Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number IA/24441/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2014	**On 18 June 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Karina Noemi Melgar
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: In person (with help of Ms L. Silva).
For the Respondent: Ms J Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Morrison promulgated on 18 August 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 22 May 2014 to refuse to issue her with a 'derivative residence card' pursuant to regulation 15A of the Immigration (European Economic Area) Regulations 2006.

2. The Appellant's appeal before the First-tier Tribunal had been dealt with 'on the papers'. However, the Appellant appeared before me, and was accompanied by Ms Lydia Silva. Ms Silva was a friend of the Appellant who worked for an organisation called GYROS that had assisted in the presentation of the Appellant's application to the Respondent (e.g. see

Annex B of the Respondent's bundle before the First-tier Tribunal). She told me that she had obtained OISC level I. She did not attend formally to represent the Appellant in the appeal but to offer help and support. Ms Isherwood raised no objection to Ms Silva participating in the hearing in such a way, and accordingly I invited observations and comments during the course of the hearing from both the Appellant and Ms Silva. (I note that there is also a written submission prepared for consideration by the Upper Tribunal, which is a matter of record on file, and to which I have had regard.)

Background

3. The Appellant is a national of Argentina born on 21 November 1969. Her full immigration and personal histories are not set out with any clarity in the documents on file. Be that as it may, it is common ground that the Appellant first entered the UK as a visitor on 4 August 2005. Thereafter, she applied for a residence card on 1 August 2006 which was issued on 9 November 2006. An application for permanent residence made on 10 October 2011 was rejected on 20 October 2011. On 5 November 2012 she again applied for permanent residence, which was refused on 23 May 2013. A subsequent appeal (ref IA/22073/2013) was dismissed by a determination promulgated on 16 December 2013.

4. In the meantime the Appellant made a further application, on 3 October 2013. The earlier application appears to have been based on her relationship with her partner; the instant application, however, was for a derivative residence card as the primary carer of the child of an EEA national. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 22 May 2014 with particular reference to regulation 15A(4) of the Immigration (European Economic Area) Regulations 2006, and a Notice of Immigration Decision was issued on the same date..

5. The Appellant appealed to the IAC.

6. The First-tier Tribunal Judge dismissed the Appellant's appeal after consideration 'on the papers' for reasons set out in his determination.

7. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge Hollingworth on 3 October 2014.

Consideration

8. The Appellant's application for a derivative residence card was based on her relationship with her two children (whose names and dates of birth are a matter of record on file). The Appellant lives with her children and their father, Mr Marcello Alejandro Campos Da Silva, a Portuguese national.

9. The Respondent refused the application on the basis that she was not satisfied that the Appellant was the primary carer of her children (regulation 15A(4)(a), with reference to regulation 15A(7)).

10. The Appellant's Grounds of Appeal to the First-tier Tribunal in the Notice of Appeal are generalised and do not contain anything by way of particularisation of the facts and circumstances of her own case. I pause to note that the Grounds do not plead Article 8 of the ECHR; however, as identified by the First-tier Tribunal Judge at paragraph 10 of his decision, subsequent representations by the Appellant made assertions in respect of Article 8.

11. The First-tier Tribunal Judge refused the appeal under the EEA Regulations essentially on the basis that the Appellant had not addressed the issue of 'primary carer', commenting that the Appellant had seemingly "*failed to understand the nature of the refusal*" (paragraph 11). In respect of Article 8 the Judge identified that it was necessary to deal with the issue (paragraph 12), but then did not do so on the basis that no removal directions had been issued (paragraph 13), and that it was not disproportionate to expect the Appellant to make a relevant 'human rights' application as suggested in the RFRL (paragraph 14).

12. The Appellant's Grounds in support of the application for permission to appeal do not expressly identify any error of law. Rather they constitute a number of factual assertions as to the Appellant's history and circumstances in the UK, and refer to reasons why the children could not go to Argentina, assert that her husband "*will not return to Argentina*" with her, and that the family have established ties to the UK. The Grounds conclude with a request that the Appellant's Article 8 rights be respected.

