play such that Regulation 492/2011 is engaged .

73.
We have considered whether the effect of paragraph GEN 1.9 of Appendix FM would permit the making of a human rights claim within an appeal. We consider for the reasons given above that it cannot. The issues here are the jurisdiction of the Tribunal as constituted by statute; provisions of the Rules cannot alter that.

74.
Drawing these observations together, we conclude that not only is the claimants' case possible only on a contorted reading of the statutory provisions and the decision letters, there is no need for it to be. If they believe that they are entitled under EU law to confirmation of that, the EEA appeal allows them to say so. If they are not so entitled, they are no different from anyone else in the same position – an overstayer who can make a human rights application which may or may not be successful. The making of an unsuccessful EEA application cannot rationally put them in a different position. The refusal of the application leaves them in the same position as before the application, that is, an overstayer. The removal, if it occurs, is not in consequence of the decision: it is as a result of overstaying.

75.
For these reasons, we conclude that, where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot in an appeal under the EEA Regulations bring a Human Rights challenge to removal .

76.
Our conclusions with respect to the individual appeals are set out in Schedule 2.

SUMMARY OF CONCLUSIONS

1
The decision of the First-tier Tribunal in the appeal of Mr Amirteymour did not involve the making of an error of law and we uphold it.

2
The decision of the First-tier Tribunal in the appeal s of Ms Tijana and Ms Jamiu did not involve the making of an error of law and we uphold them .

3
The decision of the First-tier Tribunal in the appeal of Ms Izvira did involve the making of an error of law and we set it aside. We remake the appeal by dismissing it on all grounds.

4
The decision of the First-tier Tribunal in the appeals of HF and AN did involve the making of an error of law and we set them aside. We remake the appeals by dismissing them on all grounds.

Signed Date: 28 July 2015

Upper Tribunal Judge Rintoul

Schedule 1 – Relevant legislative provisions

1.
Section 3 provides:

3.— General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen :

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

2.
This is subject to the provisions of section 7 of the Immigration Act 1988:

7.— Persons exercising Community rights and nationals of member States.

(1) A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972 .

(2) The Secretary of State may by order made by statutory instrument give leave to enter the United Kingdom for a limited period to any class of persons who are nationals of member States but who are not entitled to enter the United Kingdom as mentioned in subsection (1) above; and any such order may give leave subject to such conditions as may be imposed by the order.

(3) References in the principal Act to limited leave shall include references to leave given by an order under subsection (2) above and a person having leave by virtue of such an order shall be treated as having been given that leave by a notice given to him by an immigration officer within the period specified in paragraph 6(1) of Schedule 2 to that Act.

3.
These provisions are mirrored in Schedule 2 of the EEA Regulations which are made pursuant to section 109 of the 2002 Act.

1.— Leave under the 1971 Act

(1) In accordance with section 7 of the Immigration Act 1988 , a person who is admitted to or acquires a right to reside in the United Kingdom under these Regulations shall not require leave to remain in the United Kingdom under the 1971 Act during any period in which he has a right to reside under these Regulations but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right.

(2) Subject to sub-paragraph (3), where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions shall not have effect for as long as the person has that right to reside.

(3) Where the person mentioned in sub-paragraph (2) is an accession State national subject to worker authorisation working in the United Kingdom during the accession period and the document endorsed to show that the person has leave is an accession worker authorisation document, any conditions to which that leave is subject restricting his employment shall continue to apply.

4.
Section 82 of the 2002 Act provides:

82 Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal [to the Tribunal] 1 .

(2) In this Part “immigration decision” means—

(a) refusal of leave to enter the United Kingdom ,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom ,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),

5.
Section 84 of the 2002 Act provides;

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of [...] 1 [Article 20A of the Race Relations (Northern Ireland) Order 1997] 2 [or by virtue of section 29 of the Equality Act 2010 (discrimination in the exercise of public functions etc) so far as relating to race as defined by section 9(1) of that Act] 3 ;

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) “EEA national” means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as it has effect from time to time).

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(1) 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) , 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which i t thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But subsection (4) is subject to the exceptions in section 85A .

