IN THE UPPER TRIBUNAL **Appeal No: CE/372/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal disallows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Leeds on 4 December 2014 under reference SC007/13/07921 did not involve any error on a material point of law and therefore the decision is not set aside.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007

REASONS FOR DECISION

1. I heard an oral hearing of this appeal. The appellant attended with his wife and represented himself. The Secretary of State was represented by Mr Cooper, solicitor. The appellant had been represented by Kirklees Law Centre in seeking to appeal the First-tier Tribunal's decision of the 4 December 2014 to the Upper Tribunal but it was unable to represent him at the hearing.

2. This is a 'right to reside' appeal. The issue that arises on this appeal is whether the appellant and his wife can have a right to reside in the UK on the basis of at least one their grandchildren being in education in the UK and the grandparents having worked in the UK. The short answer to that question is "No". This is because the person who has worked or been a 'worker' needs to be the parent of the child(ren) in order for the derivative right of residence to arise under regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regs") or article 10 of Regulation (EU) No 492/2011.

3. The appellant and his wife are Slovakian nationals. On 19 August 2013 the appellant made a claim for employment and support allowance ("ESA"). The claim was refused by a decision dated 3 October 2013 on the basis that the appellant could not satisfy regulation 70 of the Employment and Support Allowance Regulations 2008 because, in short, he did not have a right to reside in the United Kingdom (UK).

4. Some further facts are needed to give context to the legal issue with which this appeal is concerned. The appellant came to live in the UK with his wife in October 2008. It is accepted for the purposes of this appeal that the appellant's wife has worked in the past in the UK sufficient to give her the status of 'worker' in the UK under EU law. It is also accepted that at all material times the appellant and his wife have been (and remain) the primary carers for their two grandchildren, though not any court order vesting parental responsibility in them; and at least one of those grandchildren has been in education in the UK since April 2013. The grandchildren were born on 14 September 2008 and 11 April 2010. The evidence shows that their grandmother – the appellant's wife – was in registered employment under the accession state worker registration scheme for over a year from 8 May 2009. Given the focus of this appeal, it is not necessary to set out the facts in any more detail save to say that the appellant's wife being in employment in the UK did coincide with her and her husband being primary carers for their grandchildren.

5. The appeal against the Secretary of State's decision of 3 October 2013 was dismissed, and that decision upheld, by the First-tier Tribunal on 4 December 2014 (the tribunal"). In its reasoning the tribunal accepted the above facts and also found that the appellant and his wife were the primary carers for their grandchildren. However, it also found (findings which are not disputed) that: (i) the appellant's own children were no longer of school age; and (ii) there was no evidence that either of the grandchildren's parents (i.e. the appellant's daughter and the father of the grandchildren) had ever worked in the UK.

6. On the basis of these findings the tribunal did not consider that the appellant had a right to reside in the UK at the time of his claim for ESA in August 2013. The only relevant issue on this further appeal concerns the correctness of that decision. The tribunal based itself on article 10 of Regulation (EU) No 492/2011, which provides:

> " The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.
>
> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

7. Cases decided in the Court of Justice of the European Union (CJEU) such as *Ibrahim* (Case C-310/08) and *Teixeira* (Case C-480/08) have established that article 10 gives rise to an independent right to reside which is not dependent on the children or primary carer being self-sufficient or holding comprehensive sickness insurance. Further the right is not dependent on the child having started in education while the parent was in work. However, it is necessary for the child to have been born at the time that the parent was a worker: see paragraphs 29 and 30 of *Brown v Secretary of State for Scotland* (Case 197/86) [1988] ECR 3205. The issue on this appeal is whether a right to reside arises under article 10 (or the domestic regulations seeking to implement it) where the person who is or has been employed in the Member State is not the parent of the child but his or her grandparent.

8. The tribunal only addressed article 10. It found it was not met. It said that it was unclear whether the primary carer of the child has also to have been the parent of that child for article 10 to be satisfied. The tribunal referred to DWP guidance in Memo DMG 30/10 and its view that "the parent must be or have been a worker". The tribunal's stated that its experience was that "the DWP do not consider grandparents fall within article 10". It concluded that the "law was unclear but in view of the guidance decided that the Appellant had to be a parent and primary carer to

fall within article 10". It gave the appellant permission to appeal to the Upper Tribunal. The tribunals approach and reasoning may be criticised on a number of grounds, not least its failure to consider the domestic regulations, but such criticism will count for nought if its decision was nonetheless still correct (as I consider it was).

