Upper Tribunal
(Immigration and Asylum Chamber)

Jaff (s.120 notice; statement of "additional grounds") [2012] UKUT 00396(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 August 2012	.....

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALAND OSMAN JAFF

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Ms F Kadic of Cambridge Immigration Legal Centre Limited

(i) In the absence of a s.120 notice and a statement of "additional grounds", an appellant could not rely on the Immigration (European Economic Area) Regulations 2006 before the First-tier Tribunal as that had not formed part of his application for leave to remain made to the Secretary of State: Lamichhane v SSHD [2012] EWCA Civ 260 applied.

(ii) A statement of "additional grounds" may be made in response to a s.120 notice at any time, including up to (and perhaps at the time of) the hearing of the appeal.

(iii) Although the legislative scheme prescribes no particular form in which a statement of "additional grounds" must be made, such a statement must as a minimum set out with some level of particularity the ground(s) relied upon by the appellant as the foundation for remaining in the UK and upon which reliance has not previously been placed. It must "state" the additional ground to be relied on in substance or, at least, in form.

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Headen) allowing the claimant's appeal against the Secretary of State's decision taken on 25 March 2011 refusing to vary his leave to remain in the UK and to remove him by way of directions to Iraq under s.47 of the Immigration, Asylum and Nationality Act 2006.

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

The Judge's Decision

3. Judge Headen dismissed the appellant's appeal on asylum and humanitarian protection grounds. She did not accept that the appellant would be at risk on return to Iraq. That decision was not challenged before me and stands.

4. However, the Judge allowed the appellant's appeal on two bases: first, under Article 8 of the ECHR; and secondly, under the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations"). Both decisions were based upon the appellant's relationship with a Latvian national (Anna Danilova) who was his girlfriend. At para 46, the Judge found:

> "The unchallenged evidence is that the appellant is the partner of an EEA national and has been in a durable relationship with her since 2008. They plan to marry. The appellant's partner has been living with the appellant at his address. Documentary evidence has been provided to confirm this relationship and the partner's status."

5. The Judge found that from 1 May 2011, the appellant's girlfriend ceased to be subject to the Worker Registration Scheme in respect of Latvia and, as a worker, was exercising EU treaty rights.

6. As regards the 2006 Regulations, on the basis of the finding that the appellant had a durable relationship with an EEA national worker the Judge said this (at para 46):

> "….The appellant is therefore under Regulation 8(5) an extended family member entitled to a family permit."

7. In relation to Art 8, the Judge found that the appellant's removal would be a disproportionate interference with his family life enjoyed with his partner on the basis that, as she was exercising treaty rights in the UK, she could not be expected to return to Latvia in order to live with the appellant and equally, she could not be expected to return to Iraq with the appellant.

The Grounds and Submissions

8. On 6 June 2011, the First-tier Tribunal (Judge E B Grant) granted the Secretary of State permission to appeal on the two grounds set out in the application. First, the Judge had been wrong to allow the appeal under the 2006 Regulations as the appellant had not made an application under those Regulations. Relying on the case of R (Weiss) v SSHD [2010] EWCA Civ 803 the grounds argue that the Judge could not make a decision under the 2006 Regulations if an application had not been made to the Secretary of State. Secondly, the grounds argue that the Judge was wrong to allow the appeal under Article 8 (which is described as a "discretionary basis") before the appellant had exhausted his statutory options, namely made an application under the 2006 Regulations.

9. In his submissions on behalf of the Secretary of State, Mr Tarlow accepted that the Judge's decision in respect of Article 8 was entirely appropriate. He did not formally concede that point but he made no further submissions in relation to it. Nevertheless he submitted that for the reasons set out in the grounds upon which permission to appeal was sought the Judge should not have made a decision in respect of the 2006 Regulations in the absence of the appellant having made an application under those Regulations.

10. Ms Kadic, who represented the appellant submitted that the judge was entitled to consider the 2006 Regulations but, she accepted, since the decision to issue a residence card to an extended family member of an EEA national required the exercise of discretion under reg 17(4) of the 2006 Regulations, the Judge had been wrong to allow the appeal outright. The Secretary of State was still required to exercise her discretion under reg 17(4).

