



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

Appeal Number: IA/19060/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13th July 2016**

**Decision & Reasons
On 28th July 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A C

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Ahmad, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal even though this is an appeal by the Secretary of State. First-tier Tribunal Judge Rimington allowed the Appellant's appeal against the refusal of a residence card as confirmation of a derivative right of residence on Article 8 grounds.
2. The judge dismissed the Appellant's appeal under Regulation 15A of the Immigration (EEA) Regulations 2006 on the basis that, although the Appellant was the primary carer of the child, the child would not be

required to leave the UK. The refusal of a derivative residence card would not lead to a situation where the child had to leave the European Union nor would he be deprived of his rights as a citizen in relation to Article 20 of the TFEU.

3. The Respondent appealed on the basis that there was no removal decision and therefore the judge was wrong to consider Article 8 and allow it on that basis. Permission to appeal was granted by First-tier Tribunal Judge Frankish on 27th July 2015 on the ground that it was arguable that consideration of a derivative right under Regulation 15 had 'veered off' into Article 8 notwithstanding removal being 'a hypothetical consideration'.
4. The Appellant also applied for permission to appeal to the Upper Tribunal on the basis that the judge had erred in law in her findings under the EEA Regulations 2006. Unfortunately, the application was made to the Upper Tribunal and not to the First-tier Tribunal. The application for permission was not admitted under Rule 21(a) and (b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 because the Appellant had failed to make an application to the First-tier Tribunal. It was open to the Appellant to make such an application requesting an extension of time. There was no evidence on the court file that such an application had been made by the Appellant and therefore there was no jurisdiction to consider the Appellant's cross-appeal. I am therefore only concerned with the Respondent's appeal.
5. I did not need to hear from Ms Ahmad because, since the decision was promulgated and after the grounds of appeal were submitted, the case of Amirteymour and Others (EEA appeals - human rights) [2015] UKUT 00046 (IAC) has been promulgated. In that case the Upper Tribunal held that, where no notice under Section 120 of the 2002 Act had been served and where no EEA decision to remove had been made, an Appellant could not bring a human rights challenge to removal in an appeal under the EEA Regulations.
6. There was no Section 120 notice in this case and there was no EEA decision to remove the Appellant. Accordingly, the judge's finding that the appeal succeeded under Article 8 was one which was not open to her. I, therefore, set aside the judge's decision under Article 8.
7. There was no error of law in the judge's decision under the EEA Regulations 2006 and her findings in that respect are preserved. It is open to the Appellant in this case to make a further application under the EEA Regulations 2006 or on Article 8 grounds.
8. In summary, I find that there was an error of law in the judge's decision dated 28th April 2015 and I set aside the decision to allow the appeal on

Article 8 grounds. The decision to dismiss the appeal under the EEA Regulations 2006 shall stand and the judge's findings are preserved. The Respondent's appeal is allowed.

Notice of Decision

Appeal allowed.

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 her or any member of her 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.

J Frances

Signed

Date: 27th July 2016

Upper Tribunal Judge Frances