6.
The EEA Regulations provide in respect of appeal rights as follows:

26.— Appeal rights

(1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State .

(2A) If a person claims to be in a durable relationship with an EEA national he may not appeal under these Regulations unless he produces—

(a) a passport; and

(b) either—

(i) an EEA family permit; or

(ii) sufficient evidence to satisfy the Secretary of State that he is in a relationship with that EEA national.

(3) If a person [to whom paragraph (2) does not apply] 3 claims to be a family member who has retained the right of residence or the family member or relative of an EEA national he may not appeal under these Regulations unless he produces—

(a) a passport; and

(b) either—

(i) an EEA family permit;

(ia) a qualifying EEA State residence card;

(ii) proof that he is the family member or relative of an EEA national; or

(iii) in the case of a person claiming to be a family member who has retained the right of residence, proof that he was a family member of the relevant person.

(3A) If a person claims to be a person with a derivative right of entry or residence he may not appeal under these Regulations unless he produces a valid national identity card issued by an EEA State or a passport, and either—

(a) an EEA family permit; or

(b) proof that—

(i) where the person claims to have [a derivative right of entry or residence as a result of] 8 regulation 15A(2) , he is a direct relative or guardian of an EEA national who is under the age of 18;

(ii) where the person claims to have [a derivative right of entry or residence as a result of] 8 regulation 15A(3) , he is the child of an EEA national;

(iii) where the person claims to have [a derivative right of entry or residence as a result of] 8 regulation 15A(4) , he is a direct relative or guardian of the child of an EEA national;

(iv) where the person claims to have [a derivative right of entry or residence as a result of] 8 regulation 15A(5) , he is under the age of 18 and is a dependant of a person satisfying the criteria in [(i) or (iii);] 9

(v) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(4A) , he is a direct relative or guardian of a British citizen.

(4) A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations.

(5) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act 11 .

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the [First-tier Tribunal] 12 .

(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] 12 in accordance with that Schedule.

7.
Schedule 1 of the EEA Regulations provided, at the relevant time, as follows:

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 as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1), except paragraphs (a) and (f);

sections 85 to 87;

section 105 and any regulations made under that section; and

section 106 and any rules made under that section

8.
Section 120 of the 2002 Act provides:

120 Requirement to state additional grounds for application

(1) This section applies to a person if—

(a) he has made an application to enter or remain in the United Kingdom , or

(b) an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him.

(2) The Secretary of State or an immigration officer may by notice in writing require the person to state—

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

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

(c) any grounds on which he 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) the application mentioned in subsection (1)(a), or

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

Schedule 2 – Decisions relating to the individual appeals

Amirteymour

1.
Mr Amirteymour is a citizen of the United States of America bo r n on 8 November 1956. He and his former wife are originally from Iran where they married in 2003; their daughter was born in the United Kingdom on 11 October 2005. The appellant has visited the UK to see his daughter twice a year since 2005, entering as a visitor. It appears that he has been living her permanently since 2013 albeit without leave in any capacity. He sees his daughter 2-3 times a week but she does not live with him.

2.
On 14 August 2013, the claima nt requested a residence card on the basis that he is the primary carer of his daughter who is a British Citizen. That application was refused on 21 February 2014 for the reasons set out in a letter of that date. In that letter the respondent noted that the claimant wished to rely on family or private life, but advised him that he would need to make a separate, charged application using the appropriate form. The refusal letter acknowledges the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 and that the duty is discharged by acting on concerns the respondent identifies regarding the welfare of children. Finally, the refusal letter notes that the appellant is not required to the leave the United Kingdom if he can demonstrate he has a right to reside, but that he ought to make arrangements to leave. No section 120 notice was served.

3.
The grounds of appeal to the First-tier Tribunal aver that the respondent’s decision was:

(a)
Not in accordance with the Rules;

(b)
Not in accordance with the law;

(c)
In breach of rights conferred by the Community Treaties;

(d)
Unlawful under section 6 of the Human Rights Act 1998;

(e)
Not in the daughter's best interests which require him to be allowed to remain; and,

(f)
A disproportionate interference with the claimant's article 8 rights.

