



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

Appeal Number: IA/04061/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke-on-Trent
On 5th January 2015**

**Determination Promulgated
On 22nd January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

**MRS AICHA DIALLO EPOUSE WATERS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Stephen Vokes, instructed by Chattertons Solicitors
For the Respondent: Miss C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Ivory Coast who applied for a derivative residence card under the EEA Regulations as confirmation of the right of residence as the primary carer of two British children. Her application was refused by the Respondent on 31st December 2013 and the Appellant has exercised her right of appeal. The Secretary of State has been granted permission to appeal and therefore, strictly speaking, the Secretary of State is the Appellant and Mrs Aicha Waters is the Respondent. However, in order to avoid confusion I propose to refer to the parties as they were before the First-tier Tribunal i.e. Mrs Waters is the Appellant and the Secretary of State is the Respondent.

2. The appeal was dismissed in the First-tier Tribunal by First-tier Judge Gurung-Thapa on 2nd September 2014. On that occasion the Appellant was represented by Mr Vokes and the Respondent was represented by a Home Office Presenting Officer, Mr Aigbokie. The appeal was allowed by the First-tier Judge under the 2006 Regulations and on human rights grounds (Article 8 ECHR).
3. The Respondent's representative applied for permission to appeal and permission was granted in the First-tier Tribunal on 9th October 2014. The judge who granted permission considered that, in the light of Damion Harrison (Jamaica) and SSHD, the Appellant's circumstances reflected a situation of choice rather than necessity. Furthermore, the judge considered it arguable that the First-tier Judge overlooked the fact that the Appellant's husband had his office in the Canary Islands. The judge did not appear to have considered whether the family could relocate there in which case the children would not be forced to leave the EU. On that basis it was directed that all grounds could be argued.
4. Thus the matter came before me in the Upper Tribunal on 5th January 2015 for an error of law hearing. Representation was as mentioned above.
5. The Appellant's representatives served a Rule 24 response, drafted by Mr Vokes, and upon which he relied in submissions.
6. The background to the appeal is that the Appellant applied for a derivative right of residence under the 2006 Regulations as a result of unexpectedly giving birth to two UK citizen children, Kimberley and Andrew, who were born on 24th October 2012 while she and her partner, Mr Harry Waters, a UK citizen were visiting relatives in the UK. The Appellant had visited the UK on many previous occasions and had a five year multi-visit visa valid until 31st July 2016.
7. In submissions, Miss Johnstone relied upon the grounds submitted in support of the application for permission to appeal. She referred in particular to paragraph 3 of Ground 1 which submit that the First-tier Tribunal erred in finding that the decision was disproportionate as the Appellant had leave until 2016 and was not currently subject to a removal decision. Miss Johnstone repeated that the Appellant had leave until 2016 which had not been revoked. As at the date of the hearing she still had leave and was not required to leave the United Kingdom. Therefore she would not be separated from her children. Miss Johnstone submitted that the First-tier Judge's determination contained a material error of law and should be set aside. She asked for a re-hearing.
8. For the Appellant, Mr Vokes began his submission by pointing out that the Respondent's Grounds of Appeal make no reference to Section 19 of the Immigration Act 2014 which came into force on 28th July 2014. This is referred to by the First-tier Judge at paragraph 34 of her determination. Section 19 amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains Sections 117A, 117B, 117C and 117D. Part 5A does not apply to EEA appeals i.e. appeals brought under Regulation 26 of the 2006 Regulations. Schedule 1 to the 2006 Regulations had not been amended and makes no reference to the provisions of Part 5A. Mr Vokes pointed out that there was no challenge to this part of the determination.

9. Mr Vokes further submitted that the Respondent's grounds were fundamentally flawed. Contrary to the assertion made by the Presenting Officer, he submitted that the Appellant has no right to remain until 2016 as the holder of a multi-visit visa. Such a visa only permits the holder to remain in the United Kingdom for a fixed number of days after which he or she has to leave. It does not allow the holder to remain continuously in the United Kingdom for the full term of the visa.
10. Mr Vokes reminded me that the Appellant's premature twins were under 2 years of age. He submitted that the Sponsor could not reasonably be expected to look after such young babies with their special needs on his own.
11. He further pointed out that the Appellant is not an EEA national and argued that the Respondent had put forward no evidence to demonstrate how the Appellant would be able to gain access to Spain. He said that it was mere speculation on the part of the Respondent to say that it was open to her to go to Las Palmas with her EU Sponsor.
12. Mr Vokes referred to paragraph 41 of the determination which confirms that the children are British citizens and therefore European Union citizens and, in the opinion of the First-tier Judge, could not be expected to relocate to the Ivory Coast with the Appellant. Mr Vokes pointed out that there was no challenge by the Respondent to the First-tier Judge's reasons as to proportionality.
13. I accept Mr Vokes' argument concerning the requirements of a multi-visit visa. I do not accept that this conferred leave to remain as contended on behalf of the Respondent. The First-tier Judge has rightly taken into account of the best interests of the Appellant's children as a primary consideration. Exceptional circumstances have been identified at paragraphs 41 and 42 of the determination. The First-tier Judge has given proper reasons in support of her conclusion that there were compelling circumstances involving UK children which meant that the Appellant should not be expected to leave the UK.

NOTICE OF DECISION

I am not persuaded that the First-tier Tribunal's decision involved the making of a material error on a point of law. I uphold the decision and dismiss the Respondent's appeal.

I make no order for anonymity.

Signed

Date 19th January 2015

Deputy Upper Tribunal Judge Coates