



IAC-FH-AR

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

Appeal Number: IA/28141/2014

**THE IMMIGRATION ACTS**

Heard in Birmingham  
On 22 June 2015  
Prepared 26 June 2015

Decision & Reasons Promulgated  
On 10 August 2015

Before

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

Between

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

Appellant

and

**XIAOHUI CHEN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Miss A White, Counsel, instructed by Ian Henery Solicitors  
For the Respondent: Mr N Smart, Senior Presenting Officer  
Interpreter: Y P Nan, language Mandarin

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant. The Claimant, a national of the People's Republic of China, date of birth 28 March 1993, had appealed against the Secretary of State's decision, dated 20 June 2014, to refuse a derivative residence card with reference to the Immigration (European Economic Area) Regulations 2006 (the 2006

Regulations), which appeal came before First-tier Tribunal Judge Broe (“the judge”) who, on 18 December 2014, dismissed the appeal on human rights grounds and under the Immigration Rules.

2. It was conceded that the basis of application under the 2006 Regulations seeking a permanent residence card was certain to fail because the Claimant could not meet the requirements of those Regulations. Accordingly the Original Tribunal’s decision on the EEA application stands.
3. The challenge on Article 8 ECHR grounds to the judge’s decision came before me and on 27 March 2015 I found that the Original Tribunal decision could not stand for reasons set out in my determination. At that stage, having heard argument I concluded that although the relevant decision of the Secretary of State to refuse the derivative residence card as a confirmation of a right of residence as the primary carer of an EEA national minor who was a qualified self-sufficient person, was correct, it remained open for an Article 8 claim to also be considered.
4. Thus, at the further hearing to remake the decision I heard evidence and submissions relating to Article 8 ECHR issues and directed at the proportionality of the Secretary of State’s decision. I have only remade the decision in respect of the Article 8 ECHR claim.
5. In the alternative if I was wrong in doing so, I am satisfied that there was no other right of appeal, there being no Section 120 notice, to pursue Article 8 ECHR grounds. I reach that latter view on the basis that:- first an application for a derivative residence card is a completely different application to that under Article 8 of the ECHR. Secondly, there are no removal directions contemplated by the Secretary of State’s decision and thus the Claimant’s position in terms of a claim under Article 8 ECHR is protected for hearing at a later date if a decision to remove is made, when there will, in any event, be further appeal rights available.
6. Turning therefore to the Article 8 claim, the position is somewhat the more difficult because of the conduct of the Claimant’s parents. The Claimant’s parents are from Fujian Province in eastern China. The Claimant’s father entered the United Kingdom in 1994 and ultimately was granted indefinite leave to remain on the basis of fourteen years’ residence. His residence in the United Kingdom was not lawful.
7. The Claimant’s mother entered the United Kingdom in 1999 and made a claim for asylum which had no substance and was essentially a device to remain here, as she now accepts.
8. She then made arrangements when pregnant to go, via Northern Ireland with limited border controls, to the Republic of Ireland to give birth to her children, Jenny, date of birth 25 June 2004, and Jessica, date of birth 8 September 2001. It appeared that with the help of another she was able to misrepresent her status to obtain Irish Nationality for her children. The Claimant’s mother resided in the Republic for about three months, on each occasion staying with an Irish national. She now acknowledged these arrangements were entirely carried out in order to enable her to remain in the

UK reliant upon her daughters' nationality, and thus rendered the parents effectively irremovable from the United Kingdom.

9. These children have thus been brought up in the United Kingdom at public expense and all this achieved wholly and deliberately to defeat immigration controls in the United Kingdom.
10. In respect of the Claimant the position was more complicated. He was born on 28 March 1993 before his father left the PRC for the United Kingdom, he was left to be brought up by his grandparents. His mother, until she came to the United Kingdom appeared to have been living with other family members in China. The Claimant was brought to the United Kingdom having entry clearance as a dependant of an EEA national child, his sister Jessica, a child, and entry clearance was valid until 12 May 2014. The Claimant is over the age of 18, is not eligible for a derivative residence card as he is no longer a dependant. He is not and never was the primary carer of an EEA national child. So far as I am aware he lives an independent life but for convenience remains living at home.
11. It was again apparent that the device behind the derivative residence card application was intended to defeat immigration control and to enable the Claimant to remain in the UK. It seemed to me that both the Claimant and his parents were responsible for that application.
12. In the meantime in the United Kingdom the Claimant has been undergoing education. Whilst it was said he was fully fluent in English, his nerves were such that he preferred to give evidence at the hearing through a Mandarin interpreter. Again it may be that the payment of property rentals in China to the Claimant was simply to enable an EEA basis of claim to be made that the Claimant had a rental income from the PRC which rendered him self-sufficient.
13. It may be that the rental income was his parents but they have diverted it to him. Whether or not it was truly his to spend as a fact was quite another matter to which the evidence does not specifically address (see paragraph 15 and 17 of this decision post). Essentially, although it is a somewhat unattractive argument, it was being argued that because the two Irish national children cannot be removed from the United Kingdom outside the EEA area and because the parents of the children are in the United Kingdom as their primary carers, the Claimant should be entitled to remain. His removal would be an interference with private/family life rights being exercised and that his removal would not be in the best interests of his two sisters who would be upset by his absence.
14. The part the Claimant truly played in the sisters' lives was not explained in the evidence and apart from the commonsense likelihood of his having some contact with his younger siblings and they with him. The fact was the evidence did not show that the interference in that relationship would not be in their best interests nor have any significant adverse effects upon them or him.