It is also averred that a discretion under the rules should have been exercised differently.

4.
The appeal was heard by First-tier tribunal Judge I Ross who dismissed it under the EEA Regulations and under article 8 ECHR in a decision promulgated on 17 November 2014 which records [6] that the claimant's counsel indicated that no claim was to be pursued under the EEA regulations and that the appeal would proceed only under article 8 grounds.

5.
Judge Ross found that:

(a)
the refusal to issue a residence card did not involve an interference with family life sufficiently severe to engage article 8 [13];

(b)
the principle established in Chikwamba SSHD [2008] UKHL 40 did not apply to this case [19];

(c)
section 117B of the 2002 Act was not relevant as there was no suggestion that the appellant would be removed from the United Kingdom [21].

6.
The claimant sought permission to appeal to the Upper Tribunal on the grounds that Judge Ross erred:-

(a)
In concluding that the respondent's decision did not engage article 8 [1];

(b)
In not treating the child's best interests as a primary consideration [2];

(c)
In not adopting the correct procedure with respect to article 8 [3]; and,

(d)
In concluding that section 117B of the 2002 Act was not engaged [4].

7.
On 15 January 2015 permission to appeal to the Upper Tribunal was granted, it being observed that it was arguable that the judge should not have considered article 8.

8.
The grounds of appeal to the Upper Tribunal do not challenge the findings made in respect of the EEA Regulations. We have concluded for the reasons set out above that the Tribunal does not have jurisdiction to consider a ground which is different from the subject of the decision under appeal. The judge should not in this case have considered whether the decision was contrary to the claim ant's

human rights, as he had no jurisdiction so to do. It follows that any error in his consideration of article 8 and the application of section 117B of the 2002 Act could not be material. On the basis we consider that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Tawa Tijani & Radeeyah Olamide Jamiu

1.
Ms Tijani is a citizen of Nigeria who entered the United Kingdom in 2004 and overstayed. She is the mother of Ms Jamiu who was born on 23 January 2008. A second daughter, Roheemot Motunrayo Jamiu Grace Koffi was born on 16 June 2009 who is a French national as is her father. Ms Tijani is not and has never been married to him. There is also, it now transpires, a third child, who is named in later documents but in respect of whom it appears that no application was made to the respondent.

2.
On 20 July 2012, an application was made for the claimants to be issued with a residence card on the basis of the decision in Zambrano; the application also raises article 8 and the duties imposed on the respondent by section 55 of the Borders, Citizenship and Immigration Act 2009. That application was refused on 18 July 2013, the respondent concluding that the requirements of Regulation 15A (2) had not been met as there was no evidence that neither the principal appellant nor her EEA national daughter had sufficient funds.

3.
As in the other appeals before us, the refusal letters made it clear that consideration had been given only to the EEA Regulations; that no removal decision had yet been made; and, that if the claimants wished to make an application for leave to remain under the Immigration Rules, this would need to be made by means of the correct form and upon payment of the correct fees.

4.
An appeal was lodged on the grounds that the respondent had erred in concluding that there were insufficient funds; had failed to consider whether the EEA national child would be unable to remain in the United Kingdom if the primary carer were required to leave, and the effect would be to force an EEA national who cannot be required to leave the United Kingdom to reside outside the EU.

5.
In the appeal before the First-tier Tribunal on 30 June 2014, Ms Tijani’s case was that as she received £920 per month from rental income from property left to her in Nigeria, transferred to her through the bank account of a friend, Ms Oladapo-Solo and receives £300 a month from her sister who lives in the USA, that she did have sufficient funds. It was also her case that she did have in place comprehensive sickness insurance.

6.
In its determination promulgated on 14 July 2014, the First-tier Tribunal sets out why it was not satisfied that Ms Tijani was receipt of the rental income claimed [9]-[11], why it was not satisfied that she receives money from her sister [12]-[13], and why it was not satisfied that there was a health insurance policy in placed [14] – [17]. There was no consideration of article 8 ECHR .

