



IAC-FH-AR-V1

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

Appeal Number: IA/23437/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27<sup>th</sup> January 2016**

**Decision & Reasons Promulgated  
On 11<sup>th</sup> February 2016**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

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

Appellant

**and**

**GODFREY MPHO MOABI  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Staunton, Home Office Presenting Officer

For the Respondent: No appearance

**DECISION AND REASONS**

1. The Appellant is a citizen of South Africa, born on 15<sup>th</sup> November 1978. His appeal against the Respondent's refusal of a derivative residence card was allowed by First-tier Tribunal Judge Majid in a decision promulgated on 31<sup>st</sup> July 2014.
2. The Respondent appealed on the ground that the judge failed to make reference to Regulation 15A of the 2006 Regulations and made no findings on the issue of derivative rights. Secondly, the judge failed to consider the Immigration Rules and identify circumstances not covered by the Rules that would warrant consideration. Thirdly, the judge's approach to Article 8

was erroneous. There was no removal decision and therefore dismissing the appeal would not create an interference with the Appellant's Article 8 rights.

3. Permission was granted by First-tier Tribunal Judge Cruthers on 24<sup>th</sup> November 2015 on the following grounds.

“Ground 1: This matter was specifically refused on the issue of derivative rights under Regulation 15A and 18A of the 2006 Regulations. However the judge at no point refers to the issue under refusal, makes no reference to the EEA Regulations and makes no findings in this regard.

Ground 2: The judge has arguably failed to give any consideration at all to those Immigration Rules that relate to Article 8 of the European Convention on Human Rights and has arguably failed to mention any basis for having considered Article 8 outside the Rules in this case e.g. SS (Congo) & Others [2015] EWCA Civ 387.

Ground 3: It is arguable that the judge should not have considered Article 8 issues at all. See Amirtteymour and Others (EEA appeals: human rights) [2015] UKUT 00466 (IAC) and arguable that the Article 8 analysis which the judge does offer is tainted by amongst other things a lack of sufficient reference to Part 5A of the Nationality, Immigration and Asylum Act 2002. Amongst other things the judge seems to have thought that an absence of criminal convictions was enough to obviate any public interest in the removal of the Appellant. e.g. paragraph 10(b), Nasim and Others (Article 8) [2014] UKUT 00025 (IAC).”

4. The Appellant did not attend the hearing and there was a letter from his instructing solicitors stating that he was unable to afford representation and requesting that a decision be made on the papers.
5. Mr Staunton for the Respondent relied on the grounds of appeal and submitted that the judge’s decision was not open to him.

### **Discussion and Conclusions**

6. I find that the judge erred in law in failing to make any reference to Regulation 15A of the EEA Regulations. The Appellant made an application for a derivative residence card. He was refused a derivative residence card for the reasons given in the Reasons for Refusal Letter dated 14<sup>th</sup> May 2014. The judge failed to refer to the EEA Regulations or to the issues raised in the refusal letter.
7. The issue before the judge was limited to the EEA Regulations following the case of Amirtteymour which states “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”.

8. No Section 120 notice had been served in this case and therefore the judge erred in law in dealing only with Article 8 issues and the best interests of the children. I therefore find that the judge erred in law and set aside his decision and remake it as follows.
9. On the evidence before me the Appellant lived with the mother of his British citizen children. The Appellant therefore was unable to show that he was the primary carer of a British citizen or that the relevant British citizen would be unable to reside in the UK or in another EEA state if he was required to leave the UK.
10. The Appellant did not have primary responsibility for his British citizen children but shared that responsibility with the children's mother. She had indefinite leave to remain in the UK and was therefore an exempt person for the purposes of the EEA Regulations 2006.
11. On the facts asserted the children's mother was the primary carer not the Appellant, or alternatively the responsibility was shared. In any event, the Appellant could not satisfy the EEA Regulations because the children would not be required to leave the UK or the EU if the Appellant was required to do so.
12. Accordingly, the appeal under the EEA Regulations is dismissed. Following Amirtteymour there was no appeal under Article 8 and it is open to the Appellant to make a relevant application to the Home Office on the basis of his rights in the UK as a parent of a British citizen child as referred to in the refusal letter of 14<sup>th</sup> May 2014.
13. The decision of the First-tier Tribunal promulgated on 31<sup>st</sup> July 2015 is set aside and remade as follows. The Appellant's appeal under the EEA Regulations is dismissed.

### **Notice of Decision**

The Respondent's appeal is allowed and the decision of the First-tier Tribunal is set aside and remade.

The Appellant's appeal under the EEA Regulations is dismissed.

No anonymity direction is made.

**J Frances**

Signed  
Upper Tribunal Judge Frances

Date 9<sup>th</sup> February 2016