Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43140/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 17th April 2015	**On 27th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MP
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: No legal representation

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal P J Clarke promulgated on 26th June 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female Jamaican citizen who on 18th October 2012 applied for a derivative residence card on the basis that she is the primary carer of her British citizen child born 27th August 2003, and her child would

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be unable to reside in the United Kingdom if the Claimant were required to leave.

4. The application was refused on 3rd October 2013. In summary the Secretary of State referred to regulations 15A(4A), (7) and 18A of The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The Secretary of State noted that the child obtained her British nationality through her father, and was not satisfied that the father would not be in a position to care for the child if the Appellant was forced to leave the United Kingdom. In addition it was not accepted that the Claimant had proved that she is the primary carer of the child.

5. The appeal was heard by Judge Clarke (the judge) on 9th June 2014. The judge heard evidence from the Claimant and allowed the appeal pursuant to the 2006 Regulations, finding that the Claimant, if required to leave the United Kingdom, would have to take her daughter with her. The judge made a finding that the Claimant is the primary carer of the child.

6. The appeal was also allowed with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

7. This decision prompted the Secretary of State to apply for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had made a material misdirection of law. There was no challenge to the finding that the Claimant is the primary carer of the child, but it was contended that the judge had erred in his consideration of regulation 15A(4A)(c) and Article 8.

8. The Secretary of State submitted that the child could remain in the United Kingdom with her father, and that an unwillingness rather than an inability to care for the child did not satisfy the requirements of the 2006 Regulations. It was submitted that there had been entirely insufficient evidence before the judge, to show that the British citizen child would be unable to remain in the United Kingdom if the Claimant had to leave. The Secretary of State placed reliance upon MA and SM Iran [2013] UKUT 00380 (IAC).

9. Permission to appeal was granted by Designated First-tier Tribunal Judge Zucker in the following terms;

> "The grounds submit that there was evidence that the British citizen child could have remained in the United Kingdom with her father and that the approach of the judge was to misunderstand regulation 15A(4A)(c). It is further argued that the human rights decision was premised on a finding that the British citizen child would be compelled to leave the United Kingdom when such was not the case; it was possible for the British citizen child to live with her father.
> All grounds may be argued."

10. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal decision should be set aside.

The Upper Tribunal Hearing

11. The Claimant attended the hearing. She was not legally represented and confirmed that she was content to proceed without legal representation.

12. I explained to the Claimant the role of those present in the hearing room, and ensured that she understood the purpose of the hearing was to decide whether the First-tier Tribunal had made a mistake of law.

13. Mr Smart had provided the Claimant with a copy of MA and SM. Neither Mr Smart nor the Claimant had seen a copy of the grant of permission to appeal, and therefore both were provided with copies. The Claimant confirmed that she had with her a copy of the First-tier Tribunal determination, and she had seen the grounds prepared by the Secretary of State, contending that the decision should be set aside because of a mistake of law.

14. I firstly heard submissions from Mr Smart who relied upon the grounds contained within the application for permission to appeal and referred me specifically to paragraph 41(ii), (v), and paragraph 56, of MA and SM. Mr Smart submitted that a British child would not be compelled to leave simply because it would be inconvenient for the remaining parent to look after the child, and the judge had failed to grasp the principles in MA and SM. I was referred to paragraph 14(viii) of the First-tier decision. Mr Smart submitted that it was unclear what findings the judge was actually making in that paragraph.

15. As the judge's finding that the child would be compelled to leave also related to his consideration of Article 8, I was asked to find that the Article 8 consideration was also flawed and therefore the decision should be set aside as a whole.

16. I invited the Claimant to make representations to me, reminding her that my task was to decide whether the judge had made a mistake of law. The Claimant told me that she is the main carer of her child and has been since birth. They have lived together in one room for the last three and a half years. It would not be in the best interests of her daughter to be separated from her mother.

17. Having listened to the representations I reserved my decision.

My Conclusions and Reasons

18. I observe that the judge erred in paragraph 14(vii) when commenting that there is no definition of the term "primary carer". There is in fact a

definition contained within regulation 15A(7) which was set out at page 4 of the First-tier Tribunal decision. However the judge went on to find, that the Claimant is the primary carer of her daughter, and that finding has not been challenged, and therefore the error is not material. In my view the evidence before the judge clearly indicated that the Appellant is the primary carer of her daughter, as not only was this confirmed in the Claimant's evidence, and the witness statement of the child's father, but there were further statements confirming this which are referred to at paragraph 13(xiv) and (xvii) of the decision.