9. On the appeal Kirklees Law Centre, which by then had come on the scene to assist the appellant, argued that the tribunal had erred in law in not distinguishing the right to reside in article 10 of Regulation (EU) No 492/2011 from that found in regulation 15A(1) and (4) of the EEA Regs. The Law Centre argued that under the latter route there is a separate right to reside "for the primary carer of a worker's child in education where the child would be unable to continue to be educated in the UK if the primary carer were required to leave the UK". The Law Centre argued that a primary carer has a right to reside as the primary carer of a worker's child in education "if the primary carer was the worker or someone else was the worker". It then dealt with the issue of whether the grandparents (i.e. the appellant and his wife) could count as a 'primary carer' under the EEA Regs. The Law Centre concluded its argument on the basis that as the children had been in education and the appellant and his wife had been their primary carers, and the appellant's wife had worked previously in the UK, regulation 15A of the EEA Regs was satisfied.

10. In giving directions on the appeal, I said this:

> "Kirklees Law Centre.....have helpfully focused attention on the key argument, as I see it, which is that [the appellant] and his wife as grandparents of the two children and as their primary carers have a right to reside as *direct* relatives of their grandchildren under regulation 15A of the Immigration (EEA) Regulations 2006 as amended from 16 July 2012.
>
> As I understand the Law Centre's argument it is that the appellant as grandparent of the children is their primary carer by virtue of regulation 15A(7) as their primary carer and direct relative, and therefore has a right to reside under regulation 15A(1) and (4).

> The tribunal did not address regulation 15A at all. Instead it considered article 10 of EU Regulation No 492/2011 and relied on the DWP's view as set out in guidance to conclude that the appellant would have to be a parent of the school aged child as well as his or her primary carer in order to derive a right to reside from article 10. Guidance is, however, just that, and the tribunal has failed to analyse or explain why the view in the guidance is sound as matter of law. It also failed to address regulation 15A.
>
> On the other hand, it arguably isn't correct, as the Law Centre would seem to be submitting, that regulation 15A of the EEA Regs 2006 governed the situation and EU Regulation 492/2011 is irrelevant.
>
> How then are the two legal instruments to fit together? Is article 10 of 492/2011 and *Baumbast*, *Teixeira* and *Ibrahim* limited to conferring a right of residence on the parent of the child in education? If so, why does regulation 15A apparently cast its scope wider? Is this just an example of UK domestic law being more generous than EU law? And on the face of its wording why doesn't regulation 15A of the EEA Regs confer a derivative right of residence on the appellant as the grandparent of the child in education?"

11. In responding to those directions the Secretary of State submitted that the appellant had a right to reside in the UK by virtue of being a primary carer of a child in education. The Secretary of State accepted that a grandparent could count as a primary carer under the EEA Regs as a "direct relative" of their grandchild as the term "direct relative" should be construed as including direct relatives in the ascending line of the child. That would cover parents, grandparents and great grandparents but would exclude, for example, uncles, aunts and cousins. On this basis the Secretary of State submitted that the appellant was the direct relative of a child in relevant education, was (and had been) the primary carer of that child and was (or his wife was) in work whilst that child was in the UK, and accordingly satisfied article 10 and regulation 15A of the EEA Regs.

12. Unsurprisingly the Law Centre on behalf of the appellant accepted this submission. I, however, was troubled by one aspect of it, and raised that concern in a further set of directions.

13. I was, and am, prepared to decide the appeal on the basis that the appellant and his wife as grandparents of the two children (one of whom who has been of school age and attending primary school in their and the grandparents home town in England since April 2013) are their primary carers because they are the *direct* relatives of their grandchildren under regulation 15A(7) of the EEA Regs for the reasons given by the Secretary of State in paragraph 11 above.

