



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

Appeal Number: IA/23407/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25th August 2015**

**Determination Promulgated
On 9th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**SANYA HURLOCK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Z Nasim; Counsel instructed by Chris Raja Solicitors
For the Respondent: Mr. D Clarke; Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to the First-tier Tribunal under Regulation 26 of the Immigration (EEA) Regulations 2006 against the decision of the Secretary of State of 13th May 2014 to refuse to issue a Derivative Residence Card as confirmation of a right of residence under European Community law, as the primary carer of a British Citizen residing in the UK. First-tier Tribunal Judge Sanderson dismissed the appellant's appeal and she now appeals, with permission, to this Tribunal.
2. The appellant advances three grounds of appeal;

- i) The First-tier Tribunal Judge has erred in law as he failed to make any findings in relation to whether the appellant's child would accompany the appellant if she is required to leave the UK, and sending the matter for reconsideration to the respondent;
- ii) The First-tier Tribunal Judge was provided with sufficient evidence as specified to show that if the appellant were required to leave the UK, her child would also be required to leave the UK;
- iii) The Judge has failed to consider the evidence before him, in particular that the appellant is the person caring for her child primarily and therefore if she were to return to Jamaica, so will her child.

3. Permission to appeal was granted by First-tier Tribunal Judge Ransley on 18th May 2015. In doing so he stated;

"The ground has little merit. The judge found [at 62] that the appellant has provided no direct or other evidence to show her child would be unable to reside in the UK or another EEA State if she were required to leave the UK. [3]

However, the Judge's decision to allow the appeal to the extent that the decision of the respondent was not in accordance with the law on the basis that the respondent had not considered the appellants Article 8 rights involves an arguable error of law for the following reasons. First, the respondent has not made any removal direction after refusing the appellants application for a derivative residence right card under the EEA regulations. Secondly, as the appellant has raised ECHR Article 8 in the grounds of appeal [para 13] it was incumbent upon the judge to deal with Article 8 appeal in her decision instead of remitting the case to the respondent for the purposes of considering article 8.

4. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Sanderson involved the making of a material error of law, and if so, to remake the decision.

Background

5. The appellant is a Jamaican national who entered the UK accompanied by her father on 28th June 1997. After failing to secure indefinite leave to remain in the UK as a dependent child, on 8th March 2011, she made an Article 8 application. On 8th April 2011, the appellant was granted discretionary leave to remain in the UK until 8th April 2014. On 3rd April 2014 the appellant applied for a derivative residence card. At the time of the application she was the mother of Amaani Anuoluwapo Bolashodun, a child that is a British citizen by birth, by virtue of her father's status as a British citizen.
6. As at the date of the appellant's application and the respondent's decision, the requirements to be met by the appellant under regulation 15A of the Immigration (European Economic Area) Regulations 2006 were as follows.

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.

(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.

(7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.

(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 material paragraphs of the respondents’ decision of 13th of May 2014 are as follows:

“You have failed to submit any proof of care in the form of original official documents from the NHS, schools, dental surgery, local authority etc nor have you provided any proof of income and expenditure regarding the child.

The letter from London Metropolitan University dated 21 November 2013 states that you will be returning to your degree course in 2014/2015. This casts doubt on the amount of time that you will have free to care for your sponsor and the level of care that you will be able to provide.

You have also failed to provide any/sufficient evidence that your British citizen child sponsor is resident in the United Kingdom. This is a requirement under Regulation 15A (4A) (b).

The letter from your Representative dated 03 April 2014 states that the child's father is only 22 years old and continues to reside with his own mother and is indeed a dependent of his parents.' Notwithstanding this information, it does not negate his responsibility for his child.

Furthermore, it should be noted that any unwillingness to assume care responsibility is not by itself, sufficient for the claimed primary carer to assert that another direct relative or guardian is unable to care for the British citizen.

Therefore, you have failed to provide sufficient evidence to show that the British Citizen child, Amaani Meritta Anuoluwapo Bolashodun would be unable to remain in the United Kingdom/EEA if you were forced to leave the United Kingdom in accordance with Regulation 15A (4A)(c)."