7.
The claimants sought permission to appeal to the Upper Tribunal on the grounds that the First-tier Tribunal erred:

(a)
In finding that the insurance premiums were not paid, contrary to the evidence;

(b)
In setting too high a standard of proof in assessing if the parties were self-sufficient;

(c)
By failing to engage with the grounds of appeal and submission made with respect to article 8 and section 55 of the Borders, Citizenship and Immigration Act 2009 ;

(d)
Failing to consider whether, in effect, the EEA national child would be taken out of the EU.

8.
Permission to appeal on all grounds was granted on 7 November 2014.

9.
It is, to say the least, unfortunate that Mr Mak's skeleton argument proceeds [5] on the basis that article 8 had been raised in a section 120 notice and positively states [6] that this had been served. Only before us did he admit that no such not ice had been served. Of further concern is that the skeleton argument appears to proceed on the basis that there were only two children , yet it is now accepted that there are three.

10.
As w e have concluded for the reasons set out above that the Tribunal does not have jurisdiction to consider a ground which is different from the subjec t of the decision under appeal, the failure of the First-tier Tribunal to consider this issue was incapable of affecting the outcome.

11.
The other grounds are equally without merit. Contrary to what is averred, the First-tier Tribunal sets out in adequate detail [9]-[11] why it did not accept the account given of the funds being transferred to Ms Tijana, noting specifically the lack of evidence that the funds were transferred into Mrs Oladapo-Solo's account from Nigeria and at [10] an apparent inconsistency in the Ms Tijana saying she has no bank account yet there being cheques deposited in her name. Further, adequate and sustainable reasons were given [12] and [13] why the Tribunal did not accept that Ms Tijana was receiving £300 a month from her sister. In the circumstances, the Tribunal was manifestly entitled to conclude that there were insufficient funds available and thus any error with respect to whether there was in place comprehensive sickness insurance cannot have affected the outcome.

12.
It is wholly unarguable that the Zambrano principle is applicable here. That case was concerned with children who would effectively be compelled leave the territory of the European Union; it is not authority for the proposition that that there is a derived right of residence for the parents of children effectively compelled to live in another EEA state. The EEA Regulations at reg. 15A (4A) establish that in order to obtain a card as confirmation of a right of residence, it would need to be shown that the EEA national child could not reside in another EEA state. There was insufficient evidence to show that the child could not live in the state of her nationality or that her mother and half-siblings c ould not join her there, and thus it cannot be argued that the requirements of the regulations were in fact met.

13.

On the basis we consider that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Izvira

1.
Ms Izvira is a citizen of Albania who is married to a British Citizen. They have three children born in 2004, 2011 and May 2014 who are also British Citizens. T he oldest has significant health needs as he has cerebral palsy .

2.
The claima nt entered the United Kingdom as a visitor and overstayed. On 13 March 2012 she applied for a residence card as confirmation of her right of residence as the primary care r of a British Citizen child, the son born in 2011. That application pursuant to regulation 15A (4A) was refused on the basis that the app ellant had not shown that she was a primary carer as she had not shown that the child's father, Altin Izvira, was not in a position to care for the British Citizen child. The refusal letter records that the respondent has considered her duties under section 55 but advised the appellant that She is, however, warned that she should now make arrangements to leave and that if she does not do so, her departure may be enforced. She is also again informed that she can make an application to UKBA and that her entitlement to remain in the UK has been assessed solely on the basis of the EEA Regulations.

3.
The appeal against that decision was dismissed by First-tier Tribunal Judge Beach in a determination promulgated on 24 December 2013. Permission to appeal to the Upper Tribunal was granted. In a decision dated 14 April 2014, the Upper Tribunal held that the decision under the EEA regulations did not involv e the making of an error of law but that the First-tier Tribunal's consideration of article 8 had involved the making of an error of law, and remitted it to the First-tier Tribunal to make a fresh decision on the article 8 issue only.

4.
On 11 July 2014, the First-tier Tribunal allowed the appeal on article 8 grounds, concluding amongst other things that it would be in the best interests of all the British Citizen children that their mother and father continue to live in the United Kingdom with them, and that the interference that would be caused to the claim ant's family life would be disproportionate.

