Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03625/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2017	**On 20 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HINA TABASSUM BUTT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. I. Jarvis, Home Office Presenting Officer
For the Respondent: Mr. G. Davison, Counsel instructed by Adam Bernard Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Cockrill, promulgated on 19 January 2017, in which he allowed Mrs. Butt's appeal against the Secretary of State's decision to refuse to issue her with a derivative residence card as the primary carer of an EEA national child who was exercising Treaty rights as a self-sufficient person.

2. For the purposes of this decision I refer to Mrs. Butt as the Appellant, and to the Secretary of State as the Respondent, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "I am satisfied there is an arguable error of law in the decision in that the judge finds that the Appellant has permission to work and thus that the child is self-sufficient despite her making confusing and contradictory findings in the decision."

4. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Submissions

5. Mr. Jarvis relied on the grounds of appeal. It was submitted that the First-tier Tribunal had materially erred in its finding that the Appellant had permission to work, that her child was financially self-sufficient, and that the criteria of Regulation 15A(2)(b)(ii) were satisfied.

6. With reference to paragraph 42 of the determination, the First-tier Tribunal materially erred in law when findings concerning the Appellant's permission to work were based upon a fundamental assumption rather than the law.

7. At paragraph 31 the judge stated, in agreement with Mr. Davison, who also represented the Appellant in the First-tier Tribunal that 3C leave was inappropriate and did not apply. It was accepted by the judge that there was one issue before her, whether or not the work undertaken by the Appellant was lawful. It was the Respondent's contention that only income derived from lawful earnings could be counted when assessing whether an applicant was self-sufficient. Income from any earnings when an applicant did not have permission to work could not be counted. It was acknowledged by Mr. Jarvis that the Respondent accepted that a child, the sponsor, could be self-sufficient in reliance upon earnings of his parent, the applicant, so long as the parent had permission to work. In this case the Appellant did not have permission to work therefore her earnings could not be relied on. As a result, the sponsor, the child, was not self-sufficient.

8. The chronology of the case was not in dispute. The Appellant had been in the United Kingdom as a dependant of an EEA national, her partner and the father of the sponsor, but he had then left and gone to Germany in August 2015. Following his departure, the Appellant had made this application on the basis of a derivative right on account of her German national child.

9. It was submitted by Mr. Jarvis that this scenario was not comparable to the case of Chen (Article 18 EC – Directive 90/364/EEC) Case C-200/02 because the EEA national, the sponsor child, did not have leave. He submitted that what was being considered in that case was whether the state could make the parents of a self-sufficient child leave. The child had a right to reside in Chen without having to rely on his parents for self-sufficiency. Here, the child had no right to reside himself as he

was not self-sufficient without reliance on the Appellant. His self-sufficiency was not from lawful earnings.

10. In response, Mr. Davison submitted that the argument was circular. If the Appellant had no derivative right to remain as a result of the fact that her child could not rely on her earnings, she would have to leave, and so would her child, who would therefore not benefit from the Regulation which permitted him to remain when relying on a parent whose right derived from his presence. He submitted that it was not giving effect to the right of a sponsor child if a mother could not rely on her earnings in order to show that the child was self-sufficient.

11. He submitted that, were the father in Germany paying child support, the child would be self-sufficient. The child was placed in a worse position because his father was not paying some form of child support. If the interpretation was as the Secretary of State submitted, there was no effect given to the law and it was very unfair as the child would have to leave. He accepted that the judge had not addressed the issue of whether the money could be taken into account. However, since the EU partner had upped and left, if the Appellant was not allowed to rely on her own income, the child would have to leave the United Kingdom. The Regulations were therefore not providing a right of any effect unless the Appellant's earnings could be used for the child's self-sufficiency. He submitted that the Appellant should be allowed to remain here to give effect to her child's rights to be here.

12. I was referred to the case of Bee and another (permanent/ derived rights of residence) [2013] UKUT 00083 by Mr. Davison, although he accepted that it did not assist as the Tribunal on that occasion had not made a decision on whether or not the appellant could rely on her earnings when she did not have permission to work in order to show that the child was self-sufficient. He referred me to paragraph 42.

13. In response Mr. Jarvis submitted that the judge had decided this under the 2006 Regulations as shown in paragraph 43. There was no direction made to suggest that Regulation 15(2A) had been wrongly transposed. The judge had considered that the Regulations were met by presuming that the Appellant was residing lawfully, but she did not have permission to work either through leave to remain under the immigration rules or under EU law. He submitted that it was not a Zambrano scenario as the child was not being required to leave the EU. He was not self-sufficient in the United Kingdom so should leave to go to Germany. He was not required to leave the EU. The Regulations were not non-compliant with the principles of EU law. The judge had simply got it wrong: the issue was whether the Appellant was able to rely on unlawful earnings and the answer to that was no. The judge had erred in the approach, had failed to make clear findings, and had failed to make a finding about lawful earnings.

Error of law decision

14. Having found that the Appellant had a comprehensive health insurance policy [28], the only issue before the judge was whether the Appellant's child, her sponsor, was self-sufficient. At [30] the judge addressed the issue of whether she was able to take into account the Appellant's earnings. At [31] she states that she agrees that 3C leave is not appropriate and finds that the Appellant "cannot say, on the basis of 3C leave, that she is working lawfully."

15. At [32] with reference to the case of W (China) and X (China) [2006] EWCA Civ 1494, she finds that income from illegal employment cannot create self-sufficiency for that child.

