



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003475

First-tier Tribunal No:
EA/03557/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Kholoud Moh'd Rafiq Sha'ban
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Z Nazim, Counsel, instructed Direct Access

For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 5 September 2023

DECISION AND REASONS

1. The appellant is a national of Jordan. On 4 March 2020 she made an application under the EU Settlement Scheme as a person with a 'derivative right to reside' in the UK. Her application was refused by the respondent for reasons set out in a decision dated 4 February 2021. Her appeal against the respondent's decision under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 was dismissed by First-tier Tribunal Judge Thapar for reasons set out in a decision promulgated on 19 January 2022.
2. The appellant claims the decision of Judge Thapar is vitiated by material errors of law. The grounds of appeal, that are akin to lengthy submissions

rather than an attempt to properly identify an error of law, include a claim that the appellant's Article 8 rights were not properly considered by the judge. The appellant claims in the grounds of appeal that she is the stepmother of three children, all of whom are German nationals and to whom she is very close. She has cared for her stepdaughters' for a period in excess of six years and has developed an intense emotional bond with them. The appellant claims there was evidence before the First-tier Tribunal in the form of a 'Step-Parent Parental Responsibility Agreement' under s4A(1)(a) Children Act 1989 recorded at the Central Family Court on 26 March 2021, and other documents confirming the role the appellant plays in the lives of her stepdaughters' that the First-tier Tribunal judge failed to have adequate regard to. The appellant claims that she, as a stepmother, is a *de-facto* adoptive parent.

3. Permission to appeal was granted by Upper Tribunal Judge Pickup on 30 September 2022. He said:

"The judge found for the reasons set out in the application that the appellant failed to demonstrate that she was a 'direct relative', or qualify in any other way at the date of the application to the respondent. That finding was fundamental and arguably fatal to the application under EUSS. However, there is a possible argument that the appellant may qualify under a *de facto* adoption as a parent. That will require further elaboration and careful consideration. At the least, I am satisfied that the point is arguable."

4. Before me, Mr Nazim confirmed that he was not the author of the grounds of appeal. He quite properly accepts that the appellant is unable to maintain the claim that the First-tier Tribunal Judge failed to have regard to the Article 8 rights of the appellant and her family, and that Appendix FM of the Immigration Rules is irrelevant. Mr Nazim accepts Appendix EU and the Immigration (European Economic Area) Regulations 2016 ("the 2016 EEA Regulations") do not give effect to the UK's obligations under Article 8 ECHR, and the consideration of Article 8 forms no part of the decision-making process in relation to such an application. Mr Nazim accepts that regardless of the strength of any Article 8 claim, leave could not be granted under those provisions unless the requirements of the relevant rules are satisfied and it remains open to the appellant to make an Article 8 claim to the respondent.
5. Mr Nazim submits Regulation 16 of the 2016 EEA Regulations that were in force when the appellant made her application make provision for a derivative right of residence for a person that meets certain criteria including parents and primary carers. A person is the "primary carer" if they are a direct relative or a legal guardian. Mr Nazim submits there is no definition of the terms "direct relative" or "legal Guardian" and a 'direct relative' is not restricted to biological relationships. In any event, there is now a 'Step-Parent Parental Responsibility Agreement' and that is capable of establishing that the appellant is a 'legal guardian' for the purposes of the 2016 EEA Regulations. He submits that on the facts, the appellant was for all intents and purposes the mother of the children.

6. In reply, Ms Arif adopts the rule 24 response dated 30 November 2022 filed and served by the respondent. The respondent claims the 2016 EEA Regulations are clear in that a person is the “primary carer” if they are a ‘direct relative’ or a ‘legal guardian’. The appellant is neither. The respondent submits the children’s mother is alive and residing in Germany. She had not surrendered parental responsibility for the children as at the specified date (31 December 2020). The ‘Step-Parent Parental Responsibility Agreement’ postdates 31 December 2020 and does not amount to an adoption order. Neither does it extinguish the biological mother’s parental responsibility for the children. In any event given the geographical locations of the children’s father and biological mother, there is no reason to believe that a refusal of the application would force the children to leave the EU.
7. Ms Arif submits the ‘Step Parental Responsibility Agreement’ was referred to by the judge and came about some time after the application had been made and refused. She submits there is no material error of law in the decision of the FtT. She submits it remains open to the appellant to make an application for leave to remain on Article 8 grounds.

Decision

8. To put matters in context it is helpful to begin by referring to the relevant background as set out in paragraph [1] of the decision of the FtT:

“The Appellant is a national of Jordan, born 28 February 1979 and is now aged 42 years. The Appellant married Mr Musa Mahmood Shaikh (“Mr Shaikh”) in Dubai on 26 November 2015. Mr Shaikh is a national of Pakistan and he has three children from a previous relationship MS aged 15 years, JS aged 14 years and SS aged 11 years. These three children are German citizens. Their biological mother resides in Germany. Mr Shaikh and his three children have been granted pre-settled status under the EU Settlement Scheme (“EUSS”). The Appellant and Mr Shaikh have one child together AS now aged 5 years. AS is an American national and was granted pre-settled status under the EUSS on 04 February 2021. The Appellant states she has lived with Mr Shaikh and her stepchildren since their marriage in 2015. They relocated to the United Kingdom (“UK”) on 29 October 2019. The Appellant’s application for status under the EUSS was made on 04 March [2020]. The Appellant appeals against the Respondent’s decision dated 04 February 2021 refusing her application under the EUSS as a person with a derivative right to reside. The appeal is brought under the Immigration Citizens’ Rights Appeals (EU Exit) Regulations 2020. A Step-Parent Parental Responsibility Agreement in respect of SS, granting parental responsibility to the Appellant was registered at the Central Family Court on 26 March 2021.”
9. The UK withdrew from the EU at 11.00PM on 31 January 2020. However, many aspects of EU law continued to apply to the UK during the “implementation period” that followed, and which came to an end at 11.00PM on 31 December 2020. EU law relating to the free movement of persons continued to apply to the UK, and to British citizens and their family members residing in the EU, during the implementation period. The 2016 EEA Regulations remained in force until the conclusion of the implementation period, at which point they were revoked.

10. The appellant's application was made on 4 March 2020. At paragraph [3] of her decision, the judge summarised the respondent's reasons for refusing the application:

"The Respondent refused the Appellant's application as it was not accepted that the Appellant met the definition of a 'direct relative' nor was it accepted that the Appellant was a legal guardian of an EEA citizen child at the time of the application. Therefore, the Appellant was unable to establish that she was the joint primary carer of a self-sufficient EEA citizen child under regulation 16(2) of the 2016 Regulations. Consequently, the Appellant was unable to meet the requirements of either rule EU11 or EU14 of Appendix EU of the Immigration Rules."

11. The judge refers to the evidence of the appellant that she has been a primary carer of her stepdaughters since her marriage in 2015 at paragraph [14] of the decision,. She refers to the claim that there should be no distinction between a biological mother and stepmother, at paragraph [16] of the decision. At paragraph [19] of her decision, the judge noted that to meet the requirements under rule EU14 the appellant must establish that she was a person with a derivative right to reside in accordance with regulation 16 of the 2016 EEA Regulations. The judge said the appellant must demonstrate that not only did she meet the requirements at the date of the application but she did so by the specified date being 31 December 2020.

12. Nothing that is said by Mr Nazim in his submissions before me or in the grounds of appeal to the extent they are relied upon by Mr Nazim, undermines the judge's reasons for reaching the conclusions she did. I accept, as Mr Nazim submits, there is no definition of 'direct relative' or legal guardian' in the 2016 EEA Regulations. However, the judge referred at paragraph [21] to the respondent's published guidance; 'EU Settlement Scheme: derivative right to reside (Chen and Ibrahim/Teixeira cases" (Version 2.0) published by the Home Office on 18 November 2019.

"Where the person claiming to be the primary carer of the child is not their parent, you must be satisfied that they are another direct relative of the child, or their legal guardian, with primary carer responsibility for the child, for example by the provision of a valid guardianship order or another valid court order which establishes their primary carer responsibility for the child. An example of an alternative court order would be one transferring parental responsibility. Such court orders must be considered on a case by case basis to determine whether they establish that the person is the child's primary carer.

For the purposes of assessing whether, by the specified date, the applicant is (or, as the case may be, for the relevant period was) a 'person with a derivative right to reside' for the purposes of Part 1 of Appendix EU, a direct relative of the relevant EEA citizen child is:

- a parent
- a grandparent
- a brother or sister

- a spouse or civil partner (for example, in the case of Ibrahim and Teixeira where the individual in education is aged 18)
- a child
- a grandchild

This is an exhaustive list and no other type of family relationship may be accepted. Step-children are not considered to come within the definition of 'direct relative' for the purposes of assessing whether they are (or were) a primary carer unless there is also an adoption order or a lawful guardianship order in place. (*my emphasis*)

13. Having referred to the respondent's guidance, the judge set out her reasons for rejecting the claims made by the appellant at paragraphs [22] to [24] of the decision:

"22. The Respondent in refusing the Appellant's application found she did not meet the above definition at the time of the application. In the case of R (Hamid Saeed) v SSHD [2018] EWHC 1707 (Admin), Mr Justice Lane stated there "is no binding dictum from the CJEU that Member States are to recognise derivative rights of residence in respect of any wider categories of persons than those for which the defendant has made provision in the 2016 Regulations". The court found clear authority from the CJEU or the EU's legislature would be required, before a finding that a Member State had no entitlement to circumscribe the category of persons who may be regarded as a primary carer of an EU citizen could be made.

23. Mr Mustafa relied upon the Upper Tribunal's decision in the case of R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC). This decision considered factors required to demonstrate the existence of a parental relationship. I find this decision does not further the Appellant's case. The issue within this appeal is whether the Appellant firstly comes within the category of person who can benefit from the provisions of regulation 16 of the 2016 Regulations. I have found for the reason's stated above that the Appellant has failed to meet this first hurdle and establish that she was a direct relative or a legal guardian at the relevant time.

24. Furthermore, I find the addition of legal guardian makes provisions for a stepparent to be included as a primary carer. I find this additional limb would not have been included had the intention been for stepparents to be included within the definition of a parent. A legal guardian must provide documentary evidence to demonstrate that they have responsibility for the relevant child. The Appellant entered into a Step-Parent Parental Responsibility Agreement, however this was not until 26 March 2021. The Appellant therefore did not become a legal guardian of SS until after the date of the application and after the specified date of 31 December 2020."

14. I reject the submission made by Mr Nazim that the term 'direct relative' is not restricted to biological relationships. Each of the relationships referred to in the respondent's published guidance is a biological relationship. The only exception is where the person is a 'a spouse or civil partner', but that is limited to circumstances concerning a child aged 18 in education in the UK (*see Ibrahim C-310/08 and Teixeira C-480/08*). The respondent's published guidance makes it clear that the category of familial relationship is an exhaustive list and that 'step-children' are not considered to come

within the definition of 'direct relative' unless there is also an adoption order or a lawful guardianship order in place. Here there is neither.

15. The judge quite properly noted the 'Step-Parent Parental Responsibility Agreement' relied upon by the appellant was entered into a Step-Parent Parental Responsibility Agreement, on 26 March 2021. The appellant therefore did not become a legal guardian until after the date of the application and after the specified date of 31 December 2020.
16. It is now well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. An appeal before the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. Here, Judge Thapar properly considered the claims made by the appellant and referred to the relevant guidance and authorities that informed her decision. The findings and conclusions reached by the judge were neither irrational nor unreasonable in the *Wednesbury* sense, or findings and conclusions that were wholly unsupported by the evidence. Judge Thapar had proper regard to all relevant matters. Where a judge applies the correct test, and that results in an arguably harsh conclusion, it does not mean that it was erroneous in law. The Upper Tribunal is not entitled to find an error of law simply because it does not agree with the decision.
17. It follows that the appeal is dismissed.
18. Although the appellant was unable to succeed under the 2016 EEA Regulations, it is common ground between the parties that it remains open to the appellant to make an Article 8 claim to the respondent.

Notice of Decision

19. The appeal is dismissed. The decision of First-tier Tribunal Judge Thapar stands.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 February 2024