Discussion and Analysis

11. The judge's factual finding that the appellant and his partner are in a durable relationship is not challenged. Nor is it challenged that as from 1 May 2011, the appellant's partner was an EEA national exercising Treaty rights in the UK. As a consequence, Ms Danilova had a right to reside in the UK. On the basis of the judge's factual finding in respect of their relationship, the appellant was, in fact, an "extended family member" under reg 8(5) of the 2006 Regulations. However, even if the judge was entitled to make a decision under the 2006 Regulations, she was wrong to

consider that the appellant was "entitled to a family permit". (The document is in fact properly called a "residence card": see reg 17). By virtue of reg 17(4) a residence card *may* be issued to an extended family member by the Secretary of State but that involves the exercise of discretion which has yet to be exercised by the Secretary of State. Therefore, even if the First-tier Tribunal had been entitled to decide the appeal under the 2006 Regulations, the successful outcome of the appeal could be no more than the Secretary of State's decision was not in accordance with the law and it remained for her to exercise discretion under reg 17(4) in line with the First-tier Tribunal's finding that the appellant and his partner are in a durable relationship.

12. That said, however, I have concluded that the First-tier Tribunal was not entitled to reach a decision under the 2006 Regulations.

13. It is not disputed that the appellant has not made an application under those Regulations to the Secretary of State for a residence card as an "extended family member". Indeed, I was told at the hearing that he has not done so even now. In those circumstances, it is clear from a line of cases decided by the Court of Appeal that the First-tier Tribunal could only consider a ground of appeal not part of the application considered by the Secretary of State in reaching the appealed immigration decision if it has been raised in a statement in response to a s.120 notice served by the Secretary of State under the Nationality, Immigration and Asylum Act 2002. That line of cases includes Weiss (relied upon by the Secretary of State in the grounds); AS (Afghanistan) v SSHD [2009] EWCA Civ 1079 and culminating in the recent decision in Lamichhane v SSHD [2012] EWCA Civ 260.

14. In Lamichhane the Court of Appeal considered the issue of whether the First-tier Tribunal had jurisdiction to deal with matters raised by an appellant in an appeal which he had not previously raised with the Secretary of State where a "one-stop" notice under s.120 of the Nationality, Immigration and Asylum Act 2002 had not been served by the Secretary of State on the appellant. Having examined the relevant statutory provisions in the 2002 Act, Stanley Burnton LJ concluded at [41] that :

> "…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."

15. That decision followed the earlier decision of the Court of Appeal in AS (Afghanistan) to the same effect.

16. Consequently, the Court of Appeal held that the First-tier Tribunal had no jurisdiction to consider that appellant's claim to remain as a Tier 4 student as that had not been the basis upon which he had sought leave (it was in fact on long residence grounds) and which had resulted in the immigration decision the subject of the appeal as the Secretary of State

had not served a s.120 notice inviting that appellant to state "additional grounds" on which he claimed to be entitled to remain in the UK.

17. In this appeal, the Secretary of State argues that, by parity, the First-tier Tribunal had no jurisdiction to consider whether the appellant had any basis under the 2006 Regulations to remain in the UK as this had not formed part of his original application.

18. Although this case concerned an appellant's claim to reside in the UK by virtue of the 2006 Regulations, the approach in Lamichhane is no less applicable. As in Lamichhane the appellant is seeking to rely upon a ground set out in s.84 of the 2002 Act (s. 84(1)(d)). However in this appeal, unlike in Lamichhane, a s.120 notice was served by the Secretary of State upon the appellant as part of the refusal decision dated 25 March 2011. That "one-stop" notice states:

> "You must now make a formal statement stating your reasons for wishing to enter or remain in the United Kingdom. You should also state any grounds on which you should be permitted to enter or remain in the United Kingdom, and any grounds on which you should not be removed from or be required to leave the United Kingdom."

19. In response to that the appellant did not serve any formal statement upon the Secretary of State. The first reference that the appellant makes to his relationship with his EEA partner was in the bundle of documents served on the First-tier Tribunal two days before the hearing which was held on 6 May 2011. Reference is made to his relationship in his statement dated 15 April 2011 (at page 11 of the bundle). Further, albeit in the context of Article 8, the skeleton argument at para 23 states that the "appellant has…a girlfriend in the UK". That is the only reference in the skeleton argument to his girlfriend and no reference or reliance is placed upon the 2006 Regulations. In addition, there is a statement from the appellant's girlfriend (at pages 12-13 of the bundle) dated 3 May 2011 stating, inter alia, that they have been living together since 20 May 2009. No direct reference is made to her EEA status or any suggestion that the appellant wishes to assert a claim to be in the UK based upon his relationship with an EEA national.

