Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/32329/2013**

THE IMMIGRATION ACTS

Heard at Field House, London
On 9 October 2014

Determination Promulgated
On 20 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

YING SUN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Lam, instructed by David Tang & Co
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of China, appealed to the First-tier Tribunal against the decision of the Secretary of State to refuse her a Derivative Residence Card in accordance with regulation 15A of the of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). First-tier Tribunal Judge Steer dismissed the appeal and the appellant now appeals with permission to this Tribunal.

2. The background to this appeal is that the appellant claims to have entered the UK clandestinely in 2004. She claims that she began living with her partner, a British citizen, in September 2008. He has a young son from a

© CROWN COPYRIGHT 2014

previous relationship who lives with the couple and is a British citizen. The couple also have a son together who was born in the UK on 19 September 2009 who is also a British citizen.

3. The Judge dismissed the appeal under the EEA Regulations and under paragraph 276ADE and Appendix FM of the Immigration Rules. The Judge considered the guidance in the cases of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) and decided that there were no exceptional circumstances not adequately recognised in the Rules to justify considering the application outside the Rules on the basis of Article 8. The grounds of appeal to the Upper Tribunal contend that the Judge erred in her decision that the appellant did not meet the requirements of paragraph 15A of the Regulations. The grounds of appeal further contend that the First-tier Tribunal Judge erred in her consideration of the Immigration Rules in relation to Article 8 and that the Judge should have gone on to consider the appeal outside the Immigration Rules and under Article 8.

4. Permission to appeal was refused by the First-tier Tribunal. The appellant renewed her application for permission to the Upper Tribunal and Upper Tribunal Judge Pitt refused to grant permission to appeal on the first ground. She said that the ground concerning regulation 15A was misconceived because the appellant cannot meet the requirements of regulation 15A (4A) (c) as the children's father is British and the child would therefore be able to reside in the UK even if the appellant returns to China. It seems clear to me that the appellant could never have met the requirements of paragraph 15A and it is not at all clear why she made the application on this basis. Upper Tribunal Judge Pitt granted permission to appeal on the second ground only.

Error of Law

5. Mr Whitwell submitted that there was no jurisdiction to consider Article 8. Mr Lam submitted that the First-tier Tribunal Judge did have jurisdiction by virtue of schedule 1 of the EEA Regulations. However Schedule 1, paragraph 1 of the EEA Regulations provides that certain provisions of the Nationality, Immigration and Asylum Act 2002 have effect in relation to an appeal under the EEA Regulations as if it were an appeal against an immigration decision under section 82(1) of that Act except for section 84(1) (a) and (f). Section 84(1) (a) is the ground that the decision is not in accordance with Immigration Rules. The appellant appealed to the First-tier Tribunal under regulation 26 of the EEA Regulations and Schedule 1, paragraph 1 of those Regulations therefore prohibited the First-tier Tribunal Judge from considering whether the refusal decision was in accordance with the Immigration Rules. I am therefore satisfied that the First-tier Tribunal Judge had no jurisdiction to consider an appeal in this case on the ground that the decision is not in accordance with the Immigration Rules. The First-tier Tribunal Judge therefore erred in considering the appeal under Appendix FM and paragraph 276ADE. The Judge therefore materially erred in law in considering the appeal on this ground.

6. Mr Lam submitted that the First-tier Tribunal Judge did have jurisdiction to consider the appeal under Article 8. He submitted that this was because the application was made in October 2011, before the changes introduced to the Immigration Rules in July 2012. He therefore submitted that the Judge had erred in failing to undertake an assessment under Article 8. I accept this submission. Schedule 1 of the EEA Regulations does not preclude consideration of human rights grounds of appeal. In light of the provisions of schedule 1 and the decision of the Court of Appeal in Edgehill & Anor v SSHD [2014] EWCA Civ 402, in relation to applications made before July 2012, I am satisfied that the First-tier Tribunal Judge erred in considering this appeal under the Immigration Rules and failing to consider Article 8.

7. I therefore set aside paragraphs 21-25 of the First-tier Tribunal Judge's decision which deal with human rights and I go on to remake that part of the decision.

Remaking the decision

8. Mr Lam submitted that the First-tier Tribunal Judge failed to consider the effect of the appellant's removal upon the children and the proportionality of the decision. He submitted that there was undue delay on the respondent's part in considering this application and that the consequent uncertainty was agonising for the appellant. He submitted that at the time the application was made the boundaries of the derivative right of residence were not so clear.

9. Mr Whitwell submitted that the appellant can make an application to the respondent under Article 8. He accepted that there had been a delay on the respondent's part but pointed to the delay on the appellant's part as she had not made any application between 2004 and 2011. He submitted that it is entirely proportionate for the appellant to make an application for leave to remain as there is no removal decision.

10. In remaking the decision under Article 8 I bear in mind that schedule 1 of the EEA Regulations precludes me from considering whether the refusal decision is in accordance with the Immigration Rule and I cannot therefore make findings as to whether the appellant meets the requirements of paragraph 276ADE or Appendix FM of the Immigration Rules.

11. I therefore consider the appellant's appeal under Article 8 as the appellant does have a right of appeal on this basis. In undertaking an assessment under Article 8 I follow the five stage approach set out by Lord Bingham in R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27.

12. The appellant enjoys family life in the UK with her partner, stepson and son. In the Reasons for Refusal letter dated 15 July 2013 the respondent suggested that if the appellant wishes to have her family life considered she should make a separate application for leave to remain under Appendix FM or paragraph 276ADE. As soon as the appellant makes such an application there will be no threat to remove her from the UK whilst the application is being considered. If the respondent refuses any such

application any decision to remove the appellant will attract a right of appeal within the UK. In these circumstances I am satisfied there is at present no real interference with the appellant's family life in the UK. However I go on to consider the other steps in the Article 8 assessment in the event that I am wrong in this. If there is an interference with family life I accept that it may have consequences of such gravity as potentially to engage the operation of Article 8. In light of the First-tier Tribunal Judge's decision in relation to the EEA Regulations (which still stands) I am satisfied that any such interference would be in accordance with the law.

13. The final two questions go to the proportionality of the decision appealed against. Mr Whitwell submitted that there is no removal decision in this case and that it is proportionate to expect the appellant to make an application for leave to remain under Appendix FM if she wishes to stay in the UK. Mr Lam submitted that there has been undue delay in this case. I note that the application was made in October 2011 and the decision was not made until July 2013. However I weigh against this the fact that the application and appeal under regulation 15A was bound to fail in the circumstances of this case and the appellant has therefore wasted time and effort pursuing an application for an EEA residence card which had little merit. I also bear in mind the fact that the appellant claims to have been in the UK since 2004 and have lived with her partner since September 2008 yet she did not make any application to regularise her stay in the UK until October 2011. There have therefore been delays on both sides.

14. In all of the circumstances I am satisfied that any interference with the appellant's family life, in the form of a requirement to make an application under the Rules, is proportionate to the respondent's legitimate aim of the maintenance of an effective system of immigration control for the prevention of disorder or crime or to secure the economic well-being of the country.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of an error on point of law in relation to Article 8 only.

I set aside that part of the decision only and remake it by dismissing the appeal.

Signed Date: 19 November 2014

A Grimes
Deputy Judge of the Upper Tribunal