



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39794/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21st August 2014
Prepared: 21st August 2014

Determination Promulgated
On 28th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS AGATHE EDUKU AMMAH TEBA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L. Appiah of Counsel
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

The Proceedings

1. The Appellant is a citizen of Ivory Coast born on 3rd February 1983. She appealed against the decision of the Respondent dated 10th September 2013 to refuse her application for a derivative residence card as the primary carer of a British citizen resident in the United Kingdom pursuant to Regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Her appeal was allowed at first instance by Judge of the First-tier Tribunal Lester sitting at

Taylor House on 13th May 2014. The matter comes before me as an appeal by the Respondent against that decision but for the sake of convenience I will continue to refer to the parties as they were known at first instance.

2. The Appellant has been in the United Kingdom with leave since 2002. She married a French national exercising treaty rights in the United Kingdom Mr Ademola Adetoye on 29th March 2010. He had been granted permanent residence the year before. As a result of that marriage the Appellant was issued with a residence card on 28th September 2010 valid until 28th September 2015. The Appellant's daughter A was born on 23rd July 2010. By that stage the Appellant and her husband had separated and the Appellant has not seen him or had any contact with him since 2010. A is a British citizen and was issued with a passport on 28th March 2012. A has had and continues to have serious medical problems having been diagnosed at an early age with an autoimmune condition which has necessitated repeated hospital admissions, invasive treatment and medication with strong drugs. She remains under the care of Great Ormond Street Hospital where she has regular appointments.
3. On 31st August 2012 the Appellant applied for a derivative residence card as the primary carer of A a British citizen. The burden of proof of establishing that the requirements of the 2006 Regulations were met rested upon the Appellant and the standard of proof was the usual civil standard of balance of probabilities. In arriving at its conclusions the Tribunal was obliged to take into account facts and matters at the date of hearing. Under Regulation 15A the Appellant had to demonstrate she was the primary carer of a British citizen who was residing in the UK and who would be unable to reside in the UK or in another EEA State if her primary carer were required to leave the United Kingdom. "Primary carer" was defined as a direct relative or legal guardian and the person who has primary responsibility for that person's care.
4. The Judge found on the evidence that it was inconceivable that the Appellant could leave A in the United Kingdom while she returned to the Ivory Coast. The whole purpose of obtaining a British passport for A was so that the Appellant and A could travel together to the Ivory Coast to be with the Appellant's mother who was sick. There was some uncertainty as to whether adequate medical care for A would be available in the Ivory Coast and even if it were whether it would be affordable. The Appellant was the only one who had provided for A. To separate A from the Appellant at this stage of A's life would cause very serious consequences for A's physical and psychological health. The Judge allowed the appeal.
5. The Respondent appealed against that decision taking an issue which had not been raised at first instance. The Appellant was an exempt person under the 2006 Regulations because she had been issued with a residence card which excluded her from entitlement to a derivative right to reside in the United Kingdom (Regulation 15A(1)). An exempt person is defined by Regulation 15A(6)(c) as a person who has a right to reside in the United Kingdom as a result of any other provisions of the 2006 Regulations. The Appellant had a right to reside in the United Kingdom as a result of the Residence Card issued to her pursuant to Regulation 17 of the 2006 Regulations. She was still entitled to the residence card that she had notwithstanding that she and her husband had separated pursuant to the case of **Amos [2011] EWCA.**

Separation short of divorce did not affect the right of the non-EEA national spouse under Article 16 of the Directive (which was implemented by the 2006 Regulations) to hold a Residence Card if both the EEA national and his or her non-national spouse continue to reside in the same Member State. There was no need for the Judge to consider the substantive application under Regulation 15A(4a) and the appeal should have been dismissed for that reason.

6. The application for permission to appeal came before Designated Judge McClure on the papers on 24th June 2014. In granting permission to appeal he noted that the Appellant was separated from her husband but not divorced and it was not suggested that the existing residence card was going to be withdrawn. The grounds were arguable.
7. There was no Rule 24 response filed on behalf of the Appellant to the grant of permission to appeal and the matter came before me to decide whether there was an error of law in the determination. The point at issue was a narrow one, if the Appellant was an exempt person there was no valid appeal before the First-tier Tribunal. If she was not an exempt person then the decision of the First-tier Tribunal would stand as there was no dispute that but for her status as an exempt person the Appellant would otherwise have been entitled to a derived right of residence as a carer. The Appellant's departure from the United Kingdom would leave the Appellant without anyone to care for her.
8. In submissions the Presenting Officer indicated he was content to rely on the grounds of appeal. When her existing residence card expires next year the Appellant could apply for permanent right of residence. For the Appellant Counsel argued that the case of Amos could be distinguished from the instant case because the Appellant did not know where her husband was and could not therefore say that her husband was residing in the United Kingdom. That the Appellant was an exempt person was not a point made at first instance. The Appellant was concerned that were she to leave the United Kingdom and then seek to return she might face difficulties upon production of her residence card if she was asked as to the whereabouts of her husband. She would not know the answer to that question.
9. In the refusal letter the Respondent had impliedly suggested the Appellant could apply on the basis of a derived residence card stating:

“If you consider that you have a right to reside in the United Kingdom as a matter of European law and are in a position to submit the necessary information to support your application for a derivative residence card as recognition of that right, you may wish to submit a further application for consideration”.

