



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

Appeal Number: EA/05479/2017

THE IMMIGRATION ACTS

Heard at Field House

On 16th January 2018

Decision & Reasons

Promulgated

On 7th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**NYIMASATA [C]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant in person

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Gambia, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 30th May 2017 to refuse her application for a derivative residence card in accordance with Regulation 16(5) of the Immigration (EEA) Regulations 2016. First-tier Tribunal Judge Lawrence considered the appeal on the papers in accordance with the Appellant's request and dismissed the appeal in a decision promulgated on 1st September 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Grimmett on 13th November 2017.

2. According to the papers before me the Appellant made an application for a residence card on the basis of a derivative right of residence as the primary carer of a British citizen child, her son, who was born in the UK on [] 2016. I note that in the application form the Appellant ticked a box at 2.2 indicating that she was applying as “a joint primary carer who shares care and responsibility for a British citizen equally with another person”. At 2.21 of the form she named the child’s father as a British citizen. The Appellant sent the child’s passport and birth certificate which gave details of the Appellant and the child’s father.
3. The application was refused by the Secretary of State on the basis that the Appellant had not provided adequate evidence to show that she is the primary carer of a British citizen because she had failed to provide sufficient evidence of primary care.
4. The Appellant appealed against that decision and provided evidence to the First-tier Tribunal. This evidence is contained in a bundle with a covering letter dated 21st July 2017. The bundle contains a letter dated 12th June 2017 from the Appellant stating that she is the primary carer of her son and that she has permanent primary care including physical custody, development, medical care, upbringing and parental care as a mother. She enclosed some documentary evidence. These included a letter from her GP which states, “Ms [C] is the main carer for her son []. She is the one with him at all times. She attends the clinic with him when he is unwell and for his immunisation. I have not seen him with his father”. She submitted a letter from a health visitor which states that the Appellant is the primary carer for her son. She also enclosed a letter from a children’s centre confirming that the Appellant and her son attend the centre. She also enclosed a household bill in her name.
5. The First-tier Tribunal Judge made the decision on the basis of this evidence and the evidence in the Respondent’s bundle. The judge’s findings are contained at paragraphs 4 and 5. At paragraph 4 the judge noted that on the face of it the child is a British national. At paragraph 5 the judge said:

“The relevant provisions are to be found in reg 15A(2) of the 2006 Regs. The appellant must demonstrate, inter alia, on balance, that [the child] would not be able to remain in the UK if she were to be required to leave the UK. The appellant has provided evidence that she takes [the child] to GP surgery and the like. However, there is no evidence that [the child] would be able to remain in the UK if the appellant returns to the Gambia. The appellant has not provided any evidence of the whereabouts of the child’s father. The letters from the GP assert that the GPs have not seen the child with its father. This does not mean the father is not living in the same house or his whereabouts are not known. Or that he does not play his part in the care of the child. The mere fact that she is the mother of a British child is insufficient to meet the requirements of reg 15A(2) of the 2006 Regs.”
6. The Appellant sought permission to appeal against that decision in which she asserts that she is the primary carer of the child. She asserts that the

child's father is mainly responsible for her financial support paying an amount every week for the child's maintenance. She says that she has not been in touch with the child's father and has not known his whereabouts for about four months. She submitted that the evidence produced was sufficient.

7. Permission to appeal was granted by First-tier Tribunal Judge Grimmett who highlighted that the First-tier Tribunal Judge said that the Appellant had not shown that the child would not be able to remain in the UK if she were required to leave but went on to say that there was no evidence that the child would be able to remain in the UK if the Appellant returned to the Gambia. The judge considered that there was an arguable error of law in light of that conclusion.
8. In the Rule 24 response the Secretary of State submitted that there is a palpable typing error in the judge's findings which are clearly meant to read that there was no evidence that the child would not be able to remain in the UK if the Appellant left. It is contended that this is the only sensible reading of the determination which reads as a conclusion properly open to the judge on the evidence.
9. At the hearing before me Ms Fijiwala submitted that the burden is on the Appellant to prove that the child would be unable to remain in the UK if she were required to leave. The judge found that there was insufficient evidence in relation to the father's involvement and in her submission the judge could not have decided this case any other way.
10. The Appellant appeared in person at the hearing before me. She was clearly upset by the decision and indicated that she did not have funds to make any other application to court or to seek an oral hearing before the First-tier Tribunal Judge. She said that she did not have funds to seek legal advice in relation to this matter. She explained that the father did not live with her and was not involved in the child's life.
11. I explained to the Appellant at the hearing that in my view that the judge made a decision that was open to him on the basis of the evidence.

Error of Law

12. I accept the Secretary of State's submission that it is clear that the sentence in paragraph 5 which reads, "however, there is no evidence that [the child] will be able to remain in the UK if the Appellant returns to the Gambia" must be a typing error in the context of the rest of that paragraph. It is clear that the judge found that the Appellant had not provided sufficient evidence in relation to the whereabouts of the father of the child.
13. In my view this finding was clearly open to the judge on the evidence before him. I note that the application form indicates that the Appellant was applying on the basis that she was a joint primary carer, sharing responsibility for a child. The documentary evidence submitted contains little more than an assertion by the Appellant that she is the primary carer and an indication by the GP that they had not seen the child with his

father. The judge was entitled to conclude that this does not mean that the father is not living in the same house as the Appellant or that his whereabouts are not known or that he does not play his part in the care of the child. These were conclusions properly open to the judge on the basis of the evidence before him.

14. Although it was not raised by the Appellant who was unrepresented I also note that the judge referred to Regulation 15A of the 2006 Regulations whereas in fact, because the application was made in March 2017, this decision was considered in accordance with the provisions of Regulation 16(5) of the 2016 Regulations. Regulation 16(5) provides as follows:
“The criteria in this paragraph are that –
 - (a) The person is the primary carer of a British citizen (“BC”);
 - (b) BC is residing in the United Kingdom; and
 - (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.”
15. I am satisfied that there is no material difference between these provisions in terms of the test and the issues the judge was looking at. Thus this is not a material error either.
16. I suggested to the Appellant that it would be appropriate for her if she wished to pursue this application to seek advice and to consider making a fresh application with further evidence as to her claimed current circumstances.
17. Based on my findings above I am satisfied that the judge reached a decision open to him on the basis of the evidence before him. In these circumstances the judge made no material error of law.

Notice of Decision

The First-tier Tribunal Judge did not make a material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 5th February 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed

Date: 5th February 2018

Deputy Upper Tribunal Judge Grimes