5.
The respondent sought permission to appeal to the Upper Tribunal on the basis that the FtTJ had attached undue weight to the interests of the children; had erred by misapplying the decisions in Chikwamba [2008] UKHL 40 and Edgehill [2014] EWCA Civ 402; and, in failing to direct himself in line with Gulshan (article 8 – new rules – Correct approach) Pakistan [2013] EWCA Civ 1192. Those grounds were later amended to include the ground that the First-tier Tribunal had not had jurisdiction to consider Human Rights. There is no cross -appeal

6.
Given our conclusion that the Tribunal does not have jurisdiction to consider a ground which is different from the subjec t of the decision under appeal, the First-tier Tribunal erred in law in considering whether the decision was contrary to the claimant's human rights, as it had no jurisdiction so to do. It follows that in allowing the appeal on article 8 grounds, the First-tier Tribunal's decision did involve the making of an error of law and we set it aside.

7.
As the only basis on which it was pursued before the First-tier Tribunal was on the basis that the decision amounted to a disproportionate interference with the appellant's rights under article 8 of the Human Rights Convention, and there is no jurisdiction to consider that issue, it follows that the appeal must be dismissed.

H F & A N

1.
These claimants are mother and daughter. They entered the United Kingdom on 3 March 2009 and 11 June 2010 respectively to join the SG , an EEA national as his spouse and dependent child. On 23 November 2010 they were granted Residence Cards valid for 5 years on that basis. On 18 October 2012 Ms F left her husband due to domestic violence; their marriage was dissolved on 8 January 2013. Ms F has, since then, give n birth to another child, F ; Mr G is not the father.

2.
On 22 March 2013, the claimants applied for permanent residence cards as confirmation of Ms F and her daughter's right to remain in accordance with regulation 10 of the EEA Regulations. Those applications were refused as the respondent was not satisfied that Ms F met the requirements of either regulation 10 (5) or regulation 10 (6). The respondent also revoked their Residence Cards which had been issued in November 2010 on the basis that Ms F and her daughter no longer met the requirements of the EEA Regulations.

3.
As with in the other appeals before us, the refusal letters made it clear that consideration had been given only to the EEA Regulations; that no removal decision had yet been made; and, that if the claimants wished to make an application for leave to remain under the Immigration Rules, this would need to be made by means of the correct form and upon payment of the correct fees.

4.
On appeal, in a determination promulgated on 10 April 2014, the First-tier Tribunal found that Ms F did meet the requirements of regulation 10 (5) but, as she had conceded [21] that she had not been employed, self-employed or self-sufficient since her divorce became final, she did not meet the requirements of regulation 10 (6) and so did not meet the requirements of the EEA Regulations. The appeal was, however , allow ed pursuant to article 8.

5.
The respondent sought permission to appeal on the grounds that, in allowing the appeal pursuant to article 8, the judge had erred in failing first to consider whether the requirements of appendix FM of the Immigration Rules had been met, and further, in failing properly to explain why the cases were exceptional. Permission to appeal was granted on 19 May 2014 and the matter then came before Upper Tribunal Judge Hanson who permitted the respondent to amend her grounds to include a challenge asserting that the First-tier Tribunal does not have the jurisdiction to entertain an article 8 application in an appeal against an EEA decision. There is no cross-appeal.

6.
Given our conclusion the Tribunal does not have jurisdiction to consider a ground which is different from the subjec t of the decision under appeal, the First-tier Tribunal erred in law in considering whether the decision was contrary to the appellant's human rights, as it had no jurisdiction so to do. It

follows that in allowing the appeal on article 8 grounds, the First-tier Tribunal's decision did involve the making of an error of law and we set it aside.

7.
As the only basis on which it was pursued before the First-tier Tribunal was on the basis that the decision amounted to a disproportionate interference with the appellant's rights under article 8 of the Human Rights Convention, and there is no jurisdiction to consider that issue, it follows that we must remake the appeal by dismissing it.

8.
We maintain the anonymity order made by the First-tier Tribunal.