



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

Appeal Number: IA/26583/2013

**THE IMMIGRATION ACTS**

**Heard at Belfast**

**On 14 January 2015**

**Decision & Reasons  
Promulgated**

**On 19 February 2015**

**Before**

**UPPER TRIBUNAL JUDGE KING TD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and  
QIANG CHEN**

Respondent/Claimant

**Representation:**

For the Appellant: Mr. M. Shilliday, Home Office Presenting officer

For the Respondent: Mr M. Brennan, Martin Brennan solicitors

**DECISION AND REASONS**

1. The claimant is a citizen of China, born on 17 December 1968. He sought to appeal against the decision of Secretary of State for the Home Department dated 21 June 2013 refusing to issue him with a residence card as confirmation of a right of residence under European Community Law as the primary carer of an EEA national exercising treaty rights in the United Kingdom.
2. The Reasons for Refusal Letter dated 21 June 2013 did not take issue with the fact that the claimant was the primary carer but rather raised an objection whether or not the child qualified to be a self-sufficient person by

having the necessary funds as required under the Regulations. No consideration was given to Article 8 for reasons as stated in the decision.

3. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Hutchinson on 8 July 2014. The Judge found that the financial requirements for the child to be self-sufficient were indeed met on the evidence provided. There has been no challenge to that finding.
4. The Judge, however, drew the attention of the parties to Regulation 15A(2) of the Immigration (European Economic Area) Regulations 2006 which provided that:

“(a) The appellant 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 UK as a self-sufficient person and
- (iii) would be unable to remain in the UK if their primary carer were required to leave the UK.

5. The Regulation that had been referred to represented a change in the Regulations from the date of the application.
6. It is not in issue that there was no expectation that the child would not remain in the United Kingdom because the claimant's wife was a British citizen who also was caring for the child. Given that possibility, it would seem that the claimant would not have met the new test of primary carer, particularly having regard to Regulation 15A(2)(b)(iii).
7. Quite properly, therefore, the Judge raised that matter for consideration in these terms:-

“14. Although not raised by the respondent, I raise as a preliminary issue the definition of primary carer under Regulation 15 of the 2006 Regulations which the appellant (claimant) does not meet as his wife is a British citizen. However Mr Brennan pointed out that the appellant's application was made on 10 May 2012 which predates the amendment to the 2006 Regulations implementing Regulation 15 which was made in July 2012 but which Mr Brennan argued was not operative until October 2012. Therefore Mr Brennan argued that this more restrictive definition of primary carer did not apply to the appellant.

15. Mr Williams, on behalf of the Home Office, indicated that he agreed with Mr Brennan's position and it is significant in my view that the respondent did not raise any issue as to whether the appellant could qualify as a primary carer; in Mr Brennan's view it was not raised as it does not apply. In view of the respondent's position both in the refusal letter and at the appeal hearing, I accept that this is the case.”

8. The Judge went on therefore to uphold the contention made that the claimant was the primary carer for the purpose of the appeal and thus the appeal was allowed. The Judge did not make any substantive findings as to Article 8 of the ECHR in the circumstances.
9. The Secretary of State for the Home Department now seeks, through the grounds of appeal, to challenge that finding of the Judge and/or to withdraw the concession which was made at the hearing. Permission to appeal was granted. Thus the matter comes before me in pursuance of that grant.
10. Mr Shilliday, who represents the Secretary of State for the Home Department, contends that it was immaterial that the application made on 10 May 2012 predated the implementation of Regulation 15A{2} on 16 July 2012. The new Regulation was applicable to all applications decided on or after 16 July 2012 even if the application had been made before the date. There were no transitional provisions affecting the operation of that particular Regulation.
11. He accepts that the Secretary of State for the Home Department should in the Reasons for Refusal Letter of 21 June 2013 have taken that point but did not. It was simply wrong for the Secretary of State for the Home Department to have accepted that the claimant was a primary carer under the Regulations. Similarly the information which was provided to the Judge at the hearing concerning the operation of Regulation 15A was simply incorrect as a matter of law given the hearing on 8 July 2014.
12. In that connection he invites my attention to the decision of the House of Lords in **Adeola [2009] UKHL 25**.
13. Their lordships were concerned with the construction of the Statement of Changes in Immigration Rules. The Rules were not subordinate legislation but detailed statements by a Minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration.
14. The court focused upon the issue of the change in the substance of the Immigration Rule between application and decision.
15. It was contended that the Rule should be applied as it was at the date of application, not at the date of decision. A fee had been paid by the appellant in that case on the basis of the law that was in place as at the date of application with the reasonable expectation that that would be the situation at the date of decision. Thus it was said that to move the position between application and decision was unfair.
16. That proposition was not accepted by their lordships. The court did not find that the appellant in that case had a vested right or a legitimate

