



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

Appeal Number: IA/01059/2014

THE IMMIGRATION ACTS

**Heard at Phoenix House, Bradford
On 13th August 2014**

**Determination Promulgated
On 15th Aug 2014**

Before

**UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE COKER**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ABIE PATRICIA NICOL

Respondent

Representation:

For the Appellant: Mr M Diwyncz Senior Home Office Presenting Officer
For the Respondent: Mr J Nicholson, instructed by Levi Solicitors

DETERMINATION AND REASONS

1. The Secretary of State seeks to appeal a decision of the First-tier Tribunal allowing the appeal of the claimant against a decision of the SSHD refusing her a derivative residence card for reasons set out in a letter dated 16th December 2013.

Background

2. The claimant made an application for a derivative residence card on 13th December 2013 on the grounds that she was a third country national (a Gambian citizen) upon whom a British citizen was dependent. The SSHD in her reasons for refusal held
 - The claimant did not come under the definition of ‘family member’ as set out in Article 2 of the Directive 2004/38/EC and was thus not entitled to a Residence Card in accordance with regulation 18A Immigration (European Economic Area) Regulations 2006.
 - The claimant has not provided adequate proof that the British Citizen child lives with her, that she makes decisions in relation to the child or provided reasons why the child’s father could not assume responsibility for the child;
 - The claimant did not meet the requirements of the Immigration Rules/Article 8 for leave to remain as primary carer of the child.
3. The First-tier Tribunal judge dismissed the appeal under the EEA Regulations, apparently with the consent of Counsel although we were informed this was not in fact the case but, apparently on the basis that the decision of the SSHD was not in accordance with the law, allowed the appeal to the extent that it was remitted back to the SSHD for a decision to be taken on the claimant’s application to remain in the UK as the primary carer of the child.
4. The SSHD sought and was granted permission to appeal on the following ground:

“the Immigration Judge has found that the Immigration (European Economic Area) Regulations 2006 (the “Regulations”) do not apply since the “EEA” citizen is a United Kingdom Citizen. As such the Immigration Judge remits the matter for the Secretary of State to make a decision on the Appellant’s application to remain in the United Kingdom as the primary carer of a UK minor citizen:
It is respectfully submitted that this finding amounts to a material misdirection of law”

5. Regulation 18A of the regulations (in so far as relevant to this claimant) states

18A.— Issue of a derivative residence card

(1) The Secretary of State must issue a person with a derivative residence card on application and on production of—

(a) a valid identity card issued by an EEA State or a valid passport; and

(b) proof that the applicant has a derivative right of residence under [regulation 15A](#).

6. Regulation 15A states, in so far as is relevant to this claimant:

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.

.....

(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.

.....

(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.

.....

(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.

7. The respondent acknowledges in the letter dated 16th December 2013

- the child is a British citizen
- the claimant is a non EU citizen
- the child lives with the claimant and she makes the decisions for her
- the child's father has infrequent parental contact with the child;
- the child's father lives with his wife and she does not know of the existence of the child;
- there is no or little evidence of who financially supports the child.

8. The test as relevant in this appeal is whether the claimant HAS primary responsibility for the child's care OR shares equally the responsibility with one other person who is not exempt.

9. Before us both parties accepted that the judge was wrong to find that regulation 15A did not apply and therefore erred in law in dismissing the appeal. With the consent of both parties we set aside the decision which is therefore at large before us to be remade.

Remaking the decision

10. The child was born on 27th July 2007. Her father is a British Citizen who lives with his wife (not the claimant) who does not know of the existence of this child. Mr Diwinycz accepted before us that on any sensible view in the light of the evidence produced, the claimant is the primary carer. He also accepted that the reasons for refusal letter imports an incorrect test namely that a failure or unwillingness of a parent or carer who might otherwise be thought capable of being a primary carer to assume care and responsibility is insufficient to assert that another direct relative is the primary carer.

11. It was also common ground between the parties and agreed between the parties that the claimant meets all of the requirements of regulation 15A(4A) and 15A (7) so that under 15A (1) she is a person to whom a derivative right to reside in the UK should be granted.

12. The consequence is that given all the circumstances, particularly the age of the child, the claimant satisfies all of the requirements of the applicable regulations and is therefore entitled to reside in the UK.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision and substitute a decision allowing the appeal against the decision of the Secretary of State to refuse a derivative right of residence card.

Date 14th August 2014

Upper Tribunal Judge Coker