



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: IA/42385/2014**

**THE IMMIGRATION ACTS**

**Heard at** Field House  
**On** 20 October 2015

**Decision & Reasons Promulgated  
On 28 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**C L A M**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer.

For the Respondent: Mr E Wilford (counsel), instructed by M Reale, solicitors

**DECISION AND REASONS**

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant or her children. I do so on the basis of the minority of the children and their best interests in remaining anonymous.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier

Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Mitchell, promulgated on 22 May 2015, which allowed the Appellant's appeal under the Immigration (EEA) Regulations 2006 and on article 8 ECHR grounds.

### Background

3. The Appellant was born on 11 May 1981 and is a national of Brazil. On 9 October 2014 the respondent refused the appellant's application for a derivative residence card as the primary carer of her two children, who are British Citizens.

### The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Mitchell ("the Judge") allowed the appeal against the Respondent's decision both under the Immigration (EEA) Regulations and on article 8 ECHR grounds.

5. Grounds of appeal were lodged and on 26 August 2015 Designated Judge of the First tier Tribunal Zucker gave permission to appeal stating inter alia

"The grounds submit that the Judge erred in that the application made by the appellant was not on human rights grounds and that the decision was not one which interfered with the appellant's human rights in any event. The grounds are arguable: see Amirteymour & others (EEA appeals; Human Rights) [2015] UKUT 00466."

### The Hearing

6. Ms Everett for the respondent sought leave to vary the grounds of appeal. Permission to appeal was granted on the basis that the Judge dismissed the appeal under the Immigration (EEA) Regulations 2006. That is incorrect. At [19] the Judge clearly finds that the appellant meets the requirements of the Immigration (EEA) Regulations 2006. In seeking permission to appeal, at paragraph 3, the author of the grounds of appeal states "*the FTT considered the refusal and appears to have dismissed the appeal under the EEA regulations....*" but then goes on to discuss both the Immigration EEA Regulations 2006 and relevant case law.

7. Mr Wilford, counsel for the appellant, opposed the application to vary the grounds of appeal arguing that the amendment sought is entirely without merit because the appellant fulfils the requirements of regulation 15 A paragraph 4(a) (c) of the 2006 regulations. He argued that because (in his submission) the ground that the respondent seeks to argue cannot succeed, variation of the grounds of appeal should not be permitted.

8. I allow the application to vary the grounds of appeal. The amended grounds of appeal focuses the issues between the parties. The appellant was put on notice of the matters which the respondent now seeks to argue when the grounds of appeal were originally drafted; indeed the rule 24 response (tendered on behalf of the appellant only at the commencement of the hearing) specifically addresses paragraph 4A of regulation 15 the Immigration (EEA)

Regulations 2006. I cannot see that the appellant suffers any prejudice by allowing both aspects of this appeal to be properly ventilated.

9. Ms Everett argued that the findings of the judge [12] are perverse. She told me that the Judge placed far too much reliance on a residence order made by a family court, and reminded me that family courts do not take account of the Immigration (EEA) Regulations 2006 when making such orders. She told me that it is clear that the appellant's children would not be compelled to leave the UK because the appellant's children could live with their father. She focused on the last two sentences of [12] and told me that those findings are perverse; they are not supported by evidence, and that they undermine the decision to such an extent that the decision must be set aside. In relation to the Judge's consideration of article 8 ECHR, Ms Everett relied on the case of Amirteymour & others (EEA appeals; Human Rights) [2015] UKUT 00466, and argued that the Judge should not have considered article 8 ECHR.

10. Mr Wilford adopted the terms of the rule 24 reply. He told me that even though family courts do not consider the Immigration (EEA) Regulations 2006, the residence order produced is an important adminicle of evidence demonstrating that the appellant is the primary carer of her two British citizen children. He said that the Judge was correct to find that the residence order, together with the other evidence produced, indicated that if the appellant was required to leave the UK, British citizen children would be unable to reside in the UK or in another EEA state. He argued that there was no reliable evidence that the children will be able to reside with their father in the absence of the appellant, so that the Judge's finding was fully sustainable

11. In the alternative, Mr Wilford argued that the final two sentences of [12] of the decision may be viewed as ambiguous; in the event that the decision is tainted by material error of law (which is denied) the only appropriate course of action would be to remit the case to the First-tier to be determined of new.

### Analysis

12. The relevant part of regulation 15 A of the immigration (EEA) regulations is "15A. Derivative right of residence

(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.*

*... (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."*

13. Reg 15A(7) states that a person, 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.

14. At [11] & [12] the Judge makes a clear finding that the appellant is the primary carer of two British citizens. At [12] the Judge finds that there was no evidence the children would be able to continue living in the UK or in another EEA state if the appellant were required to leave the UK. In making those findings, the Judge makes it clear that, on the basis of the evidence placed before the Judge, the appellant is the primary carer of British citizen children, and there are no alternative arrangements for their care - so that if the appellant leaves the UK the children have to leave with her. That is a finding which it was open to the Judge to make on the evidence led and the facts as he found them to be.

15. Ms Everett argued that the error of law is contained in the final two sentences of [12] because they display perverse findings of fact. There is no merit in that submission. Ms Everett candidly conceded that there is a high threshold to be passed to make a finding of perversity. The penultimate sentence of [12] is a comment that the Judge passes reflecting on the submission made by counsel for the appellant. The final sentence is an unambiguous statement “*Yet on balance of probabilities the appellant meets the requirements of the 2006 regulations*”.

16. In R and Others v SSHD (2005) EWCA civ 982 Lord Justice Brooke noted that perversity represented a very high hurdle. It embraced decisions which were irrational or unreasonable in the *Wednesbury* sense.

17. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Disagreement with a Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because a Judge concludes that the story told is untrue.

18. There is merit in Ms Everett's submissions in relation to the Judge's treatment of article 8 ECHR. In Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 it was held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.

19. The respondent's decision of 9 October 2014 refused the appellant's application by reference to the 2006 Regulations alone. No section 120 notice was served on the appellant and there are no removal directions.

20. I find that the Judge's consideration of Article 8 ECHR constitutes a clear & material error of law. At [18] & [19] the Judge incorrectly refers to "*family life*" and "*article 8 ECHR*". Between [13] and [18], the Judge embarks on an exercise considering the appellant's rights in terms of Article 8 ECHR. It is beyond dispute that there is neither a Section 120 notice nor removal directions in this case. The case of Amirteymour makes it quite clear that Article 8 ECHR was not a consideration in this case and was not a matter which could competently be considered by the judge.

### **Conclusion**

21 I therefore find that the determination contains a material error of law and must be set aside.

### **Decision**

22. The decision promulgated on 22 May 2015 is tainted by a material error of law in regard to the consideration of Article 8 ECHR and must be set aside.

23. I consider the case of new and substitute the following decision.

24. The appeal is allowed under the Immigration (EEA) Regulations 2006.

Signed:

Date: 27 October 2015

Doyle

Deputy Upper Tribunal Judge