8. In her decision of 16th May 2014 the respondent did not accept that the appellant was the primary carer of Amaani. The respondent was not satisfied that the appellant met the requirements of Regulation 15A (4A) (a). Neither did she accept that the appellant had provided sufficient evidence that her British citizen child is resident in the UK as required under Regulation 15A (4A)(b). In light of those conclusions, the respondent considered that the appellant had failed to provide sufficient evidence to show that the British Citizen child would be unable to remain in the UK if the appellant were forced to leave the UK in accordance with Regulation 15A (4A)(c).

The decision of the First-tier Tribunal

9. The decision of the First-tier Tribunal is set out at paragraphs [61] to [64] of the decision and reasons promulgated on 9th February 2015. In so far as is material to this appeal, First-Tier Tribunal Judge Sanderson states;

"[61]The appellant has given evidence that her British citizen child Amaani is living with her and she has a second child, born on 30 January 2014, namely Amelia Alice Oreoluwa Hurlock from the relationship with Amaani's. She has produced documentary evidence that her child Amaani is attending school and has done so since September of last year. The tenancy agreement includes the name of her daughter Amaani and the appellant's mother has given evidence that while her daughter is at university on a part-time course she looks after the two children. This is on Tuesday and Wednesday each week. There have been court proceedings concerning Amaani and the contact arrangements have been specified. There is therefore clear and incontrovertible evidence that Amaani is in the United Kingdom and is being looked after by her mother for the majority of the time. There has been no contact with Amaani's father since October 2014 even though he is able to exercise his right of contact with his daughter. I accept that he has shown little interest in both his children and has moved on to other relationships, one of which has produced another child. It appears also that he has been incarcerated for a period of 7 to 8 months for

a serious criminal offence. Clearly during that time he would have been unable to play any part as a carer for his daughter.

[62] I accept, given the circumstances that the appellant is the primary carer of her child Amaani in that she is a direct relative, namely the mother of Amaani and has primary responsibility for her daughter's care. However, the appellant has provided no direct or other evidence that her child would be unable to reside in the United Kingdom or another EEA State if the she were required to leave.

[63] It may well be that the appellant would have difficulty in satisfying Regulation 15A(4A)(c) i.e. the relevant British citizen would be unable to reside in the UK or in another EEA State if the appellant were required to leave but I make no finding on this aspect of the appellant's case as there has been no active consideration by the respondent of the appellant's Article 8 rights to family and private life under the Immigration Rules or outside the Rules.

[64] I conclude, therefore, that the decision by the respondent is not in accordance with the law and that the decision remains with the Secretary of State."

The Upper Tribunal Hearing

10. On behalf of the appellant, Mr Nasim submitted that having found at [62], that the appellant is the primary carer of her child, and has primary responsibility for her daughters care, First-tier Tribunal Judge Sanderson should have gone on to make a finding as to whether or not, the Tribunal accepted that Amaani, a British citizen, would be unable to reside in the UK if the Appellant were required to leave. He submitted that there is sufficient from the evidence that is recited at paragraph [61] to establish that the child would be unable to reside in the UK or another EEA State, if the appellant were required to leave.
11. On behalf of the respondent, Mr. Clarke was prepared to accept that the respondent in her decision of 13th May 2014 had proceeded on the basis that the appellant was not the primary carer of a British Citizen child. The respondent's conclusions as to the remaining requirements under regulation 15 (4A) flowed from that conclusion. He submitted that First-tier Tribunal Judge Sanderson has found that the appellant is the primary carer of her child Amaani, and that there is clear and incontrovertible evidence that Amaani is in the UK. In the circumstances it was entirely appropriate for the matter to be remitted to the respondent so that the remaining requirement under regulation 15 (4A)(c) can be considered by the respondent against a correct factual matrix. He submitted that it does not necessarily follow from the matters set out in paragraph [61] of the decision of the First-tier Tribunal, that the evidence establishes that the child would be unable to reside in the UK, if the appellant were required to leave. He submits that to the contrary, what is said at paragraphs [62] and [63] of the decision, suggests that the Judge was not satisfied that the requirements of Regulation 15A(4A)(c) are, or can be met.

