

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No CIS/1383/2016

Before UPPER TRIBUNAL JUDGE WARD

Decision: In formal terms only, the appeal is allowed. The decision of the First-tier Tribunal sitting at Sheffield on 9 February 2016 under reference SC147/15/01761 involved the making of an error on a point of law and is set aside.

However, acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision of the First-tier Tribunal in the following terms:

The claimant's appeal against the DWP's decision of 6 August 2015 that from 27 July 2015 his claim for income support effectively failed because he lacked the right to reside is allowed. He did have such a right, pursuant to regulation 15A of the Immigration (European Economic Area) Regulations 2006 as the primary carer of his daughter M..... .

It will now be for the DWP to reach a decision on the substantive question of entitlement to income support which, if disputed, will carry fresh appeal rights.

REASONS FOR DECISION

1. Both the claimant's representative and the representative of the Secretary of State agree that the First-tier Tribunal erred in law by finding that the claimant, a Slovakian national, had retained worker status as being involuntarily unemployed, when the evidence was that he had stopped working in order to care for his mother-in-law. The tribunal also erred by finding (at any rate without adequate explanation) that the claimant was not the primary carer of his children when the DWP had already conceded that he shared equally responsibility for their care with his wife.

2. Regulation 15A provides:

“(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.

...

(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.

....

- (6) For the purpose of this regulation—

...

- (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 abode 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.

....”

3. The claimant's daughter M.... satisfied the criteria in para (3) and thus, if the claimant could establish he was the “primary carer” for this purpose, he would satisfy para (4). DWP's concession that he shared responsibility for his daughter's care with his wife got him part of the way, but in order to meet the terms of para (7)(b)(ii) he needed to establish that she was not an “exempt person”.

4. The claimant, who has very poor English and was as a result in considerable difficulty in asserting his rights in this case, was fortunate eventually find his way to Sheffield Citizens Advice and Law Centre who, in a cogent submission, demonstrated why the claimant's wife, a Slovakian national with a level of disability now reflected in an award of Personal Independence Payment at the standard rate of the mobility component and the enhanced rate of the mobility component, did not otherwise have a right to reside and in her particular circumstances had little realistic prospect of getting one. As a result she fell outside the definition of “exempt person” in

para 6(c), which in turn meant the claimant qualified as a primary carer under para (7).

5. The above position led the Secretary of State to concede the claimant's right to reside. The Secretary of State originally made an application to withdraw his appeal, which in view of the mistaken basis on which the First-tier Tribunal had found for the claimant I was not minded to accept, proposing instead the way in which this decision has now determined the case. The Secretary of State's representative indicated no objection and there has been no further response on behalf of the claimant.

(signed)

C.G.Ward
Judge of the Upper Tribunal
22 November 2016