



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: IA/38831/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 19 November 2014

On 19 December 2014

Prepared 19 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F S

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms S Vydyadharan, Home Office Presenting Officer

For the Respondent: Ms N Nnamani, Counsel instructed by Howe & Co

DECISION AND REASONS

1. In this determination the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Kosovo, appealed against the Respondent's decision, dated 22 July 2013, to refuse to issue a derivative residence card with reference to Regulation 15A(7)(b)(i) and (4A)(a) and (c) of the Immigration (European Economic Area)

Regulations 2006, (the 2006 Regulations). An appeal against that decision was made on that basis to First-tier Tribunal Judge Boyes, who on 5 August 2014 dismissed the appeal against the refusal of the derivative residence card but allowed the appeal under Article 8 of the ECHR.

3. The Secretary of State sought permission to appeal that decision which was granted by First-tier Tribunal Judge P J M Hollingworth on 14 October 2014.
4. The basis of the Secretary of State's appeal is essentially that the judge did not take the necessary gateway steps to satisfy himself with reference to MF (Nigeria) [2013] EWCA Civ 1192, Nagre [2013] EWHC Civ 720 (Admin) and Gulshan [2013] UKUT 640 that it was appropriate to consider the case outside of the Rules under Article 8. It seemed to me the course contemplated in Huang [2007] UKHL 11, MM (Lebanon) [2014] EWCA Civ 1654 and Ganesabalan [2014] EWHC 2712 (Admin) are also relevant in this challenge.
5. Essentially it was said therefore that the judge had failed to consider whether there were, with the Immigration Rules being a complete code as a starting point, with compelling circumstances not recognised by the Rules and that an appeal should only be allowed where there were exceptional circumstances: Obviously intrinsic to that was that there was a reasonable prospect of such an argument succeeding.
6. It is clear that what the judge did. Having concluded that the appeal failed under 2006 EEA Regulations, it was stated as follows:

“26. Having considered whether the requirements of the Immigration Rules relating to family life are met, I am required to go on to consider the case separately under Article 8 the ECHR arise. This approach was approved by the Upper Tribunal in the case of Sanade [2012] UKUT 48.”
7. What was being argued by the judge was that because the Appellant could return it would be wrong for the Sponsor and their two children, British citizens, although one a baby, to force them to follow, thus depriving the children of their treaty rights to reside in the European Union, let alone the UK.
8. The Secretary of State does not assert under which Rule or part of Appendix FM or with reference to paragraph 276ADE the Claimant could have succeeded. That at least is consistent with the Claimant's case that the Claimant was the primary carer of the children, the father works long and unsocial hours as a cleaning supervisor on the underground, the company is responsible for

cleaning the underground trains, the Sponsor works at night and sleeps during the day and leaves home at 8pm and returns the following day at 8am in the morning and is unable to care for the children and that the Claimant is still breastfeeding the youngest child. The latest daughter E was born on 1 March 2014 and the elder child V was born on 29 June 2011.

9. It was not apparent to me what basis there was, if looking at this within the Immigration Rules, to enable her to stay. Ms Vydyadharan did not suggest there were. I do not find the Immigration Rules as a complete code in immigration decision.
10. It seemed to me that it was an error by the judge in not setting out the relevant considerations: On the case argued there were none.
11. Plainly the circumstances even contemplated by the judge were somewhat difficult in that it was contemplated through the breastfeeding E could remain on the basis of being bottle-fed formula milk and cared for by the Sponsor. This course was in the context of him giving up employment, hoping to find some suitable employment which would fit in around childcare as well as being probably needing to go on to social security benefits. The analysis of those options really was very superficial but it is not the subject of an appeal or cross-challenge on those findings. I conclude that there is no threshold to considering Article 8 outside the Rules. Plainly circumstances, the strength of the case, the degree of compelling/compassionate circumstances, the scope of the Rules, the public interest are all material to proportionality.
12. In the circumstances it seemed to me that the judge's analysis of the Article 8 considerations was not criticised in the grounds to assert that any different considerations should have arisen.
13. As a result, whilst there may be no insurmountable obstacles to relocating as a family to Kosovo the question is whether in the circumstances it is reasonable to do so when on the face of it there was no accommodation, funding, work, arrangements to enable the best interests of the children as British nationals to be protected.
14. Plainly the best interests of the children remain in being with their family than rather simply present in the United Kingdom. In the circumstances I conclude that the judge's errors would not have made a material difference to the outcome of the appeal. Therefore the appeal by the Secretary of State fails.
15. The original Tribunal's decision stands.

NOTICE OF DECISION

The appeal is dismissed.

An anonymity direction is made because of the presence of the child.

DIRECTION REGARDING ANONYMITY - RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Respondent and to the Appellant. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2014

Date **18 December**

Deputy Upper Tribunal Judge Davey