13. In granting permission to appeal Judge Hollingworth does not engage at all with these grounds or otherwise with the Article 8 issue. Instead he identifies Judge Morrison's observation at paragraph 11 of the determination that the Appellant had seemingly failed to understand the nature of the refusal, and then opines that this gives rise to an arguable error of law with reference to "*the principle of equality of arms*".

14. I am not remotely persuaded that the Judge's reference at paragraph 11 gives rise to an error of law. Nor am I persuaded that there is any issue of an 'inequality of arms'. The question of fairness in this context is really one of opportunity. It cannot be said - and indeed is not asserted by her - that the Appellant has not had the opportunity of seeking advice and representation in her appeal before the First-tier Tribunal. Indeed the Appellant had access to an organisation that offers immigration advice and carries an OISC logo on its letterhead in the presentation of her application, and there is nothing to suggest that there was any barrier to seeking and obtaining continuing advice and assistance in the context of the appeal. I am entirely satisfied that the Appellant has had the same opportunity as any other Appellant to participate in the appeal process: she has had a free election as to whether to have her case decided 'on the papers' or at a hearing at which she could attend to give evidence and address any relevant issues, and she had in any event been given the opportunity to file and serve any materials upon which she might wish to rely before the First-tier Tribunal.

15. Whilst not determinative, I note that the written submission to the Upper Tribunal dated 6 November 2014 made on the Appellant's behalf does not make any reference to, or otherwise seek to develop the argument in respect of 'inequality of arms', or otherwise raise any issue in respect of procedural fairness.

16. Nonetheless, notwithstanding the absence of any properly formulated grounds identifying an error of law, and my rejection of the formulation of an error of law in the decision granting permission to appeal, Ms Isherwood was content for there to be a 'general airing' and discussion of the Appellant's case against the background of the Regulations.

17. At the conclusion of the hearing I indicated that I would be determining the appeal on the basis of there being no error of law under the EEA Regulations, and no material error in respect of Article 8.

18. However, in the writing of the decision herein I have come to a different view under the Regulations.

19. The key passage in the RFRL is as follows:

> "The evidence you have submitted fails to show that you are the primary carer of your children.
>
> The children's father…. is also resident in the United Kingdom and resides with you and the children.
>
> The payslips and Jobcentreplus letter submitted confirm that your children's father, an EEA national… has been continuously resident in the United Kingdom since at least May 2005.
>
> Therefore you cannot satisfy the criteria that your children resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker and the EEA national parent no longer resides in the United Kingdom.
>
> This is because the children's father has not left the United Kingdom and has been continuously resident here since at least May 2005."

20. The First-tier Tribunal Judge does not expressly engage with this reasoning, or otherwise seek to apply the Regulations to the facts of the Appellant's case, but simply relies upon the Appellant's failure expressly to address the 'primary carer' issue in the appeal.

21. Regulation 15(4) is in the following terms:

> "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."

22. It is to be noted that the Respondent's decision does not raise any issue as to the children meeting the criteria of regulation 15A(3).

23. In respect of 'primary carer', regulations 15A(7) and (7A) provide:

> "(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."

24. An 'exempt person' is defined for the purposes of regulation 15A in subparagraph (6)(c)(i)-(iv). None of (6)(c)(ii)-(iv) is of potential application to the Appellant's husband. Subparagraph (6)(c)(i) specifies a person "*who has a right to reside in the United Kingdom as a result of any other provision of these Regulations*".

25. There is no issue in respect of 15A(7)(a) – the Appellant is clearly a direct relative of her children. The Appellant shares responsibility for her children with her husband. The question arises, therefore, as to whether Mr Da Silva is or is not an 'exempt person'.

