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

MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Kings Court, North Shields** | **Determination Promulgated** |
|---|---|
| **On 05 December 2014** | ..... |

**Before**

**The President, The Hon. Mr Justice McCloskey**

**Deputy Upper Tribunal Judge Holmes**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR**

Respondent

**Anonymity Direction Made under Rule 14**

**Representation :**

Appellant: Ms Rackstraw, Senior Home Office Presenting Officer

Respondent: Ms M Rasoul, instructed by Halliday Reeves Solicitors

(1)
A judge considering an application for permission to appeal to the Upper Tribunal must avoid granting permission on what, properly analysed, is no more than a simple quarrel with the First-tier Tribunal judge's assessment of the evidence.

(2) When granting permission to appeal to the Upper Tribunal, it is unsatisfactory merely to state that the applicant's grounds are arguable.

(3) The requirement, emphasised in Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC), to engage with each and every ground of application, need not involve anything of an unduly elaborate, burdensome or analytical nature. The reasons for granting or refusing permission to appeal, in whole or part, in any given case will almost invariably be capable of being expressed in a concise and focused manner.

**DETERMINATION AND REASONS**

**Introduction**

1.
This appeal originates in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the " Secretary of State ") dated 18 December 2013. By this decision the application of the Respondent, a national of Brazil aged 33 years, for a derivative residence card under the Immigration (European Economic Area) Regulations 2006 (hereinafter the " 2006 Regulations ") was refused. The Respondent appealed, successfully, to the First-tier Tribunal (the " FtT "). The Secretary of State appeals, with permission, to this Tribunal.

2.
In the context of this appeal, the relevant provision of the EEA Regulations is regulation 15A. This is one of the new provisions which was introduced by the Government, by amendment, purportedly giving effect to the decisions of the CJEU in a series of cases, in particular Chen (Case C-200/02) and McCarthy (Case C-434/09). Regulation 15A describes the conditions which a person must satisfy in order to qualify for a so-called "derivative" right of residence. This species of right does not stem directly from Directive 2004/38/EC. Rather, it may be conveniently described as indirect in nature. It is derivative, in the sense that where it arises it derives from the status of a relevant EEA national and the direct rights attendant thereon. These amendments took effect on 16 July 2012.

3.
By regulation 15A(1), a person is entitled to a derivative right to reside in the United Kingdom provided that the specified criteria are satisfied. In the context of this appeal, it is unnecessary to reproduce regulation 15A. The relevant EEA national is the Respondent's child, now aged ten years and of whom the Respondent is the primary carer. The sole issue is whether this child " would be unable to remain in the United Kingdom " if the Respondent were refused her application for a derivative right of residence and, hence, would be required to leave the United Kingdom. Factually, the key issue addressed in the Secretary of State's decision was whether the child's father would be able to care for the child if the Respondent were required to leave the United Kingdom. The conclusion made, in substance, answered this question in the affirmative.

4.
On appeal, the FtT disagreed with the Secretary of State's assessment. It was uncontentuous that the Respondent has been the primary carer and, in effect, the sole residential parent of the child during the whole of her ten years since birth in the various countries concerned. The evidence available to the Judge included documentary evidence emanating from the father, members of his family and family friends, together with the testimony of the father and the Respondent. Much of the evidence focused on the period during which mother and child have been residing in the United Kingdom viz from October 2012. The Judge gave particular consideration to self evidently material issues such as the father's marital and family circumstances, contact between the father and the child and the attitude of the father's spouse. On his own initiative, the Judge explored the issue of whether, in the event of the Respondent's departure from the United Kingdom, it would be possible for the child to go to live with her father and his family. It is clear that the Judge explored this important issue with appropriate care and in suitable depth. The Judge then made certain discrete findings, based on those aspects of the relevant evidence which he found credible and persuasive or the opposite, as the case may be: see [64] – [67] and [72]. These led him to an omnibus conclusion, or finding, expressed in the following terms:

“ It seems to me then that on the evidence actually before me, it has been shown that [the child] would not be able to live with her father ……. if the Appellant had to leave the United Kingdom. I accept the evidence of both [the father] and the Appellant on this point. ”

These are the key passages in the determination. Commendably, the Judge then examined two other hypotheses, namely the possibility of the child living with relatives of the father and the possibility of the child living in some statutory care framework.

