



IAC-AH-CJ-V1

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

Appeal Numbers: IA/16139/2015  
IA/16156/2015  
IA/16149/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25<sup>th</sup> January 2016**

**Decision & Reasons  
Promulgated  
On 18<sup>th</sup> March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR R Z (FIRST APPELLANT)  
MRS Y W (SECOND APPELLANT)  
MR B Z (THIRD APPELLANT)  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: None

For the Respondent: Ms Sreeraman, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was granted permission to appeal against the decision of the First-tier Tribunal Judge Suffield-Thompson who, on 6<sup>th</sup> August 2015, dismissed the appellants' linked appeals against the respondent's decision

to revoke their residence cards under Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006.

2. The grounds argue that the appellants did not receive a notice of hearing and that they had requested an oral hearing not a paper one. They had not sent in their evidence as they were awaiting a notification of a hearing date and the email correspondence was appended to substantiate their assertions.
3. The first appellant born on 20<sup>th</sup> September 1983 is a citizen of China and the second and third appellants are his parents. The first appellant came to the UK as the partner of an EEA national Ms D A and was issued with a residence card on 18<sup>th</sup> April 2013. The revocation was based on the fact that the appellant was no longer in a durable relationship with a member of an EEA national and was therefore not a family member and no longer had a right to reside in the UK.
4. To remain in the UK the appellant under Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006 the appellant would have to prove that he is the partner of an EEA national and he is in a durable relationship with that EEA member.
5. On 16<sup>th</sup> April 2015 it was pointed out in a reasons for revocation letter to the first appellant he was no longer in a relationship and to the second and third appellants that as their son R Z, the first appellant, was the unmarried extended family member of the EEA national, they were not related to the EEA national, and they were not entitled to hold a residence card defined by Regulation 17(1) of the Immigration (EEA) Regulations 17(1). They did not fall to be considered as extended family members and there was no provision under the EEA Regulations to allow them to retain a residence card.
6. The First-tier Tribunal Judge heard the appeal on 24<sup>th</sup> July 2015 and recorded that there was no representation for the appellant or for the respondent. The application for permission to appeal sets out that in fact the first appellant had received confirmation from the First-tier Tribunal on 22<sup>nd</sup> June 2015 that the appeal was due to be considered by way of an oral hearing. That hearing, however, took place without him and without a solicitor being informed and he was not given the opportunity to submit documentation.
7. At the hearing Mr R Z attended and confirmed that he was not aware that any hearing took place. He had filed some documents with his appeal but was waiting for directions of how to submit further evidence. Pending criminal proceedings against him for child cruelty have now been finalised and he had been acquitted.
8. Ms Sreeraman submitted that it would appear the judge was not aware that there had been an email from the appellant confirming that he wished to have an oral hearing or at least that the Tribunal had not given the

appellant notice of the pending hearing. Indeed I noted that on the file there is indeed a letter dated 22<sup>nd</sup> June 2015 from the Immigration Tribunal (IAC) confirming that the appeal had now been changed to an oral hearing and to the appellant

“You will receive correspondence informing you when a hearing will take place”.

9. There is further correspondence dated 7<sup>th</sup> August 2015 from the appellant explaining that he was waiting for the hearing date and preparing for the case and then he received a decision from the First-tier Tribunal and the decision was based on his paper submissions only.
10. Mr R Z submitted that he was not given an opportunity to present evidence before the judge or to counter the letters sent by his former partner to the Home Office without his knowledge. The judge had not had the opportunity to set up facts as they actually were and the evidence before the judge was incorrect. He submitted that without clear evidence regarding the custody and contact there was no clear picture as to whether Article 8 should apply. His ex-partner had brought a false accusation against him and he had been kept away from his children. He had been acquitted in a criminal court and had been found not abusive to any of his children and hoped to be granted custody. It was only fair for the case to be considered in front of the court again.
11. He submitted that he made the application for residence of the children on 20<sup>th</sup> August 2014.
12. Mr R Z submitted that there were clearly special circumstances and that the judge should have adjourned the matter.
13. In conclusion, it is correct to state that the judge failed to notice that the appellant had been advised that his appeal hearing would take the form of an oral hearing and although he was served with a notice on 8<sup>th</sup> July 2015 informing him that the appeal was to be decided without a hearing on the papers, it also gave him a deadline of the same date within which to submit any written evidence. Similarly the same date was given to the respondent.
14. There were submissions made from the Home Office dated 4<sup>th</sup> June 2015 applying for the appeal to be struck out on the basis that it was likely the children were Austrian nationals and the mother had custody and thus he could not even benefit from claiming a derivative right of residence under Regulation 15A(4) she being the primary carer of the children.
15. No further notice regarding a hearing was sent to the appellant save for the First-tier Tribunal decision refusing his appeal and the appellant promptly responded to the Tribunal on 7<sup>th</sup> August 2015 pointing out that there had been an administrative mistake and he was waiting for an appeal hearing.