26. In this context regulation 6(4) *et seq* is germane in respect of the way in which a 'jobseeker' may or may not be defined as a 'qualified person'. It may reasonably be presumed that Judge Morrison had this in mind in stating "*I assume that the respondent did not consider the application on the basis of the appellant's spouse as if he had been a Job Seeker since 2005 is not a person who has been exercising Treaty Rights in the UK*" (paragraph 7). Indeed this is the basis upon which the earlier appeal (IA/22073/2013) was dismissed: see decision of First-tier Tribunal Judge Camp at paragraphs 10–12, concluding "*that the sponsor [i.e. the Appellant's husband] has not shown that he is a qualified person*". (I pause to note that in the course of the hearing the Appellant confirmed that whilst he had worked initially following the family's arrival in the UK from May 2005 until November 2005 feeding chickens, her husband had not had a job for the last 9 years whilst in the UK.)

27. As such, and bearing in mind regulations 13 and 14(1) – "*a qualified person is entitled to reside in the United Kingdom for so long as he*

remains a qualified person" – it is readily apparent that the Appellant's husband did not have a right to reside as a result of any other provisions in the Regulations, and accordingly was not an exempt person.

28. Regulation 15A(7)(b)(ii) therefore applied, and accordingly regulation 15A(4)(b) fell to be considered on the basis that both the Appellant and her husband would be required to leave the United Kingdom. If that were the case, necessarily neither of the children would be able to continue in their education in the UK. In such circumstances the Appellant meets the definition of a 'primary carer'.

29. The Respondent's reference in the RFRL to the Appellant's husband being continuously resident in the UK would only be material if he were resident pursuant to a right to reside under the Regulations as a qualified person – a matter that is not only not borne out in the evidence, but had previously been expressly rejected both by the Respondent and by the IAC in earlier proceedings, and moreover was expressly rejected by Judge Morrison at paragraph 11 of his decision.

30. Given that no issue was taken in respect of regulation 15A(3), and that the only issue raised was in respect of the Appellant being a primary carer of her children, her appeal properly fell to be allowed under the Regulations for the reasons set out above.

31. Notwithstanding that the Appellant's case was not properly or adequately articulated before the First Tier Tribunal, I am satisfied that it was an error of law in effect to endorse the decision of the Respondent merely by reason of the Appellant's failure expressly to address the key issue in her Grounds and representations, without subjecting the Respondent's decision to the independent scrutiny of the Tribunal.

32. In all the circumstances I set aside the decision of the First-tier Tribunal and remake the decision in the appeal by allowing it under the EEA Regulations for the reasons set out above. The Appellant was entitled to a derivative residence card pursuant to regulation 18A of the Immigration (European Economic Area) Regulations 2006 by reason of meeting the requirements of regulation 15A(4).

33. In so far as I gave a different indication at the hearing, this was primarily because I misread regulation 15A(3)(b) as stipulating a requirement that the relevant EEA national parent have continued to be a worker. However, it now seems to me clear that all that is necessary is that the relevant child have resided in the UK at *any time* when the EEA national parent was residing as a worker.

34. I have given consideration to whether or not in light of my *volte face* it would be appropriate to reconvene the hearing to invite further submissions. I have decided that that is not necessary. Once regulation 15A(3)(b) is properly understood, given the historical acceptance of the fact that the Appellant's husband *has been* a worker (and had produced

payslips - which was acknowledged by the Respondent in the RFRL herein), and given that he is not a 'qualified person' with his own right to reside under the Regulations, the conclusion that the Appellant meets the definition of a primary carer is unavoidable, and the outcome of the appeal is inevitable - and therefore not amenable to alteration by further submissions.

35. In the circumstances it is not necessary for me to consider any further the Article 8 issue.

Notice of Decision

36. The decision of the First-tier Tribunal contained a material error of law and is set aside.

37. I remake the decision in the appeal. The appeal is allowed under the EEA Regulations.

38. No anonymity order is sought or made.

Deputy Judge of the Upper Tribunal I. A. Lewis 15 June 2015