expectation and found in any event that the aspect of unfairness was slight which could be compensated by the return of the wasted fee.

17. He submits that the Presenting Officer at the hearing was in error in making the concession which was made. In any event it was a concession that that was wrong as a point of law and that it would be wholly inappropriate for the Tribunal to condone a concession which continued to perpetrate an error of law rather than an acceptance of fact. He invites me, therefore, to set aside the decision of the First-tier Tribunal Judge.
18. He also seeks to argue that no application was made in relation to Article 8 and therefore the Judge was perfectly entitled not to deal with it. It was not a live issue until such time as an application was made.
19. Mr Brennan, who represents the claimant, invites me to find that the concession was not as clear cut in its terms of error as is relied upon by the Secretary of State for the Home Department. He invites me to find that the 2006 Regulations are declaratory of rights that vest in an appellant at a time when the application is made. They are not declaratory of the Secretary of State's declared intention of how the Rules should operate but rather are a statement of what the rights that apply to any appellant are. In those circumstances he invites me to consider that a distinction can be made between the Immigration Rules as a statement of intent and the 2006 Regulations as a declaration as to rights.
20. Applying the reasoning in **Adeola** he submits that the claimant had the requisite right at the time of application and that should not be taken away.
21. A similar argument was advanced by Mr Drabble before their lordships as can be seen in paragraph 36 of the judgment relying upon the **Chief Adjudication Officer v Maguire [1999] 1WLR 1778**. The Judge noted, however, in paragraph 37 of that judgement that if there were such a vested right it would be surprising that any application needs to be made.
22. Mr Shilliday responds in any event to that contention by inviting me to consider that Regulation 15A although coming into force in 2012 was in fact merely declaratory of the legal position as determined by a number of cases determined before that such as **Zambrano** and **McCarthy (European Citizen)[2011] EUECJ C-434/09** . He seeks to argue that even if there were a vested right it was vested in the right as determined by the legal authorities and merely encapsulated in the amendment.
23. It seems to me, however, and I so find that given the general comments by their lordships in **Adoela** it would be reasonable to expect that here to have been some clear wording should it have been the intention of Parliament to have preserved the position upon application rather than at decision.

24. I note, however, the comments made by their lordships in the course of the judgment concerning retrospectivity and the need to take into account the potential unfairness if such a presumption is not to take effect. The general fairness of one interpretation over another is, at least potentially, a relevant factor.
25. I note paragraph 57 of that judgment in particular:
- “57. The notion that the unfairness of a change in the Rules applying to existing applications can be taken into account when deciding if they do so apply, even if no vested right is involved, is also supported by a passage, cited with approval in **Wilson [2004] 1AC 816**, paragraph 200 from the judgment of Staughton LJ and **Secretary of State for Social Security v Tunncliffe [1991] 2AllER 712, 724**. He said that it ‘was not simply a question of clarifying an enactment as retrospective or not retrospective’ but that ‘it may be well be a matter of degree - the greater the unfairness, the more it is expected that Parliament will make it clear if it is intended’. The fact that the weight to be given to the presumption varies in this way assists the conclusion that one can take into account the fairness of the result when considering whether an amendment applies to existing applications, even where no vested right is involved’.”
26. What is clear in this case is that substantial unfairness has been occasioned to the claimant, not so much in the wording of the Regulation itself, but by the failure and repeated failure of the Secretary of State for the Home Department to engage with the issue.
27. The application was made on 10 May 2012. It was the position as set out in the decision letter that, subject to the financial considerations being resolved in favour of the claimant’s child, the claimant would meet the definition of primary carer. The Secretary of State for the Home Department in the decision of 1 June 2013 did not take the issue and indeed at the hearing on 8 July 2014, specifically accepted the proposition advanced that Regulation 15A(2) did not have application to defeat the application of the claimant. Thus the application and hearing for over two years was made upon that assumption and in the legitimate expectation that the Secretary of State would consider the application of the claimant on the basis of that which was in operation at the time of the application.
28. It must be a matter of speculation as to why a specific Article 8 Application was not made but understandably there is no need to make it, given the issues which were highlighted in the reasons for decision and canvassed at the hearing, namely the financial requirements to be met.
29. Although the Immigration Rules set out how the Secretary of State for the Home Department will approach a particular issue, it has always been open to the Secretary of State to deal exceptionally outside the Rules. The fact that there is an Immigration Rule does not necessarily prohibit the Secretary of State from dealing with a matter on a more liberal or