20. Consequently, I accept Mr Tarlow's submission that the appellant, had there been no s.120 statement, would not have been entitled to rely upon the 2006 Regulations directly before the First-tier Tribunal. However, unlike in Lamichhane, there was a s.120 notice. The issue is, therefore, whether the appellant has made a "statement of additional grounds" in response to that notice relying on the 2006 Regulations.

21. The 2002 Act does not stipulate any particular form a statement under s.120 should take. As Stanley Burnton LJ noted in Lamichhane at [35]:

> "Section 120 does not itself provide for the consequences of the service of a notice. It does not stipulate any time limit for its notice or for the statement in which it invites the applicant to make in response to it."

22. The notice as set out in the Secretary of State's refusal decision in this appeal states that:

> "The statement should be made on the form NOTICE OF APPEAL if you are appealing this decision."

23. To the extent that this appears to stipulate the form in which a statement should be made by an appellant in response to a s.120 notice, it cannot be determinative. The Notice of Appeal will, of course, be the document filed with the First-tier Tribunal when an appellant seeks to appeal an adverse immigration decision. The implication of the Secretary of State's notice is that the statement must be contained in that Notice of Appeal and, therefore, certainly cannot be made subsequently. That, however, is contrary to the express wording of s.85(3) of the 2002 Act which, in referring back to sub-section 2 of section 85, that imposes an obligation on the Tribunal to consider any matter raised in such a statement, states that

> "Sub-section (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced." (my emphasis)

24. As the emphasised words make clear, the statutory scheme contemplates a statement in response to a s.120 notice being made after an appeal has been commenced and, consequently, after a Notice of Appeal has been filed with the First-tier Tribunal. The statement may, therefore, be in a document served after the Notice of Appeal is filed. There can be no objection, therefore, in principle in the appellant having made a "statement" under s.120 shortly before the hearing of the appeal. The only issue is whether he has done so. In my judgment he has not. The "statement" must as a minimum set out with some level of particularity the ground or basis relied upon by the appellant as a basis for him remaining in the UK and upon which he has not previously relied. It must "state" the additional ground to be relied on in substance or, at least, in form. Merely setting out the evidence supporting his claimed relationship with his partner, without any reference to her EEA status and his claimed right to reside in the UK as her "extended family member" cannot, in my judgment, amount to a "statement" under s.120 relying upon the 2006 Regulations. As I have already pointed out, the skeleton argument sets out the appellant's legal basis for remaining in the UK and reliance is only placed upon Article 8 of the ECHR. No reference is made to the 2006 Regulations or his girlfriend's EEA status.

25. For this reason, the First-tier Tribunal erred in law in allowing the appeal as not being in accordance with the law because the appellant was "an extended family member of an EEA national". The First-tier Tribunal had no jurisdiction to consider that ground as it had not been raised in a s.120 statement in response to the Secretary of State's notice under s.120. To that extent, therefore, the Secretary of State's appeal is allowed.

26. However, the Judge was fully entitled (indeed required) to consider whether the appellant's removal breached Article 8 of the ECHR. In doing

so, the Judge was entitled to consider whether the appellant had any basis for remaining in the UK as the "extended family member" of an EEA national exercising treaty rights. The Judge found that he was an "extended family member" of an EEA national and that factual finding is not challenged. The Judge was entitled to find that the appellant's partner could not be expected to return to her own country to live with the appellant or to go to Iraq to live with him given that she was exercising treaty rights in the UK. I did not understand Mr Tarlow to challenge any of the Judge's findings. They are findings which were entirely open to him on the evidence. Indeed, in the absence of any countervailing factor – and none were raised before the Judge – his conclusion that the appellant's removal would be disproportionate was inevitable.

27. For these reasons, therefore, the First-tier Tribunal's decision to allow the appeal as not being in accordance with the law (namely the 2006 Regulations) involved the making of an error of law and I set that decision aside and dismiss the appeal on that ground.

28. The First-tier Tribunal's decision to dismiss the appeal on asylum and humanitarian protection grounds is not challenged and stands.

29. The First-tier Tribunal's decision to allow the appeal under Article 8 also stands.

Signed

A Grubb
Judge of the Upper Tribunal

Date: