



**Upper Tribunal  
(Immigration and Asylum Chamber)  
EA/04081/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 7 September 2017**

**Decisions & Reasons  
Promulgated**

**On 5 October 2017**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ROMILA MUSHTAQ**

**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mrs R Petterson (Senior Home Office Presenting Officer)  
For the Respondent: Mrs S Ali (Counsel)

## **DECISION AND REASONS**

1. This is the Secretary of State's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (hereinafter the tribunal) made after a hearing of 5 January 2017 whereupon it allowed the claimant's appeal against the Secretary of State's decision of 31 March 2016 refusing to grant her a residence card on the basis of derivative rights of residence.
2. By way of brief background, the claimant is a national of Pakistan and was born on 4 November 1983. She entered the UK as a Tier 4 student migrant on 20 May 2011. The following month she met one Mr Arminas Karpovicius who is a Lithuanian national. The two entered into a relationship and married each other, in the United Kingdom, on 7 September 2011. The claimant discontinued her studies and on 7 March 2012 gave birth to the couple's first child. A further child was subsequently been born to the claimant on 1 February 2016 and Mr Karpovicius is named as the father on the birth certificate. However, the relationship hit difficulties and in or around September 2015 Mr Karpovicius left the claimant and there has been no subsequent contact.
3. The claimant's application for a derivative residence card was made on the basis of her being the primary carer of the first child, a Lithuanian national, and that the child was in education in the United Kingdom.
4. The primary issue for the tribunal to resolve was whether the requirements contained within regulation 15A(3)(c) of the Immigration (European Economic Area) Regulations 2006 were met. That included requirements that the relevant child is in education in the United Kingdom and was in such education at a time when the EEA national parent (Mr Karpovicius) was in the United Kingdom.
5. The Judge made a number of favourable findings from the claimant's perspective including one that since the child she had commenced attending a school reception class she was in education within the meaning of the Regulations. But there was a difficulty in that there was no clear evidence regarding the whereabouts of Mr Karpovicius. So, the Secretary of State had argued that the claimant had failed to show that the EEA national parent was in the United Kingdom at the time the child commenced in that reception class. It was clarified before me that she had commenced her attendance at the reception class in September of 2016. However, the Judge decided that, even if that was the position, it did not matter. This was the Judge's reasoning;

"17. The appellant told me that the child in question is in "reception". Mrs Brewer [the Secretary of State's representative at the tribunal] accepts that this would meet the first part of reg 15A(3)(c), the "education" requirement. However, she submitted that the latter part, namely Mr Karpovicius must be present in the UK, is not met. In my view, the whole purpose of reg 15A of the 2006 Regs is to protect the rights of an EEA national child. If the appellant cannot prove, on balance, Mr Karpovicius "was" present in the UK at the moment the child in question enters education, it defeats the whole purpose of reg 15A of the 2006 regs,

namely the protection of the treaty rights of an EEA national child. If Mr Karpovicius had not abandoned his child there would have been no need for the appellant to make an application under reg 15A to protect the child's treaty rights. Therefore, interpreting the second part of reg 15A(3)(c) literally defeats the child's treaty rights. I do not find that that is the effect the second part of reg 15A(3)(c) was intended to have. In my view, adopting a "purposive" interpretation of the second part of reg 15A(3)(c) I find the intention of this part of the regulations is that the child in question is in "education" in the UK whether or not his father can be demonstrated to be in the UK as well. In my view, any other interpretation defeats the child's treaty rights to be present in the UK."

6. The Secretary of State sought permission to appeal. The grounds, in summary, were to the effect that the tribunal had erred in failing to apply the proper meaning of regulation 15A(3)(c) and also in accepting that Mr Karpovicius at some point whilst in the UK had been a "worker" (a consideration relevant to 15A(3)(b)). Permission to appeal was granted.
7. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law or not. Directions made provision for matters to proceed to remaking should that be necessary or otherwise appropriate. Representation at the hearing was as in indicated above and I am grateful to both representatives.
8. Mrs Petterson did not seek to rely upon the second ground. She acknowledged that the Judge had indicated, at paragraph 15 of his determination, that there was "copious" evidence of past worker status which had gone unchallenged. So, the only matter for me to decide, with respect to error of law, was that relating to the Judge's interpretation of regulation 15A(3)(c). As to that, Mrs Petterson essentially, relied upon the grounds as drafted. Mrs Ali made various points. She said that there had been in place a government concession regarding the 15A(3)(c) requirements though she did not produce it before me and acknowledged that there had been no evidence of any relevant concession before the Judge. She pointed out that further regulations, which had come into force after the relevant dates in this appeal, did not impose the same requirement concerning the EEA national parent's presence at the time the child entered into education.
9. I decided to set aside the Judge's decision and I indicated so to the parties. That is because the Judge's reasoning, of itself, does not justify departure from the clear and straightforward wording of the regulation. The parties agreed that the only issue relevant to remaking would be that of whether the evidence suggested the EEA national parent was or was not in the United Kingdom at the date the child entered into education and that that was a matter to be determined on the basis of the balance of probability. In seeking to remake the decision I heard oral evidence from the claimant. She did indicate, at the outset, that her command of English was limited but she and her representative wished to push on. Mrs Petterson did not express any concerns. In the event, clear and straightforward questions were put to her which she was able to understand and appropriately answer.

10. In response to questions put by me the claimant said that Mr Karpovicius had been living in the United Kingdom for five years prior to the two meetings for the first time in 2011. He had not told her why he had come to England but, during the time that they were a couple, he had not returned to Lithuania. He has a mother and five brothers in Lithuania. She believes that he is in East London because he had or has a girlfriend who lives in East London. Mrs Ali did not ask any questions but in response to questions put by Mrs Petterson the claimant said that he had not been present when she had given birth to her second child. She had not seen him since September of 2015.
11. Mrs Petterson submitted that in the above circumstances the claimant had failed to demonstrate that Mr Karpovicius was in the UK at the date the child entered into education and that, on that basis, I should remake the decision against the claimant. Mrs Ali submitted the opposite.
12. As I indicated to the representatives at the hearing, I have concluded that it is more likely than not that, as at the date the child entered into relevant education, Mr Karpovicius was present in the United Kingdom. That is because he has previous long residence in the United Kingdom which suggests he may prefer to be here rather than elsewhere, he clearly had reasons for leaving his home country to come here which might have been linked to his view as to his economic prospects, there was no reason to think that the ending of his relationship with the claimant would lead to his departure from the country given that the relationship was not the reason for his arrival in the country and that there was, on the face of it, no other reason as to why he would depart from the UK.
13. In light of the above, although I have set aside the decision, I have remade the decision in favour of the claimant.

## **Decision**

14. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
15. In remaking the decision, I allow the claimant's appeal against the Secretary of State's decision of 31 March 2016 refusing to grant her a derivative residence card under the Immigration (European Economic Area) Regulations 2006 (as amended).

**Signed:**

**Date: 3 October 2017**

**Upper Tribunal Judge Hemingway**

## **Anonymity**

I make no anonymity direction. None was made by the First-tier Tribunal and none was sought before me.

**Signed:**

**Date: 3 October 2017**

**Upper Tribunal Judge Hemingway**

**To the Respondent**

I make no fee award

**Signed:**

**Date: 3 October 2017**

**Upper Tribunal Judge Hemingway**