Decision

12. At paragraph [62] of the decision the Judge states “the appellant has provided no direct or other evidence that her child would be unable to reside in the United Kingdom or another EEA state if she were required to leave.”. At paragraph 63 of the decision the Judge states “it may well be that the appellant would have difficulty in satisfying regulation 15A(4A)(c) i.e. the relevant British citizen would be unable to reside in the UK or in another EEA state if the appellant were required to leave but I make no finding on this aspect of the appellant’s case as there has been no active consideration by the respondent of the appellant’s Article 8 rights....”.
13. To the extent that it was necessary to make a finding as to whether the requirements of regulation 15(4A)(c) were met, the judge’s reasoning at paragraphs [61] and [62] appears to be inconsistent. Read on its own, paragraph [62] could be read as a finding that the appellant has failed to provide evidence and therefore establish that her child would be unable to reside in the UK or another EEA State if she were required to leave.”. Such a finding might be set aside as an error of law on the grounds of perversity, if it is irrational or unreasonable in the *Wednesbury* sense, or one that is wholly unsupported by the evidence. If that were a finding at paragraph [62], it was one that was open to the Tribunal. No part of the reasoning has been undermined in this appeal. However, at paragraph [63] the Judge states that she makes “...no finding on this aspect of the appellant’s case...”.
14. The initial difficulty that confronted the Tribunal is that the respondent had not carried out the Regulation 15A(4A)(c) examination. That is because in the refusal letter the respondent did not accept that the appellant was the primary carer of the child or that the child was present in the UK. That much is clear from the use of the words “Therefore you have failed to provide sufficient evidence to show that the British Citizen child would be unable to remain in the United Kingdom/EEA if you were forced to leave the United Kingdom...” in the respondent’s reasons for refusal letter. The respondent’s cursory examination of the requirement under Regulation 15A(4A)(c) was premised upon what the First-tier Tribunal has found to be a flawed conclusion as to the requirements under Regulation 15A(4A)(a) and (b).
15. It was open to the Tribunal to conclude at [64] that the decision of the respondent is not in accordance with the law and that the decision remains with the respondent. Remittal to the respondent will enable the respondent to carry out the Regulation 15A(4A)(c) examination in light of the findings made by the First-tier Tribunal.
16. The reasons provided by First-tier Tribunal Judge Sanderson at paragraph [63] suggest that no finding was made as to whether the appellant satisfied the requirements of Regulation 15(4A)(c) as there has been no active consideration by the respondent of the appellant’s Article 8 rights under the immigration rules or outside the rules. The application

that was before the respondent was not an Article 8 application, but an application for a derivative residence card. As is set out in the respondents decision of 13th May 2014, if the appellant wishes the respondent to consider an application under appendix FM and or paragraph 276 ADE of the immigration rules, she must make a separate charge application using the appropriate specified application form.

17. I should also add that in granting permission to appeal, First-tier Tribunal Judge Ransley stated that “as the appellant has raised ECHR Article 8 in the grounds of appeal, it was incumbent on the Judge to deal with the Article 8 appeal in her decision, instead of remitting the case to the respondent for the purposes of considering Article 8.”. That was not a matter relied upon in the appellant’s grounds of appeal and at the hearing before me, Mr Nasim did not pursue that matter. He was right not to do so in light of the decision of the Upper Tribunal in **Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)**, referred to by Mr Clarke on behalf of the Respondent. The Upper Tribunal, comprising of a panel including the President and Vice President confirmed that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot in an appeal under the EEA Regulations bring a Human Rights challenge to removal.
18. Insofar as the appeal before me is concerned, the making of the decision of the First-tier Tribunal did not involve the making of an error of law affecting the outcome of the decision.
19. The appellant’s appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal, that the appeal is allowed to the extent that the decision of the respondent was not in accordance with the law and the decision remains with the respondent, shall stand.
20. No application for an anonymity direction is made and I do not make an anonymity order.

Signed:
Deputy Upper Tribunal Judge Mandalia

Date: