



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

Appeal Number: IA/15389/2014

**THE IMMIGRATION ACTS**

**Heard at Field House, London  
On 23 October 2015**

**Determination Promulgated  
On 23 November 2015**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR CELSO ANTONIO RIVERA CERNA**

Respondent

**Representation:**

For the Appellant: Ms Emma Savage, Senior Home Office Presenting Officer  
For the Respondent: Ms Sandra Akinbolu, Counsel, instructed by MReale Solicitors

**DECISION AND REASONS**

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Flynn) allowing the respondent's appeal against a decision taken on 20 March 2014 to refuse to issue a

derivative residence card under regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the Regulations”).

### **Introduction**

3. The respondent is a citizen of Peru born on 13 June 1944. He came to the UK in 2006 and lived with his family. He submitted an application for a derivative residence card on 6 November 2013 on the basis that he was the primary carer for his grandson, A, who was born in February 2012. He also claimed that he was the primary carer for his 17 year old daughter, P, the mother of A. P and A are both UK citizens. The respondent’s wife came to the UK in 2001 and was granted asylum; her four children joined her in 2004. The respondent claimed that she was unable to care for P and A; because she suffered from anxiety, depressive disorder and diabetes. P was a full time student. The respondent claims that he cared for his wife as well as P and A. The other children were adults when P fell pregnant at the age of 14.
4. The Secretary of State accepted the respondent’s identity and nationality but did not accept that his wife could not care for P and A. There was no evidence that P could not care for A and no official documentation to show that the respondent was their primary carer. P was almost 18 years old and had her own child which showed that she was capable of making her own decisions and it was unlikely that she required a primary carer. If the appellant wished to rely upon his family or private life then he had to make a separate charged application.

### **The Appeal**

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 3 November 2014 and 22 May 2015. He was represented by Mr G Lee, Counsel. The First-tier Tribunal found that the respondent was not the primary carer of A although he played the major role in his upbringing. P stated that she and the respondent’s wife had considered whether she would give up her studies to remain in the UK. Any decision to send A to Peru with the respondent was a matter of choice for the family. There was no evidence that P could not remain in the UK without the respondent. The requirements of the Regulations were not met.
6. The judge decided that the First-Tier Tribunal had jurisdiction to consider Article 8. The judge decided that the Secretary of State failed to properly consider section 55 of the 2007 Act and that there was family life between the respondent and A and P. The family was close knit and had always tried to live together. P’s dependence on the respondent had increased since the birth of A. It was not reasonable to expect her or A to leave the UK. They were both qualifying children under section 117B of the 2002 Act as at the date of application. The respondent had entered the UK with only a short period of leave and had remained without leave for almost the whole period of his residence. Nevertheless, his UK residence post-dated the start of family life with his wife and children and it would not be proportionate to remove the respondent from the UK. The appeal was allowed on human rights grounds.

## **The Appeal to the Upper Tribunal**

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in failing to consider the respondent's position under Appendix FM of the Immigration Rules ("the Rules") and wrongly applied section 117B to P, who was no longer a child as at the date of hearing. The judge also failed to attach appropriate weight to the public interest considerations.
8. Permission to appeal was granted by First-tier Tribunal Judge Heynes on 2 September 2015. There was no valid human rights appeal, following Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC).
9. Thus, the appeal came before me

## **Discussion**

10. Ms Savage submitted that the refusal to issue a residence card did not interfere with Article 8. No section 120 notice had been served and departure from Amirteymour was not justified. Paragraphs 26-75 of that decision extensively consider the law. The decision should be remade and the respondent's appeal dismissed.
11. Ms Akinbola relied upon her skeleton argument and submitted that Amirteymour was wrongly decided. I should instead follow Ahmed [2013] UKUT 89 and Dereci and others [2011] EUECJ C-256/11. In none of the relevant domestic cases was a removal decision made and each turned on the arguability of the human rights claim within the context of an appeal against refusal of a residence document.
12. I have considered the authorities. It is common ground that no "one stop notice" has been issued in this case under section 120 of the 2002 Act and no removal directions have been issued. There is no binding Court of Appeal authority on this issue but I have decided to follow the reasoning set out in paragraphs 26-75 of Amirteymour. The First-tier Tribunal did not have jurisdiction to consider Article 8.
13. The findings of fact made by the First-tier Tribunal were not challenged on appeal and remain undisturbed. They are not binding on any future decision maker but are soundly based upon the evidence and should be carefully considered by the Secretary of State if removal of the respondent is considered in the future or if the respondent makes a further application to remain in the UK. The respondent will be 72 in June 2016 and has a firmly established family life in the UK.
14. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under Article 8 involved the making of an error of law and its decision cannot stand.

## **Decision**

15. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by dismissing the respondent's appeal under the Regulations. The First-tier Tribunal had no jurisdiction to consider human rights issues but its findings of fact remain unchallenged and undisturbed.

Signed 

Date 19 November 2015

Judge Archer  
Deputy Judge of the Upper Tribunal