14. The further difficulty I had I described in the further directions as follows:

> "The difficulty I have, however, at least at present, is with the Law Centre's argument, supported now by the Secretary of State, that the grandparents had a derivative right to reside under regulation 15A(1) and (4) of the EEA Regs based on their work in the UK. It seems to me at least arguable that what is important in terms of work or being a 'worker' under regulation 15A is the work of *the parent* of the child, and the grandparents work is, at least to this extent, irrelevant if they are seeking to rely on regulation 15A(4), as I understand them to be doing. This is because on the face of it regulation 15A(4) is not concerned with the 'primary carer' being a 'worker' (i.e. being in work or having been in work). The definition of 'primary carer' in regulation 15A(7) entails that person being a 'direct relative' and, here, having primary responsibility for the person's care. It does not involve anything to do with working. Where, however, being a 'worker' is important is under the link back to sub-paragraph (3) necessitated by regulation 15A(4). But that link back when related to the facts of this case arguably gives rise to the requirement that the grandchildren are *also* the children of a 'worker'. That would seem to be what is required by regulation 15A(3)(b), that is that the 'EEA national parent' was residing in the UK as a worker.
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> If this is correct, however, then (i) the appellant's work as a grandparent is irrelevant, and (ii) the lack of evidence of either parent of the grandchildren having worked in the UK may be fatal to the ESA claim succeeding.
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> It is on this issue, and not whether a grandparent can be a primary carer/direct relative, that further arguments is needed on this case and why I make the directions set out below.
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> If the above analysis is correct then an issue may arise as to whether the First-tier Tribunal adequately investigated the EU 'worker' status of the grandchildren's parents."

15. It was on this basis and on this issue that the appeal came before me for hearing.

16. It is perhaps convenient at this stage to set out the terms of regulation 15A of the EEA Regs.

> "**15A. Derivative right of residence**
> (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
> (2) P satisfies the criteria in this paragraph if–
> (a) P is the primary carer of an EEA national ("the relevant EEA national"); and
> (b) the relevant EEA national–
> (i) is under the age of 18;
> (ii) is residing in the United Kingdom as a self-sufficient person; and
> (iii) would be unable to remain in the United Kingdom if P were required to leave.
> (3) P satisfies the criteria in this paragraph if–
> (a) P is the child of an EEA national ("the EEA national parent");
> (b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and
> (c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.
> (4) P satisfies the criteria in this paragraph if–
> (a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and
> (b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.
> (4A) P satisfies the criteria in this paragraph if–
> (a) P is the primary carer of a British Citizen ("the relevant British citizen");
> (b) the relevant British citizen is residing in the United Kingdom; and
> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.
> (5) P satisfies the criteria in this paragraph if–
> (a) P is under the age of 18;
> (b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);
> (c) P does not have leave to enter, or remain in, the United Kingdom; and (d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.
> (6) For the purpose of this regulation–
> (a) "education" excludes nursery education;
> (b) "worker" does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2); and
> (c) "an exempt person" is a person–
> (i) who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;
> (ii) who has a right of bode in the United Kingdom by virtue of section 2 of the 1971 Act;
> (iii) to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or
> (iv) who has indefinite leave to enter or remain in the United Kingdom._
> (7) P is to be regarded as a "primary carer" of another person if
> (a) P is a direct relative or a legal guardian of that person; and
> (b) P–
> (i) is the person who has primary responsibility for that person's care; or
> (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.
> (7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c)

> shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.
> (7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.
> (8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.
> (9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State has made a decision under–
> (a) regulation 19(3)(b), 20(1) or 20A(1); or
> (b) regulation 21B(2) where that decision was taken in the preceding twelve months."

17. As I have already noted, the Law Centre was unable to assist the appellant with representation at the hearing before me. It did, however, provide a letter with some short written argument. It drew attention to the fact that the grandchildren's mother was born in the USA and was an American national. Her parents (the appellant and his wife) confirmed this at the hearing before me. They could not confirm whether their daughter had been successful in obtaining dual nationality with either Slovakia or the UK. The position on the evidence in respect of the grandchildren's mother is therefore that she is not an EU national. Her parents told me at the hearing that they had no knowledge or evidence of her having worked in the UK. As for the grandchildren's father, it seemed common ground that he was a Slovakian national but there was no evidence of him having worked in the UK. In these circumstances it seems to me clear that the grandchildren's parents did not satisfy the opening words of article 10 – "[the children of a national of a Member State who is or has been employed in the territory of another Member State…" – as neither of them had been employed in the UK.

18. The Law Centre appeared, in fairness, to accept this in its letter. It argued instead that regulation 15A should be interpreted with the "grandchildren's interests in mind" and drew attention to caselaw under the predecessor to article 10 which it argued held that children of an EU citizen were entitled to remain in the UK to continue their education even if the parents had ceased to work in that State. The Law

Centre further argued that "grandchildren" can be "the children of a national of a Member State" under article 10 of Regulation (EU) No 492/2011 in the absence of a formal court order. To do otherwise, it was argued, would be to breach the children's rights under article 8 of the European Convention on Human Rights.