15. The Claimant's evidence was contained within a short statement which speaks of his parents' immigration history and confirmed he was financially self-sufficient. Separately, his parents are self-sufficient, having money from their business and personal bank accounts and employment. The Claimant simply says at the conclusion of his statement he hoped his indefinite leave to remain application will be successful

“So I can continue to live with all my family members in the United Kingdom. I do not engage myself in any criminal behaviour, neither do I smoke, drink or take drugs. I see myself as law abiding, honest and respectable.”

16. Thus his statement gave no insight into the following matters. First, the nature of any private life with any friends or links or ties with people outside of the family; Second, he did not indicate where his studies have got to and what if any expectations he had for any further study; Third there was nothing by way of information from or references from people who know him in the community; Fourth, there was no evidence of any dependency, financial, practical or in terms of emotional support from his family as part of his private life; Fifth, there was no evidence from him of any part he has ever played in the upbringing of his siblings nor any future plans to do so or any responsibility for them; Sixth, there was no evidence, not only of friends but also any social network or life he has been enjoying in the United Kingdom; Seventh, the Claimant gave no indication as to why he could not maintain a private life for himself in the PRC and it was not suggested that he would be unable to communicate in Chinese (Mandarin) or otherwise with persons in the PRC.
17. As to the Claimant's family life, he provided no evidence other than to say they live in the same home and he gave no picture of any practical reliance upon his parents or indeed they on him. The Claimant's father made a short statement, also signed by his wife, which gave something of their immigration history and identified that the Claimant's mother was the primary carer of the two children (Jenny and Jessica) but gave no information to suggest the Claimant has in fact ever been dependent upon his siblings. The Claimant's father said in his statement [9] “I am the person who is responsible financially to maintain the whole family in the UK. My wife, my son and me are sharing responsibility to look after our two daughters on a daily task.” The Claimant's father claimed, contrary to the Claimant's claim, to receive the rental income from properties in China which it was said by the Claimant rendered him self-sufficient. Rather the Appellant claimed the rental was transferred to his bank account and he was self-sufficient in the UK. Yet the Claimant's father claimed the moneys were sent to him and the transfer was to “our bank” in the UK.
18. The Claimant's mother's part of the joint statement added nothing specifically as to anything of the family life she has with the Claimant and nor indeed did in any substance the Claimant's father. I did not find the parents evidence reliable or credible of any part the Claimant played in the care of his siblings because of their willingness to use deception in the past and their present wish to secure the Claimant's presence in the UK by any means.

