



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

Appeal Numbers: IA/14556/2014
IA/14557/2014

THE IMMIGRATION ACTS

Heard at Field House

On 30 April 2015

**Decision &
Promulgated
On 22 May 2015**

Reasons

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**VALDINEIA MENENZES
MAURO MONTEIRO DE SOUZA
(ANONYMITY DIRECTIONS NOT MADE)**

Respondents

Representation:

For the Appellant: Ms A Brocklesby-Weller, a Senior Home Office Presenting Officer

For the Respondents: Mr Jones, Bhogal Partners

DECISION AND REASONS

1. I shall hereafter refer to the appellant as the respondent and to the respondents as the appellants (as they appeared respectively before the First-tier Tribunal).
2. The appellants, Valdineia Menezes (date of birth 3 March 1977) and Mauro Monteiro De Souza (date of birth 2 March 1982), are citizens of Brazil. They applied for EEA residence cards as confirmation of their right to reside in the United Kingdom as the parents of two EEA national children, GM (born - June 1997) and AM (born - August 2001). The applications were refused by the respondent on 3 March 2014 and the appellants appealed to the First-tier Tribunal (Judge S Aziz) which, in a determination promulgated on 2 December 2014, allowed the appeal on the basis that the appellants satisfied the Immigration (European Economic Area) Regulations 2007, Regulation 15A. The Secretary of State now appeals, with permission, to the Upper Tribunal.
3. Regulation 15A provides as follows:

Derivative right of residence

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.

(3) P satisfies the criteria in this paragraph if—

(a) P is the child of an EEA national ("the EEA national parent");

(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and

(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and

(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(4A) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a British citizen (“the relevant British citizen”);

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(5) P satisfies the criteria in this paragraph if—

(a) P is under the age of 18;

(b) P’s primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P’s primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation—

(a) “education” excludes nursery education;

(b) “worker” does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2); and

(c) “an exempt person” is a person—

(i) who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;

(ii) who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;

(iii) to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(7) P is to be regarded as a “primary carer” of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P—

(i) is the person who has primary responsibility for that person’s care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.

(7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A.

4. The judge made a series of findings of fact at [77]. He found that the first and second appellants were in a genuine, subsisting and durable relationship. The first appellant had been previously married to a German national (from whom she divorced in 2001) and the EEA national children (GM and AM) are the children of that relationship. Both the first and second appellant had worked unlawfully in the United Kingdom. Although the judge noted that the biological father of the EEA national children is now living in the United Kingdom he accepted that there would "be difficulty in the EEA national children's biological father being able to look after them since he is working." The judge did record, however, at [78] *et seq* that he did not accept as credible the evidence of the appellants that the biological father has little to do with the children. The judge acknowledged that it would not be in the best interests of the children to be removed to Brazil whilst both their biological parents and their stepfather were in the United Kingdom. Likewise, it would not be in their best interests for them to be removed to Germany. The judge found that the children had comprehensive sickness insurance cover [85], he "took no issue" with the evidence regarding the fact that "both the appellants were working in the United Kingdom, wholly financially providing for the EEA national children" [87]. He concluded at [88]:

Finally, it must be established that [the children] would be unable to remain here if their primary carers were required to leave the United Kingdom. In light of my above findings at paragraph 77 I am persuaded that this requirement can be met.

5. The Secretary of State asserts in the grounds of appeal that the judge erred in law. In particular, the respondent submits that Regulation 15A(2) (ii) and (iii) had not been satisfied by these appellants. The children were not self-sufficient and, insofar as they relied for financial support on their parent and step-parent, any income earned by those individuals had been obtained unlawfully and whilst they did not have leave in their own right to remain in the United Kingdom. Such funds should be excluded from the self-sufficiency assessment (*Seye (Chen children: employment)* [2013] UKUT 00178 (IAC)). No funds other than income derived from unlawful working by their parents had been disclosed which might satisfy the self-sufficiency requirement.
6. The Secretary of State also asserts that there was not evidence on which the judge could base his finding that there was comprehensive sickness insurance for both appellants. Finally, the respondent considers that the decision of the judge was inconsistent. In essence, he had found that the biological father of the children who was now living in the United Kingdom could not look after them because he is working. However, as the grounds note [8] “the appellants themselves are in the same position and the children being aged 13 and 17 do not require constant supervision and would anyway be at school for a large part of the day.” The grounds also note that it was not clear that the biological father had ever been consulted about the possibility of looking after the children. He had travelled to the United Kingdom from Brazil in order to be closer to the children and it “seems unlikely he would just turn his back on them now.”
7. Mr Jones submitted that any error on the part of the judge was not material since the appellants could satisfy the criteria of Regulation 15A(4). The children would be unable to continue to be educated in the United Kingdom if the appellants were required to leave. Regulation 15A(4) requires, in turn, that the appellants also meet the requirements of subparagraph (3). Ms Brocklesby-Weller, for the respondent, submitted that there was no evidence to show that the biological German father could not meet the requirements of Regulation 15A(3)(b).
8. I find that the judge did err in law. In particular, the judge has failed to explain why the children’s biological German father would be unable to look after the children when his ability to do so appears to be no more circumscribed than that of the appellants themselves. I agree with the judge that the appellants appear to have sought to minimise the role played by the biological father in the lives of the children. It was extraordinary that no attempt has been made by the appellants or their advisors to obtain evidence of the biological father’s views on his future involvement with the children. Secondly, the judge has ignored the ratio of *Seye* and appears to have accepted that unlawful work in the United Kingdom could be accepted in the self-sufficiency analysis.
9. I also find that it is not possible, on the basis of the evidence available to the Upper Tribunal, to conclude that any error on the part of the judge was not material to the outcome of the appeal because of the operation of

Regulation 15A(4). I am satisfied, however, for the reasons which I have stated above that the decision of the First-tier Tribunal should be set aside. Because there are a number of evidential matters which need to be clarified, I have decided to remit the appeal to the First-tier Tribunal for that Tribunal to remake the decision.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 2 December 2014 is set aside. The appeals shall be remitted to the First-tier Tribunal (not Judge S Aziz) for that Tribunal to remake the decision. None of the findings of fact of the First-tier Tribunal shall stand.

No anonymity directions are made.

Signed

Date 15 May 2015

Upper Tribunal Judge Clive Lane