generous basis. For my part I cannot see why that reasoning should not apply to the 2006 Regulations.

30. The distinction of course is that it is common ground that it was not a conscious departure from the Rules but a misunderstanding about them.
31. Mr Shilliday invites my attention to the decision of **NR (Jamaica) [2009] EWCA Civ 856** in which the Tribunal permitted the withdrawal of concessions because the concessions made, albeit statements of fact, were not supported by the background material that had been relied upon. He invited me to find that was authority for the proposition that it was open to the Tribunal to permit a withdrawal of a concession ,particularly when it was clear that it arose as a mistake of fact or, as in this case, a misunderstanding of law.
32. It seems to me, however, that the issue is not whether or not the Tribunal has the jurisdiction to permit the withdrawal of the concession but whether in the circumstances of this particular case that should be the result.
33. Mr Shilliday further invites my attention to the decision of the Court of Appeal in **Rabindra Jung Lamichhane [2012] EWCA Civ 260**.
34. In general it was a decision dealing with unrelated matters, particularly the requirement or otherwise to serve a Section 120 notice and the consequences if one was served and if one were not. He relies upon paragraphs 42 to 44 of the judgment for the proposition that the Tribunal is a creature of statute and must determine jurisdiction for itself. He submits that there is a distinction to be made between a concession of fact and a concession of law, particularly if the latter is inaccurate.
35. It seems to me that the case turns not on so much upon the construction of Regulation 15A(2) and whether or not it applied at the time of application or should have done, but whether, as a matter of fundamental fairness, the Secretary of State having not taken the point against the claimant when it could have been taken at the time of decision and having expressly excluded the point at the time of hearing, it is fair to the claimant now to permit that correction to be made over two years into the appeal process. The effect of doing so would in practical terms mean that the appeal process would have to start again on the basis of Article 8 and the costs that would be occasioned to the claimant in so doing.
36. It seems to be not in dispute that there is a genuine family relationship, he living with a British citizen and with their child. Without knowledge of the domestic and family circumstances, it would be a matter of speculation as to whether that application was reasonably likely to be successful. Given the absence of any countervailing factors it is difficult to imagine that it would not.

37. As I have indicated before, the fact that a Regulation is expressed in a particular term does not prevent the Secretary of State for the Home Department in her discretion from accepting a more generous arrangement. It seems to me that this is matter that revolves very substantially upon the fundamental principles of fairness and the entitlement of a claimant to know the case which he has to meet. Throughout the two years the case was presented on one basis by the Secretary of State for the Home Department and it seems to me, therefore, that it would not be appropriate in this case to grant any leave to withdraw the concession made. The Judge is entitled to rely upon a basis of proceeding as agreed by the parties in order to come to a judgment on the matter. The Judge most properly raised the issue for consideration and it was resolved in a particular way. On that basis the decision came to be made.
38. I find, therefore, no material error in law in the approach taken by the Judge and, even if there were, I find that, as a matter of fundamental fairness in these proceedings, the concession made by and on behalf of the Secretary of State for the Home Department should not be withdrawn.
39. In the circumstances, therefore, the appeal by the Secretary of State for the Home Department before the Upper Tribunal is dismissed. The decision of the First-tier Tribunal shall stand, namely that the appeal is allowed under the EEA Regulations on the basis of the concessions that were advanced.

### **Notice of Decision**

The appeal is allowed under the Regulations.

Signed

Date **18 February 2015**

Upper Tribunal Judge King TD