Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/47270/2013

THE IMMIGRATION ACTS

Heard Field House, London	**Determination Promulgated**
on 9 October 2014	**On 30 October 2014**

Before

The President, The Hon. Mr Justice McCloskey &
Upper Tribunal Judge Perkins

Between

MR AHMED EL DESSOUK ABD RABBOU IBRAHIM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr A Berry (of Counsel), instructed by David Tang and Co
Respondent: Mr I Jarvis, Senior Home Presenting Officer

DECISION AND REMITTAL

1. The appeal to this Tribunal has its origins in the decision made by the Secretary of State on 26 November 2013, whereby the Appellant's application for a derivative residence card was refused.

2. In the grounds of appeal to the First-tier Tribunal (hereinafter the "FtT") it was contented, *inter alia*, that the impugned decision infringed the Appellant's rights under Article 8 of the Human Rights Convention. The appeal was refused. In the application for permission to appeal the grounds focussed particularly on regulation 15A(7) of the EEA Regulation 2006 which, we emphasise' prescribes two quite separate bases whereby a person can qualify for the status of primary carer The central issue upon the hearing of the appeal before the FtT was whether, within the meaning of regulation 15A(7), the Appellant was a primary carer.

3. Permission to appeal was granted because, according to the permission Judge, there were contradictory findings regarding regulation 15(7). The Judge noted that in paragraph 10 the FtT concluded that care for the British citizen child was very much shared between the Appellant and the British citizen mother of the child, but then proceeded to find the appeal could not succeed as the Appellant was not the primary carer. The permission Judge suggested this defeats the provisions in Regulation 15(7)(b)(ii).

4. The substance of the first ground of appeal to this Tribunal is that the Judge erred in law in failing to give effect to the tests enshrined in regulation 15A(7), specifically and particularly that in sub-paragraph (i): this follows from Mr Berry's correct acceptance of the suggestion on the part of this Tribunal that the case was being advanced under that limb of the Regulation and not under the second limb, namely the shared responsibility provision.

5. Our resolution of the first ground of appeal places the spotlight firmly on paragraph 10 of the FtT determination. We note that herein there is a series of specific findings of fact. We commend the Judge for articulating with such clarity the material findings. We are conscious also that there appears to have been very little dispute about the basic facts. We conclude that paragraph 10 of the determination, which is the key passage, suffers from the following legal defect. It was, in our judgment , incumbent upon the Judge to rehearse the not less than challenging test enshrined in regulation 15(7A) of the Regulations, to display an alertness to and to demonstrate an unawareness of the distinction between sub-paragraphs (i) and (ii) and, having done so, to apply the governing test to the findings made. That exercise was not carried out and we conclude that this constitutes an error of law.

6. We accept that there is some scope for the argument where an error of this kind is found it made no difference to the outcome because the latter is, in a sense free standing and, hence, sustainable in law. That is the essence of the argument articulated on behalf of the Secretary of State by Mr Jarvis. We have reservations about acceding to this argument because of the very precise and intricate terms in which the regulation 15A(7) regime is formulated. It raises questions which, for Judges, are, as we have said, not less than challenging in every case

without exception. We are not satisfied that this was an error of law of no moment. We consider that its avoidance could have produced a different outcome. Accordingly we conclude that it was material.

7. The second ground of appeal resolves to the following proposition: did the Judge, in effect, abdicate judicial responsibility for determining the specific ground of appeal to the FtT which complained that the Secretary of State's decision infringed the Appellant's rights under Article 8 ECHR ? As the permission Judge noted, this was contrary to Section 86 of the Nationality, Immigration and Asylum Act 2002. We concur with this assessment. We consider further that this was in contravention of the free standing obligation imposed upon the FtT by Section 6 of the Human Rights Act 1998. In short, a public authority, a term which includes a court, must not act incompatibly with a Convention right,. In our judgment, , the incompatible act which occurred here was an outright refusal to consider the case that the Secretary of State's decision was in contravention of a protected Convention right, namely Article 8. The materiality of that error has not been contested, properly so.

8. For these two reasons we conclude that the decision of the FtT is unsustainable in law and must be set aside. Given the nature of the errors of law found, we order remittal to a differently constituted FtT.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 23 October 2014