



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/11517/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 February 2015

Determination Promulgated  
On 3 February 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Alain Moke

[No anonymity direction made]

Claimant

**Representation:**

For the claimant:

In person

For the appellant:

Mr P Nath, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Clarke promulgated 24.10.14, allowing the claimant's appeal against the decision of the Secretary of State to refuse his application for an EEA residence card based on a derivative right to reside in the UK as the primary carer of a British citizen child. The Judge heard the appeal on 6.10.14.
2. First-tier Tribunal Judge Cruthers granted permission to appeal on 9.12.14.

3. Thus the matter came before me on 3.2.15 as an appeal in the Upper Tribunal.

### **Error of Law**

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Clarke should be set aside.
5. Judge Clarke found at §21 that on the basis of the oral evidence, finding the claimant and his fiancé credible, that if the claimant were to be removed from the UK the British citizen child would leave with him.
6. The grounds of application for permission to appeal submit that the judge did not deal correctly with the requirements for a residence card set out in 15A and 18A of the Immigration (EEA) Regulations 2006, as amended. It is argued that the judge has misapplied the definition of 'primary carer' for the purpose of the regulations. It is also submitted that the judge should not have found that the child would be unable to remain living in this country if the claimant were required to leave.
7. It is clear that the judge has erred in law. The claimant's case at the time of the First-tier Tribunal hearing was that he and his fiancé were not living together but that they shared responsibility for caring for their young child. It is obvious that the claimant could not be the person who has primary responsibility for the child's care as the child lived with the mother and the claimant did not and was in any event out at work for about 9 hours each day, during which time the child was looked after by his mother, a French national with a permanent right to reside, settled status, in the UK. The definition of primary carer under regulation 15A(7) excludes a person sharing equally the caring responsibility with one other person if that person is an exempt person. It is clear, as Judge Clarke found at §5 of the decision that the mother is an exempt person. That was fatal to the application, but rather oddly the judge decided to ignore that failure and went on to consider the second hurdle, requiring the claimant to demonstrate that if he were required to leave the child would be unable to reside in the UK or another EEA State. Even if that second hurdle could be overcome, the claimant was not and could not be the primary carer and thus his application for a derivative residence card was doomed to failure.
8. In error Judge Clarke applied a different test to this second hurdle, concluding that if the claimant were removed the child would leave with him. At §12 the judge recorded the mother's evidence that if the claimant had to leave it would be difficult for her to look after the child and she would rather that the child left with him. Setting aside any incredulity one might have as to the veracity of this statement, it does not follow that the child would be forced to leave the UK. Even if it was her preference that he do so, is not the same thing as saying that the child would be unable to remain in the UK or another EEA state. One also has to remember that the child is a British citizen and cannot in law be required to leave the UK, but also that the mother is a citizen of France, which is an EEA state. Thus if the mother left the UK for France with her child, he would still be able to reside in an EEA state. It is

evident that Judge Clarke applied the wrong legal test, but as stated above, once it is clear that the claimant cannot be the primary carer for the purpose of the regulation, the appeal could not succeed.

9. It follows that the claimant's application was doomed to failure on the facts of this case. He neither met the primary carer definition nor was it shown on any evidence before the First-tier Tribunal that the child would be forced to leave the UK if the claimant were required to leave.
10. Judge Clarke did not go on to consider article 8 and human rights. Whilst article 8 was asserted in the letter of application and grounds of appeal to the First-tier Tribunal, there was no removal decision in this case. The decision to refuse to grant the requested residence card does not change the status quo prevailing immediately before the application. As the refusal decision explained, the claimant had previously made a human rights claim to remain which was refused in 2013 with no right of appeal. It also explained that there had been no consideration of any private and family life claim and that if he wished to make such an application for leave to remain on those grounds he should make a separate, chargeable, application on the correct form.
11. It is a matter of some current legal debate as to whether the Tribunal is required to consider a human rights claim at the same time as an EEA application. In AXA General Insurance Limited and others v The Lord Advocate [2011] UKSC 46, at §11 Lord Reed stated that, "where a person is not at risk of violation of Convention right unless and until a particular decision is taken, for example as to deportation, the person cannot claim to be a victim unless and until such a decision is in fact made." Removal is not imminent in this case and if and when a removal decision is made the appellant has an effective remedy. The decision under appeal does not engage any rights under the European Convention.
12. Further, as there was no section 120 notice in this case, in line with the cases of Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260 and Jaff (s.120 notice; statement of "additional grounds") [2012] UKUT 00396(IAC), in the absence of a section 120 notice, there is no jurisdiction for the Tribunal to consider any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against. An appellant on whom no section 120 notice has been served may not raise before the Tribunal any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against.
13. It follows that there was no basis for the Tribunal to consider article 8.
14. It follows that the decision of the First-tier Tribunal cannot stand and must be set aside and remade. However, it is clear that the appeal cannot succeed on any basis.

**Conclusion & Decision:**

15. For the reasons set out herein, the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed:

Date: 3 February 2015

Deputy Upper Tribunal Judge Pickup

**Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

**Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed:

Date: 3 February 2015

Deputy Upper Tribunal Judge Pickup