16. At [38] the judge set out the first of two alternatives, that the Appellant had permission to work adopting the position set out by Mr. Davison. At [39] she set out the second alternative, that the Appellant did not have permission to work and so could not rely on her illegal earnings. At [40] the decision states:

    "I am prepared, in the circumstances, to say what Mr. Davison has urged upon me is the correct position, that the Appellant did have permission to work."

17. No reasons are given for the accepting the proposition that the Appellant did have permission to work either at [38] or at [40]. I accept Mr. Jarvis's submission that the legal scheme is clear with regard to work, insofar as an individual in the United Kingdom without leave or without EU rights is not entitled to work. A consequence of this is that her earnings are illegal, as set out in the reasons for refusal letter and repeated at [39]. The judge has failed to give reasons for accepting the premise that the Appellant had permission to work, especially given that she had previously accepted that the Appellant did not have permission to work by virtue of any 3C leave. She also cited the case of W (China) which found that income from illegal employment could not create self-sufficiency, but despite doing so, has not explained how her earnings are lawful, and why therefore her child is self-sufficient for the purposes of the Regulations.

18. I find that the failure to give reasons and to rely on a "premise", which has adopted without giving reasons for so adopting it, is an error of law. At [42] the judge stated again that the conclusion was based on an "assumption", but has failed to give reasons for basing it on this assumption.

19. In relation to the materiality of this error, that is the question which the judge avoided answering by simply relying on the proposition that the earnings were lawful and therefore could be taken into account. Mr. Davison had accepted that 3C leave was not appropriate and therefore that the Appellant did not have permission to work by virtue of any 3C leave or alternative leave under the immigration rules. It was not submitted that she had any right to remain by virtue of her relationship with her German partner, who had left the United Kingdom. Mr. Davison's submissions were that the Appellant's earnings should be relied on because to do otherwise

would not give effect to EU law. I have carefully considered this. However, neither in the First-tier Tribunal, nor before me was an argument made that the Regulations did not effectively transpose EU law. The argument is that the Secretary of State is wrong in allowing reliance only on lawful earnings in this scenario.

20. I find that the Appellant's child, the sponsor, is not self-sufficient except by virtue of relying on the Appellant's earnings. However, the Appellant has no leave to work, and her earnings are therefore unlawful. The case of Liu v SSHD [2007] EWCA 1275 summarised the conclusions of the Court of Appeal in W (China) as follows at [12]

"The Court of Appeal held in *W (China)* that in the unusual case of a minor EU citizen, unable to cope for himself without parental or guardian support, those Community rules led to the following propositions:

i) Applying [45] of *Chen*, the right of residence of a minor could only be effectively asserted with the presence and support of a carer or guardian, and that, if the requirements of the Directives are fulfilled, creates a right for the parent to reside with the child, (see *W (China)* at [6]).

ii) All of the minor EU citizen and his non-EU citizen carers have to fulfil the Directive requirements of (a) sickness insurance; (b) sufficiency of means: *W (China)* at [8].

iii) Those conditions are pre-conditions to the existence of the Art.18 right in any given case, and thus the right does not exist until those conditions are fulfilled: (*W (China)* at [16]).

iv) The pre-condition of sufficiency of means cannot be fulfilled by funds derived from employment that is precarious because it is unlawful: (*W (China)* at [14]).

v) The member state is under no obligation to adjust its domestic law in order to make available to the EU citizen resources that will enable him to fulfil the pre-condition to the existence of the Art.18 right: (*W (China)* at [16])."

21. Liu also states at [20] and [21]

"The third submission affects all of the appellants, but it is of particular relevance to the Mouloungui appeal: which because of the continual unlawfulness of the presence in the United Kingdom of Mr Mouloungui would fail in any event if *W (China)* were applied to it. This submission was that the court should indeed look to the future, during the period of long-term residence, and ask whether, if granted permission to remain on Art.18 grounds, the adult claiming to provide the resources would indeed be able to do so, by taking employment if so permitted. The past experience was relevant to that question. Wang and Mr and Mrs Ahmed continue in their present employment; and Mr Mouloungui, although currently forbidden to work, had a "job offer". Permission to remain must therefore be provided in order to enable a parent

to fulfil the resources requirement of the Directive, and thus make a reality of the child's right of residence as an EU citizen.

This approach fails for the reasons that have already been set out. By a combination of Art.18 read with the requirements of the Directives, the right to reside only exists once the requirements of the directives are fulfilled: see [12(iii)] above. The Member State therefore is not obliged to adjust its domestic law to create for the EU citizen the resources that he needs in order to create his right to reside: see sub-para.12(v) above. In the present cases, Mr Mouloungui as a failed asylum seeker; and Ms Wang and Mr and Mrs Ahmed as overstayers; are forbidden to work save for the quirk provided by their participation in these proceedings; and there is no reason at all to think that that position will change. But the present applications demand that the United Kingdom creates for them a right to work outside the normal rules in order to provide resources for the respective children."

22. I find that the judge correctly cited the case of W(China), found that the Appellant did not have leave to work, but then decided that her income could be counted for the purposes of the child's self-sufficiency. With reference to the cases of W (China), and Liu, I find that this is contrary to the case law and I find that the judge erred in coming to this conclusion. I find that the child cannot be self-sufficient in reliance on the Appellant's unlawful earnings.

Notice of Decision

23. I find that the decision involves the making of a material error of law. The decision of the First-tier Tribunal is set aside.

24. I remake the decision, dismissing the Appellant's appeal.

25. No anonymity direction is made.

Signed Date 19 October 2017

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Chamberlain