19. The judge also erred at paragraph 14(x) in finding that it was unclear whether the Secretary of State had considered regulation 15A(4A). This was clearly considered by the Secretary of State and is set out at the top of page 2 of the reasons for refusal letter dated 3rd October 2013, and the refusal letter confirms the Secretary of State decided to refuse to issue a derivative residence card, with reference to regulations 15A(4A), 15A(7) and 18A of the 2006 Regulations. However, I do not find this to be a material error.

20. The Secretary of State in applying for permission to appeal correctly relies upon MA and SM, although this decision which was published prior to the reasons for refusal letter, was not referred to in that letter, nor was the judge referred to this decision at the hearing, even though the Secretary of State was legally represented. One would have expected this decision to have been brought to the attention of the judge.

21. The judge had to decide if regulation 15(4A) was satisfied and this is set out below;

> 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.

22. The judge had to decide whether the Claimant is the primary carer of a British citizen and he found that she was. This was clearly a finding open to him on the evidence and is not challenged.

23. It was not in dispute that the British citizen child is residing in the United Kingdom.

24. The judge then had to decide whether the British citizen child would be unable to reside in the UK if the Claimant had to leave. Guidance was given on this issue in MA and SM at paragraph 41, in which conclusions reached by Hickinbottom J in Jamil Sanneh v (1) Secretary of State for Work and Pensions and (2) the Commissioners for Her Majesty's Revenue and Customs [2013] EWHC 793 (Admin) were adopted. I set out below paragraph 41(ii) in part, together with 41(iii) and (iv);

(ii) The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.

(iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.

(iv) Nothing less than such compulsion will engage Articles 20 and 21 of the TFEU. In particular, EU law will not be engaged when the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; although (a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the relevant ascendant relative, and hence the EU dependent citizen, to leave, and (b) such actions as removal or prevention of work may result in an interference with some other right, such as the right to respect for family life under Article 8 of the European Convention on Human Rights.

25. It may be argued that the finding made by the judge in paragraph 14(viii) of his decision could have been more clearly explained, but I do not find that his finding that the child would be compelled to leave, amounts to a material error of law.

26. This is because the evidence before the judge from the child's father, in the form of a witness statement dated 12th October 2012, was that it would be impossible for him, because of his wife, to care for his daughter. The evidence of the father was that he had never cared for his daughter on a full-time basis since her birth, and this was confirmed by the Claimant's evidence, who described him having occasional contact sometimes once or twice a year, and his daughter had never stayed overnight with him.

27. The judge had to decide, in accordance with the final sentence of paragraph 41(ii) of MA and SM whether there was an ascendant relative who had the right of residence in the EU, and "who can and will in practice care for the child". There was no dispute that the child's father is a British citizen and therefore has the required right of residence, but in my view it was open to the judge to conclude that he would not in practice care for the child. MA and SM made it clear that whether a child would be compelled to leave the EU to follow a non-EU national is to be decided as a question of fact on the evidence before the Tribunal or court.

28. I therefore conclude that the judge did not err in finding that if the Claimant had to leave the United Kingdom, then her daughter would be unable to reside in the United Kingdom, and the judge was entitled to allow the appeal pursuant to regulation 15A(4A) of the 2006 Regulations and did not materially err in law in so doing.

29. The nature of the challenge made by the Secretary of State to the conclusions reached by the First-tier Tribunal on Article 8 is not entirely clear from the grounds contained within the application for permission to appeal. The judge granting permission interpreted the challenge to be based upon the error made by the judge in finding that the child would be compelled to leave the United Kingdom if the Claimant had to leave. As I have found that the judge did not materially err in law on that issue, I conclude that he did not err in his consideration of Article 8.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside.

I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

The First-tier Tribunal made an anonymity direction and I continue that order pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 for the reasons given by the First-tier Tribunal.

Signed Date 21st April 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The decision of the First-tier Tribunal stands and therefore so does the decision not to make a fee award.

Signed Date 21st April 2015

Deputy Upper Tribunal Judge M A Hall