19. Mr Cooper for the Secretary of State had helpfully filed a skeleton argument in advance of the hearing. That argument argued that as there was no evidence that either of the grandchildren's parents had been employed in the UK, neither of the conditions in regulation 15A(3)(a) and (b) was satisfied, though the condition in 15A(3)(c) was met. On this basis, the argument continued, the fact the appellant and his wife were the primary carers of their grandchildren was not sufficient as that of itself did not establish a derivative right to reside under regulation 15A. As for the argument the Law Centre made about interpreting article 10 broadly to cover grandchildren of the Member State national employed in the UK, the Secretary of State argued that the detailed provisions of regulation 15A stood against this argument and those provisions accurately reflected the scope of article 10.

20. I agree with the Secretary of State. It may perhaps be thought of as ironic that an appeal which started from an argument that the tribunal had erred by not considering regulation 15A has now become an argument that article 10 should be interpreted broadly.

21. For the reasons I set out in the directions extracted under paragraph 14 above, I do not consider that regulation 15A of the EEA Regs conferred a right to reside on the appellant at the time of his claim for ESA. In my judgment the critical part of regulation 15A of the EEA Regs on this appeal is paragraphs (3) and (4). These are linked to one another because for paragraph (4) to apply its sub-paragraph (a) has to be satisfied and that requires that, here, the appellant was the primary carer of a person meeting the criteria in paragraph (3). That person here was one or both of the grandchildren, for whom the appellant is

the primary carer. But for the grandchild to satisfy paragraph (3) in regulation 15A she had to satisfy **all** the sub-paragraphs under that paragraph. That meant that she had to be the child of an EEA national (which arguably would seem to be satisfied in respect of the child's Slovakian father) (sub-paragraph (a)); have been in education when her father was in the UK (this on the evidence seems doubtful as there is little or no evidence of the father having been in the UK, but I will ignore this for present purposes) (sub-paragraph (c)); and she must have resided in the UK at a time when the EEA national parent (i.e. her father) was residing in the UK as a worker (sub-paragraph (b).

22. It is on this last sub-paragraph that the appeal must founder under regulation 15A of the EEA Regs as: (i) there is no evidence that the either of the grandchildren's parents had ever worked or been employed in the UK; and (ii) it is not in my judgment possible to construe "the child of an EEA national" or "the EEA national parent" in regulation 15A as extending to the grandparents of the child. I come to this latter view because although regulation 15A elsewhere founds the derivative right of residence in terms of the relationship with child simply on a person being the primary carer of the child, it seems to me that the deliberate effect of regulation 15A(4) when read with regulation 15A(3) is to limit the primary carer's derivative right of residence to situations where they are caring for a child whose parent is or has been in employment in the UK.

23. Moreover, the restriction under regulation 15A(4) when read with regulation 15A(3) in my judgment is consistent with the terms of article 10 of Regulation (EU) No 492/2011, its predecessor (article 12 of Regulation (EC) 1612/68) and the caselaw decided under both. Article 10 uses the wording the "children of a national of a Member State who is or has been employed [in that State]", which on its face does not extend to grandchildren of such nationals. Furthermore, the focus of article 10 and Regulation (EU) No 492/201 more generally is on freedom of movement for "workers" and their families and the need to

ensure that workers can move easily and freely within the EU, which would be inhibited if the worker could not bring their family (i.e. their spouse and children) with them. In this sense, however, the grandparent's family is their children and not their grandchildren. Furthermore, I can identify nothing in cases decided under article 10 or its predecessor that reads "children" as extending to "grandchildren".

24. This conclusion in my view is consistent with the decision of Upper Tribunal Judge Jacobs in *IP –v- SSWP* [2015] 691 UKUT (AAC) where it was held that the primary carer of a child cannot rely for a right to reside on the worker status of a partner who is not the child's biological parent and is not in a legally recognised relationship with the parent.

25. Accordingly, the fact that the appellant or his wife had been employed in the UK and were the primary carers for their grandchildren does not assist them as the relevant derivative right of residence arising under regulation 15A is predicated on the child's parent residing in the UK as a worker.

26. For all of these reasons, this appeal is dismissed and the tribunal's decision of 4 December 2014, upholding the Secretary of State's decision of 3 October 2013, stands as the determinative decision on the appeal.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 5th July 2016