



In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40691/2013

THE IMMIGRATION ACTS

Heard at City Centre Tower Birmingham
On 13 July 2015

Decision and Reasons Promulgated
On 29 July 2015

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

ADANA FADIA SOWE

Appellant

Respondent

Representation:

For the appellant: Mr Smart, Senior Home Office Presenting Officer
For the respondent: Ms Sandhu of New Century Law

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 4 July 2014 of First-tier Tribunal Judge Ghaffar which allowed the appeal of Ms Sowe against the refusal of an EEA derivative residence card as the primary carer of an EEA national child.
2. For the purposes of this decision we refer to the Secretary of State as the respondent and to Ms Sowe as the appellant, reflecting their positions before the First-tier Tribunal.

3. It is common ground that the appellant's daughter is a Danish citizen and that the appellant is her primary carer. On 14 September 2012 the appellant applied for a residence card recognising her derived right of residence as the primary carer of an EEA national. The application was accompanied by a letter dated 13 September 2012 from the appellant's legal advisers stating that the application was made under Regulation 15A (1) and (2) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").
4. Regulations 15A (1) and (2) state:
 - 15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
 - (2) P satisfies the criteria in this paragraph if –
 - (a) P is the primary carer of an EEA national ("the relevant EEA national"); and
 - (b) the relevant EEA national –
 - (i) is under the age of 18;
 - (ii) is residing in the United Kingdom as a self-sufficient person; and
 - (iii) would be unable to remain in the United Kingdom if P were required to leave.
5. Regulations 15A (1) and (2) incorporate the findings of the Court of Justice of the European Union in Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen*.
6. The letter of 13 September 2012 that accompanied the application also referred to the case of C-34/09 *Ruiz Zambrano*,, maintaining that a residence card should be issued here as to do otherwise would deprive the appellant's daughter of a genuine enjoyment of the substance of her rights as an EEA citizen.
7. The application was refused on 28 August 2013. The respondent indicated that it was her view that this was a *Chen* case not a *Zambrano* case. The provisions of Regulations 15A (1) and (2) were not met where the appellant was not self sufficient, as required by *Chen* and Regulation 15A(2)(b)(ii) as she did not have comprehensive sickness insurance cover.
8. First-tier Tribunal Judge Ghaffar found at [13] to [15] that the appellant's daughter was self-sufficient for the purposes of Regulation 15(2)(b)(ii) as she had access to the NHS and could not be charged for that access.
9. The respondent challenges that finding, maintaining that it is an incorrect application of the ratio of *Chen* and interpretation of Regulation 15(2)(b)(ii).

10. The respondent relied on *W (China) and X (China)* [2006] EWCA Civ 1494. There, the Court of Appeal dealt in terms with the question of access to the NHS in the context of an EEA national being self sufficient at [10]-[11], thus:

“10. ... That was that in the case of the United Kingdom the requirement of sickness insurance was otiose, or automatically fulfilled, because health care was in any event available free of charge under the National Health Service. That argument overlooks the fundamental reason for the insurance requirement that was identified as the basis of the scheme of the Directive in *Chen's* case [2005] QB 325 to prevent the presence of the European Union citizen placing a burden on the host state. Use of free state medical services exactly creates such a burden. And in any event, even if the argument were otherwise valid its factual premise is false: Mr Gill did not demur from the assumption that, as citizens of a third country, W and X would not be entitled to free care under the NHS.

11. It is also because of the nature of the NHS that the social security payments currently being made by W do not count as “insurance” for these purposes. The NHS scheme is not financed solely out of the social security scheme, but is largely tax-financed. Contribution to the social security fund cannot therefore serve as any sort of proxy for insurance designed to remove from the taxpayer the burden of providing health care.”

11. To our minds, the passage cited is a complete answer to the issue in dispute here. The ratio of *Chen* did not allow for reliance on the NHS if someone sought to show that they were self-sufficient. Equally, the requirements of Regulation 15(2)(b)(ii) cannot be met by the appellant’s Danish child having free access to the NHS and where the family do not have comprehensive sickness insurance cover.
12. We therefore found that First-tier Tribunal Ghaffar erred in law in finding to the contrary such that the decision had to be set aside and remade. We remade the appeal as refused on the basis of the same reasoning. The appellant cannot meet the provisions of Regulations 15(2)(b)(ii).
13. Ms Sandhu sought to re-argue other matters, in particular that the First-tier Tribunal should have applied the ratio of *Zambrano* and made a decision under Article 8 of the ECHR.
14. We did not accept that we had jurisdiction to consider those arguments where no cross-appeal was made on any basis.
15. In any event, as above, the decision here concerns the right to a residence card, not removal, and the appellant can apply to the respondent in the specified format if she wishes to make an Article 8 claim. In addition, nothing in the evidence that was before the First-tier Tribunal here indicated that the family would be unable to live in Denmark such that the *Zambrano* principle could have any purchase.

Decision

16. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.
17. We re-make the appeal as refused finding that the appellant is not entitled to a derivative residence card.



Upper Tribunal Judge Pitt

13 July 2015