



IAC-FH-CK-V1

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

Appeal Number: IA/38549/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 October 2015**

**Decision & Reasons Promulgated  
On 6 November 2015**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

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

Appellant

**and**

**MS JINFENG JIANG**

Respondent

**Representation:**

For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer

For the Respondent: Mr C Lam, Counsel instructed by David Tang & Co

**DETERMINATION AND REASONS**

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellant is a citizen of China born on 30 November 1987. On 12 May 2014 she made an application for a residence card on the basis of a claimed derivative right of residence with reference to Regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). That application was refused in a decision dated 15 September 2014.

3. The appellant appealed against that decision and her appeal came before First-tier Tribunal Judge Hunter at a hearing on 13 April 2015 whereby the appeal was allowed under the Article 8 Immigration Rules. Permission to appeal against the First-tier Tribunal's decision was granted to the respondent, thus the appeal came before me.
4. At the hearing before me there was an application on behalf of the respondent to amend the grounds of appeal to include a ground relying on the decision in *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC), to the effect that the First-tier Judge had no jurisdiction to consider the appeal under Article 8 of the ECHR and the Article 8 Immigration Rules. There was no objection to the application for the grounds to be amended and I allowed the amendment.
5. In fact, the grounds as originally drafted on behalf of the respondent do flag up the question of whether the First-tier Judge had jurisdiction to consider Article 8 at all, pointing out that the respondent's decision does not require any of the individuals affected by the decision, to leave the UK. The decision, it is argued, is simply that the appellant is not entitled to confirmation of a right of residence on the basis of derivative rights.
6. Otherwise, the grounds take issue with the judge's conclusion that the appellant meets the suitability and eligibility requirements of the Rules, in the absence of knowledge of the appellant's immigration status. Furthermore, it is argued that in concluding that it would be unreasonable to expect the appellant's daughter J, born on 1 October 2013, to leave the UK the judge proceeded under a mistake of fact, given that there is no removal decision. The respondent had never expressed the view that J would be required to leave the UK.
7. In addition, it is said that the First-tier Judge was wrong to conclude at [50] that there had to be "repeated" breaches of Immigration Rules for the respondent to conclude that there was a very poor immigration history. Similarly, the absence of any criminal record on the part of the appellant is nothing other than a neutral factor and the First-tier Judge had erred in relying on the lack of criminal record as a positive factor.
8. Lastly, it is argued that there had been no consideration of the question of the appellant returning to China to seek entry clearance.
9. In submissions before me Ms Brocklesby-Weller relied on those grounds and also on the *Amirteymour* point. Insofar as the appellant sought to rely on the decision of *Vladimir Granovski v Secretary of State for the Home Department* [2015] EWHC 1478 (Admin), that was a different type of case which did not involve the EEA Regulations.
10. Other aspects of the determination were referred to in suggesting that the assessment under the Article 8 Immigration Rules was otherwise flawed.

11. Mr Lam relied on the decision in *Granovski*, in particular at [80] – [82]. That was a decision involving the question of adequate consideration of the ‘Section 55’ duty. Although it is accepted that that is not an EEA case, it was one involving a child it was submitted.
12. Reliance was placed on the skeleton argument put before the First-tier Tribunal, including with reference to the decision in *Dereci & Ors (European citizenship)* [2011] EUECJ C-256/11 specifically at [72], which concerned the refusal of a right of residence and whether that undermined the right to respect for private and family life provided for in Article 7 of the Charter of Fundamental Rights of the European Union.
13. In general terms it was argued that, the facts not being in dispute, the judge was entitled to consider EX.1 and the relationship between the appellant and her children in the UK. Reliance was also placed on the decision in *Zambrano* [2011] EUECJ C-34/09.
14. Furthermore, it was submitted that the judge was similarly entitled to take into account that there was no criminality evident in this case in terms of the Immigration Directorate Instructions referred to at [50]. So far as the decision in *Amirteymour* is concerned, it was submitted that there was a distinction between Article 8 proper and the Immigration Rules under Appendix FM. Paragraph EX requires different considerations although there is some overlap.

*My assessment*

15. I do not consider it necessary to deal with the detailed challenge to the judge’s conclusions with respect to the Immigration Rules because it is clear that the Secretary of State’s appeal succeeds on the ground in relation to the *Amirteymour* point.
16. It was conceded before the First-tier Tribunal that the appellant was not able to meet the requirements of the EEA Regulations, (see [14]). The appeal was considered with reference to Article 8, the judge starting his consideration under the Article 8 Immigration Rules.
17. At [41] the judge said that although the respondent did not consider the appellant’s position under Article 8, he accepted the submission on behalf of the appellant that he had jurisdiction to consider that as a ground of appeal.
18. Mr Lam submitted that *Amirteymour* was a decision based on Article 8 proper, rather than the Article 8 Immigration Rules and the position is therefore different in the case of this appellant. I do not agree with that submission. It is clear, for example from [38] – [42] of *Amirteymour* that this is precisely the issue that was determined by the Upper Tribunal in *Amirteymour*. The contrary is unarguable.
19. I have not found the decision in *Granovski* of any assistance, not least because that was not a case dealing with refusal of a residence card under

the EEA Regulations and a subsequent reliance on an Article 8 ground of appeal.

20. Similarly, although the appellant seeks to rely on the decision in *Dereci*, in the appellant's case the Secretary of State's decision does not involve any interference with family life, there being no present decision to remove the appellant. The appellant has a route to establish entitlement to leave to remain through an application on Article 8 grounds, which the statutory regime precludes in a case where the application is made for a residence card and where no s.120 notice has been served.
21. In the circumstances, whilst the First-tier judge did not have the benefit of the decision in *Amirteymour*, I am satisfied that he had no jurisdiction to determine an Article 8 ground of appeal, whether under the Article 8 Immigration Rules or under Article 8 proper. His decision to allow the appeal on that basis must be set aside.
22. Accordingly, I do not consider it necessary to consider the other grounds advanced on behalf of the Secretary of State in terms of the conclusions of the First-tier Judge in relation to the Article 8 Immigration Rules. I set aside the decision and re-make it, dismissing the appeal.

*Decision*

23. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside. The decision is re-made, dismissing the appeal.

Upper Tribunal Judge Kopieczek

5/11/15