19. It seemed to me that the extent to which family and private life was enjoyed in the United Kingdom was a fact specific issue and quite simply there was no useful or reliable evidence of the Claimant's private life and nothing to indicate whether, if he had to be removed, the interference would be significant.
20. Accordingly, I find that there was nothing in relation to the Claimant's private life to suggest removal would be a significant interference to engage Article 8(1) ECHR.
21. If I was wrong in that conclusion then plainly the Secretary of State's decision was lawful and in accordance with the objectives of Article 8(2) of the ECHR.
22. There was no evidence relating to the impact of removal of the Claimant upon either of his siblings nor on their best interests, nor of any part he plays in their family and private lives or upbringing.
23. So far as any part the Claimant played in the family life generally with his parents I have, in the light of their poor immigration history, very considerable reluctance in accepting anything they say as being the truth about it, but instead of providing information they provided nothing more than bare assertion. I find that the Claimant and his parents' oral evidence added nothing to the statements they had made.
24. The Claimant was just over the age of 18. I accept simply an 18<sup>th</sup> birthday does not make a material difference as a fact in most cases between the family life before and after such a birthday. Unfortunately, the evidence before me does not show what that family life was nor if it truly existed now. It may be the Claimant was essentially independent, self-sufficient and made his own life choices. The fact of still living in his parents' home may be his choice or convenience and their preference. There was no compassionate circumstances argued against the Claimant's return to the PRC. It was clear, assuming that the Claimant does speak English, that he can probably find some form of employment in the United Kingdom, but whilst he may have had various lawful reasons to be in the United Kingdom, I have in the light of the immigration history the gravest doubts about his ever being a genuine dependent upon his siblings, who were significantly younger, or them on him.
25. In the circumstances, therefore, I am particularly mindful of the position of the Claimant being removed from ready access to his family in the United Kingdom but in the light of the evidence I do not find on a fact specific basis that there are any personal circumstances evidenced in relation to the Claimant's parents or indeed his siblings that militated in favour of him remaining. There is nothing suggest that the Claimant's mother cannot continue, as she was claimed to be, the primary carer of his two siblings or at all. The Claimant can keep in contact with his family by e-mail, Skype, telephone or other electronic means/Apps if he does not wish to correspond by letter or card.
26. Unsurprisingly, the evidence presented by the parents of the Claimant was largely to the effect that there would not be much for him to return to in the PRC. I find their evidence was not reliable on those matters because of their self evident interest in

keeping him in the UK and willingness to use deception to achieve their immigration goals.

27. In considering the Article 8 claim, I apply the cases of Razgar [2004], Huang [2007] and ZH (Tanzania) [2013], I have considered the evidence in the context of SS (Congo) [2015] EWCA Civ 387, Gurung [2012] EWCA Civ 3 and insofar as it is applicable to the context of the claim Ghising [2012] UKUT 160.
28. I fully take into account the ages of his siblings and as ZH indicates, I put to one side the Claimant's parents' conduct in establishing themselves and the Claimant in the United Kingdom in a wholly unmeritorious fashion. It does not seem to me that their conduct should be held against the Claimant. Similarly I do not accept the Claimant's parents' evidence that the Claimant has no family to make contact with in the PRC. It seemed to me that their evidence was completely driven by their desire to keep Claimant in the United Kingdom.
29. Although it was said the Claimant sometimes helped with his sibling's care I am left with no picture of any significant or material contribution he made. I have no evidence of any significant harm or material harm to his siblings from his absence, nor evidence of their best interests. In terms of the public interest, I find that is a matter which must be significant in terms of weight. I take into account, although it was less than clear how far the Claimant's A level studies, by distance learning, have actually got. I have no idea how the Claimant actually supported himself from what was said to be a rental income of £4,982 every three months or whether he was paying for his education. I find the likelihood was that the Claimant at the age he is, was effectively independent of his parents albeit within the usual constraints of living in his parents' home. I accept the Claimant has the normal emotional ties with his parents which cannot be regarded as insignificant, but only to be expected between parents and their eldest child and none which indicated any emotional reliance one upon another.
30. However, it is fair to say that the Claimant's entry to the UK was obtained by the devices of his parents and in my opinion his status was precarious if their deception became known. I find that the public interest in the maintenance of immigration controls and Article 8(2) of the ECHR was such that those matters relied upon by the Claimant, applying the approach of Kugathas [2003] EWCA Civ 31 [25] as it is said modified by Ghising, nevertheless indicated that the Secretary of State's decision was lawful and proportionate in relation to his family life.
31. The Claimant must have a private life, it would seem in the United Kingdom, but I have no evidence of it. Whilst it is said in the context for example of EV (Philippines) [2014] EWCA Civ 874 that the Claimant's parents have been frank today and therefore should be given some credit for it, I found that was not an attractive argument bearing in mind they really had no alternative than to admit their past conduct; given the surrounding facts so obviously disclosed their willingness to deceive or evade UK immigration controls. I have fully considered Ss.117A-C of the Immigration Act 2014. I do not find the Claimant's English language skills, capacity

for employment, some education, talent and experiences militated in favour of his remaining, nor do his personal interests outweigh the public interest in his removal. It does not seem to me the parents' frankness today about their own immigration history, but not the Claimant's EEA application, rendered their evidence reliable or credible on Article 8 issues or the issue of proportionality.

32. The fact that the parents own their own home, they work and are firmly established in the United Kingdom was a material consideration but I do not find they outweigh other pertinent considerations to the claim by the Claimant as a whole or the public interest. On the minimal evidence provided I do not find that removal would be disproportionate
33. The Claimant's appeal on Article 8 ECHR grounds is dismissed.

Signed

Date 17 July 2015

Deputy Upper Tribunal Judge Davey