
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/11251/2014

**THE IMMIGRATION ACTS**

| **Heard at Laganside Courts, Belfast** | **Determination Promulgated** |
|---|---|
| **On 31 October 2014** | **On 7 November 2014** |

**Before**

**The President, The Hon. Mr Justice McCloskey**

**Between**

**HAI NA DONG**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

Appellant: Mr S McTaggart (of Counsel), instructed by DA Martin Solicitor
Respondent: Mr Mills, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. By a decision dated 17th February 2014 made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the Appellant's application for a derivative residence card under the Immigration (EEA) Regulations 2006 (the "*EEA Regulations*") was refused. The first of the two refusal reasons, namely an asserted failure to provide a

valid passport as evidence of her identity and nationality, was subsequently withdrawn. The remaining refusal reason, which relates in part to the father of the child in question, a British citizen allegedly estranged from the Appellant and the child, is encapsulated in the following passages:

> "*You have not provided evidence as to why the child's father is not in a position to care for the British citizen child if you were forced to leave the United Kingdom and there is insufficient evidence to show that the* [child] ..... *would be unable to remain in the United Kingdom if you were forced to leave. Furthermore, to be considered the primary carer we would expect you to provide evidence to show that the child lives with you or spends the majority of her time with you, that you make the day to day decisions in regard to the child's health, education etc and that you are responsible for the child ....*
>
> *In making this assessment, the burden of proof remains on the applicant and the standard of proof is the balance of probabilities .....*"

The remainder of the letter alerted the Appellant to the possibility of making a free standing application for leave to remain in the United Kingdom under the Immigration Rules and Article 8 ECHR.

2. Accordingly, at the stage of the appeal to the First tier Tribunal ("*the FtT*"), the only live refusal reason was that rehearsed above. The FtT dismissed the appeal. Upon the hearing of the appeal to this Tribunal, it was acknowledged by Mr Mills on behalf of the Secretary of State that there is a paucity of necessary findings of fact/evaluative assessments in the determination and, in his words, "*limited reasoning*", which must be considered against the background of what was accepted to have been "*considerable evidence*" adduced at the hearing. It was further specifically accepted that the following passage in the determination is misconceived:

> "*.... The Respondent in its* [decision letter] ..... *identified examples of documents that might evidence primary responsibility, in particular a valid court order which establishes primary responsibility for the child or a valid legal guardianship order. Neither was produced. I find those examples to be entirely reasonable.*"

Mr Mills agreed with me that this assessment and commentary, all of which is adverse to the Appellant, is divorced from the framework of the Appellant's case. There is no dispute that the Appellant is the biological mother of the child concerned and none of the court orders about which the Judge speculated could conceivably exist in their circumstances.

3. I am further satisfied that the Judge applied the wrong test, committing a material error of law in consequence. Under regulation 15A(4A) of the EEA Regulations, it was incumbent on the Appellant to establish that she is the "*primary carer*" of the child concerned and, in her particular case, to

do so by demonstrating that she is "*the person who has primary responsibility for that person's care*". In the determination, the Judge neither adverts to nor reproduces, in substance or at all, the statutory tests. This failing is aggravated by the Judge's adoption of an incorrect test in [21], namely that of "*sole carer*". This I consider to be a clear, free standing error of law.

## DECISION AND DIRECTIONS

4. I decide and direct as follows:

(i) The determination of the FtT is set aside.

(ii) I remit the appeal to a differently constituted FtT for the purpose of remaking the decision.

(iii) The Appellant's solicitors will formally lodge with the FtT the two extant bundles, within 14 days of today.

(iv) The case will be relisted in the FtT on the first available date thereafter.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 31 October 2014