5.
We emphasise that there is no suggestion that the Judge misdirected himself in law. Rather, permission to appeal was sought, and granted, on the basis that the Judge had “ diminished” certain aspects of the Respondent’s evidence and, in terms, should have reached a different conclusion. The essence of the complaint advanced in the grounds of appeal is encapsulated in the following sentence:

“ The Judge should have found that the Appellant could not satisfy the requirements of the Regulations and dismissed the appeal on this basis. ”

Within this passage, considered in tandem with the remainder of the grounds, one finds the key to the application for permission to appeal: a simple quarrel with the Judge’s assessment of the various pieces of evidence considered and ensuing findings, nothing more and nothing less. The grounds of appeal, properly analysed, resolve to this.

6.
In Nixon (permission to appeal: grounds) [2014] UKUT 368, this Tribunal drew attention to rule 24(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, UTIAC Guidance Note 2011 and a series of related “ elementary requirements and standards ”. We draw particular attention to [6]:

“[ 6] Given recent experience, it may be timely to formulate some general rules of practice. It is axiomatic that every application for permission to appeal to the Upper Tribunal should identify, clearly and with all necessary particulars, the error/s of law for which the moving party contends. This must be affected in terms which are recognisable and comprehensible. A properly compiled application for permission to appeal will convey at once to the Judge concerned the error/s of law said to have been committed. It should not be necessary for the permission Judge to hunt and mine in order to understand the basis and thrust of the application. While in some cases it will be possible for the permission Judge to engage in a degree of interpretation and/or making inferences for this purpose, this should never be assumed by the applicant and cannot operate as a substitute for a properly and thoroughly compiled application. These are elementary requirements and standards. ”

We do so for the purpose of pointing out, with some emphasis, that the application for permission to appeal in the present case did not comply with the governing rules and principles. In passing, we observe that the successor to rule 24(5) of the now superseded 2005 Rules is rule 33(5) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

7.
Next, we draw attention to the terms in which permission to appeal was granted in this case:

“ The grounds on which permission to appeal is sought submit that the Judge erred in law in that he failed correctly to interpret and apply the requirement arising from Regulation 15A(2)(c) of the 2006 EEA Regulations that the Appellant’s British citizen daughter would be unable to reside in the UK or another EEA State if the Appellant were required to leave. This is arguable. ”

As appears from our assessment and conclusions above, we consider that no arguable error of law was disclosed in the permission application. The fundamental defect in the application was its failure to articulate any identifiable or recognisable error of law. Thus there was no basis for granting permission to appeal. Moreover, the terms in which permission to appeal was granted are unsatisfactory. Neither this formula nor anything kindred is acceptable. In Nixon , it was stated, in [8]

“ It may be worth emphasising that, irrespective of whether permission to appeal is granted on all of the grounds advanced or some thereof only, a reasoned decision is always required in respect of each and every ground, which reinforces the necessity of considering all grounds with scrupulous care. ”

It is appropriate to add that nothing of an unduly elaborate, burdensome or analytical nature is expected of the permission Judge. The reasons for granting or refusing permission to appeal, in whole or in part, in any given case will almost invariably be capable of being expressed in a concise and focused manner. In most cases, a couple of carefully constructed sentences will suffice. Adherence to this basic, but indispensable, discipline will ensure that only worthy candidates overcome the threshold. We are confident that compliance with this fundamental requirement would have identified the present case as an entirely unworthy candidate for the grant of permission.

8.
To conclude, the decision of the FtT in this case was unimpeachable. On behalf of the Secretary of State, the application for permission to appeal was launched on a wing and a prayer. It was manifestly devoid of any substance or merit and should have been exposed accordingly.

**DECISION**

9.
We dismiss the Secretary of State’s appeal and affirm the decision of the FtT.

**Bernard McCloskey**

THE HON. MR JUSTICE MCCLOSKEY

PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

**Date:** 05 December 2014