The reasons for refusal letter had not taken issue with whether the Appellant was an exempt person but argued instead that there was no evidence as to why A's father was not in a position to care for A. That issue was no longer relevant because of the decision of the First-tier Tribunal.

Findings

10. If the Appellant has an existing right to reside in the United Kingdom under the 2006 Regulations she is an exempt person and cannot apply for another form of residence card in this case a derived right of residence card. That is not in dispute in this case. What appears to be in dispute is the issue of whether the Appellant continues to be entitled to a residence card as she is separated from her husband and does not know where he is. Somewhat unusually it is the Appellant who is making the argument that she is not entitled to a residence card or perhaps more accurately that she would not be entitled to a renewal of her residence card when her existing residence card expires next year. Even if that were correct and for the reasons which I set out below I do not accept that argument, it still would not affect the basic position that the Appellant has a residence card and there are no plans by the Respondent to seek to withdraw it.
11. Quite the contrary the Respondent's position is that the card remains valid and thus the Appellant is an exempt person. She was not entitled to apply for another form of residence card notwithstanding that the factual matrix in this case shows that had it not been for the fact that she was an exempt person she would otherwise have been entitled to a derived right of residence. The short answer to this appeal is that there was no valid appeal before the First-tier Tribunal because the Appellant could not apply for a derived right of residence card because she was an exempt person. She was prohibited by Regulation 15A which I have cited above from applying for a derived right of residence card.
12. The Appellant's concern is that her status as a holder of a residence card may be called into question either when she seeks to re-enter the United Kingdom from a trip abroad or when she seeks to renew her residence card next year given that her marriage to her husband has broken down and she does not know where he is
13. In relation to the first point whilst I understand her concern, it does imply that immigration officials would not properly respect the residence card to which she is entitled. That does not seem to me to be an issue which I can consider as there is no evidence that officials of the UK Border Agency would fail to respect the issue of the residence card.
14. The Respondent has given an assurance that the residence card will not be withdrawn and there appears to be no reason why it should be. Whilst it is correct that the Appellant does not know where her husband is, they remain legally married notwithstanding that they are not living together. Separation short of divorce was held by the European Court of Justice in the well-known case of **Diatta [1985] ECR 567** not to affect the right of the non-national spouse under Article 16 of the Citizens' Directive if both the EEA national and the non-national spouse continue to reside in the same Member State. Even if the Appellant does not know where her husband is, it would still be for the Respondent to show that he was not residing in the United Kingdom. The Appellant and her husband last resided together in the United Kingdom and there is no evidence that he has left the United Kingdom. The case of **Amos** still applies to the facts of the present case. The Appellant is thus still entitled

to her residence card and there seems no reason why next year when that card expires she will not be entitled to a permanent right of residence.

- 15. In this connection it is useful to note the Upper Tribunal decision in the case of **Bee [2013] UKUT 83** which held that a non-EU citizen who is residing in the United Kingdom by reason of a derived right of residence for example as the primary carer of an EU citizen child cannot thereby acquire a permanent right of residence in the United Kingdom. The derived right of residence card which the Appellant was seeking might have put her in a worse position (when it eventually expired) than the present residence card to which she is entitled (which she can use to acquire permanent residence in the future).
- 16. I appreciate that the Respondent did not raise the issue of the Appellant’s exempt status at first instance. That does not invalidate the Respondent’s appeal against the decision of the First-tier since the question of the Appellant’s exempt status went to the question of the jurisdiction of the Tribunal to hear the appeal at all. There was no waiver by the Respondent that jurisdiction was not in issue the matter simply was not raised. Even if it were consent does not found jurisdiction. There was never a valid appeal before the First-tier Tribunal. The Appellant cannot succeed under the Rules and no submissions were made to me in relation to Article 8.
- 17. There remains the issue of the fee award. The Judge in allowing the appeal made a fee award against the Respondent in the sum of £140 which was the fee payable. Although I have overturned the Judge’s decision and allowed the Respondent’s appeal, I bear in mind that the issue of the Appellant’s exempt status was not raised at first instance when it could and should have been. I am not therefore minded in the particular circumstances of this case to reverse the fee award made by Judge Lester at first instance. That fee award will therefore stand.

Decision

I make no anonymity order as there is no public policy reason for so doing.

The fee award of the First-tier Tribunal will stand.

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by dismissing the Appellant’s appeal against the Respondent’s decision to refuse to issue a derived right of residence card.

The Respondent’s decision against the decision of the First-tier Tribunal allowed.

The Appellant’s appeal against the Respondent’s decision dismissed.

Signed this 27th day of August 2014

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Deputy Upper Tribunal Judge Woodcraft