16. It was submitted by Ms Sreeraman that the appellant's case was hopeless and that there was no provision under the EEA Regulations with which he could avail himself. It was the appellant's position that there were exceptional circumstances in this case and it was fair for the judge to decide on, not for the Home Office merely to state that there was no prospect of the appellant's success.
17. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 apply. Rule 25 sets out that the Tribunal must hold a hearing before making a decision which disposes the proceedings except where:
- (a) *each party has consented to, or has not objected to, the matter being decided without a hearing;*
  - (b) *the appellant has not consented to the appeal being determined without a hearing but the Lord Chancellor has refused to issue a certificate of fee satisfaction for the fee payable for a hearing;*
  - (c) *the appellant is outside the United Kingdom and does not have a representative who has an address for service in the United Kingdom;*
  - (d) *it is impracticable to give the appellant notice of the hearing;*
  - (e) *a party has failed to comply with a provision of these Rules, a practice direction or a direction and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing;*
  - (f) *the appeal is one to which rule 16(2) or 18(2) applies; or*
  - (g) *subject to paragraph (2), the Tribunal considers that it can justly determine the matter without a hearing.*
- (2) *Where paragraph (1)(g) applies, the Tribunal must not make the decision without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.*
- ...
18. The application of the Rules should also be considered in the light of the overriding objective set out at paragraph 2:
- 2.—(1)***The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
- (2) *Dealing with a case fairly and justly includes—*

- (a) *dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;*
- (b) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (c) *ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
- (d) *using any special expertise of the Tribunal effectively; and*
- (e) *avoiding delay, so far as compatible with proper consideration of the issues.*

I note that the parties should ensure so far as practicable that the parties are able to participate fully in the proceedings.

19. It is clear that on two counts the judge fell into error because the judge failed (through no fault of his or her own) to appreciate that this had indeed been changed to an oral consideration and as this had been missed by the Tribunal there was no notice of hearing sent to the appellant on the file.
20. There is on file a letter dated 4<sup>th</sup> July 2015 sent from the ex-partner of the appellant and I note dated and stamped on 7<sup>th</sup> July 2016 which is an impossibility, detailing physical and emotional abuse perpetrated on her repeatedly through their relationship. This confirmed that the appellant and she had separated.
21. The judge quite rightly sets out the appellant's case but notes that it is based upon his "limited written evidence" [10] and it would appear that the evidence is obtained from the appellant's appeal documentation and the letter cited above from the ex-partner.
22. At the hearing before me the appellant stated that some of the evidence in the facts recorded were incorrect but he did confirm that he and his partner had separated as detailed in his notice of appeal and that he had been subsequently acquitted of child cruelty at his Crown Court case which endured for five days. He had separated in early 2014 and he was then charged for three counts of common assault but found guilty only on one. He stated he continued to fight for custody of his children but at present the person who has primary custody is the mother.
23. I find that there was a procedural error in that a hearing should have been allowed by the First-tier Tribunal although I have located no fee recorded in order that the matter be amended to an oral hearing. That said it is correct, as the judge recorded at paragraph 15, that to remain in

the UK under Regulation 8(5) he would need to be in a durable relationship with an EEA national and he is not.

24. Under the EEA Regulations

**8.— “Extended family member”**

(1) *In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).*

(2) *A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—*

*(a) the person is residing in a country other than the United Kingdom ]<sub>1</sub> [...] ]<sub>2</sub> and is dependent upon the EEA national or is a member of his household;*

*(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or*

*(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.*

(3) *A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.*

(4) *A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.*

**(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.**

(6) *In these Regulations “relevant EEA national” means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).*

**20.— Refusal to issue or renew and revocation of residence documentation**

(2) *The Secretary of State may revoke a registration certificate or a residence card or refuse to renew a residence card if the holder of the certificate or card has ceased to have, or never had, a right to reside under these Regulations.*

25. The first appellant’s claim is bound to fail in that regard as he is no longer a partner of an EEA national and is not in a durable relationship. The second and third appellants’ claim is also bound to fail as they were never a relative of an EEA national, his spouse or civil partner. The first appellant and the EEA national were not married and they were his parents not her parents.

26. I should make it clear that the appellant is no longer awaiting a trial for criminal charges and has been acquitted of any case of child cruelty. However any issue in respect of a derivative right of residence cannot be founded by the facts as they were before the First-tier Tribunal and as they remain. Essentially the appellant's ex-partner is still the carer and primary carer of the children and although there are court proceedings pending they do not give rise to a right under Regulation 15A of the European Economic Area Regulations. Once again the appellant's claim in this respect was bound to fail.
27. I turn to a consideration of the human rights points made in the judge's decision and note that in fact Article 8 is not applicable because of **Amirteymour and Others (EEA Appeal:Human Rights)** [2015] UKUT 00466 (IAC). This confirmed that where, in response to an application to remain under the EEA Regulations, and where no Section 120 notice had been served and/or there was no removal decision, the appellant could not raise human rights grounds. A valid application under the Immigration Rules should be made. The appellant's application was under the EEA Regulations only and not in relation to Article 8 and as set out in **Amirteymour** it is necessary for the appellant to make a separate application under Article 8. There is not a suggestion that the appellant is to be removed and thus the Secretary of State, in this instance, was making a decision which would affect the children under Section 55 of the Borders Citizenship and Immigration Act 2009.
28. I therefore find that there was an error of law and I set aside and I remake the decision, but in the light of my findings above, the appellants' claims were bound to fail. The second and third appellants, it would appear, have returned to China and as stated above their appeals can have no prospect of success either.

### **Order**

The appeals of appellants are dismissed under the EEA Regulations.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because of the sensitive nature of the information included and because there are minors involved.

Signed

Date 10<sup>th</sup> March 2016

Deputy Upper Tribunal Judge Rimington