

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18764/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2014

Sent on:
On 15 January 2014
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Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R S

Respondent

Representation

For the appellant: Mr P Deller, Senior Home Office Presenting Officer

For the respondent: R S in person

DETERMINATION AND REASONS

1. In a determination sent on 28 November 2013 First-tier Tribunal Judge Keane heard an appeal brought by the respondent (hereafter the claimant) against a decision by the appellant (hereafter the Secretary of State for the Home Department (SSHD)) dated 4 June 2013 refusing to grant her a derivative residence card as a "Zambrano sole carer" under the Immigration (European Economic Area) Regulations 2006 as amended. Judge Keane:

- (i) found that the claimant was entirely credible and that she was the sole primary carer of her son D B who is a British citizen and that he would be unable to reside in the UK if she were required to leave;
- (ii) held that she did not nevertheless qualify for a derived right of residence under reg 15A of the 2006 Regulations and so dismissed her appeal on that ground;
- (iii) allowed her appeal on Article 8 grounds.

2. The respondent challenged the Article 8 decision and was successful in obtaining permission to appeal but in the grant of permission Judge Deans identified as a separate “obvious” point that the claimant arguably should have succeeded in her appeal under the 2006 Regulations.

3. I should mention at this stage that since the refusal decision of the SSHD the claimant has pursued applications for judicial review in relation to homelessness problems and also in relation to an outstanding FLR(O) application. None of these resulted in a grant of permission, but I did undertake at the oral renewal application on 8 January (which was concerned with the FLR(O) application) to expedite hearing of her statutory EEA appeal so that it could be heard today.

4. At the hearing before me Mr Deller on behalf of the SSHD conceded that the claimant had a derived right of residence under the 2006 Regulations and that the First-tier Tribunal judge had erred in law in not so finding. He urged that I set aside the judge’s decision and re-make it by allowing the appeal on EEA grounds. R S said that whilst she was grateful to learn that it was now accepted she had a derived right of residence that did not in fact assist her with her ongoing problems in relation to benefits and homelessness and legal aid.

My decision

5. There is no dispute raised by the SSHD to the First-tier Tribunal judge’s findings of fact that the claimant is a sole primary carer of a British citizen whom, if his mother (the claimant) had to leave the UK, would himself be forced to leave the territory of the Union.

6. Given these findings the First-tier Tribunal judge erred in law in dismissing the appeal on EEA grounds. The claimant clearly met the requirements set out in reg 15A (4A).

7. Accordingly the decision of the judge must be set aside.

8. The decision I re-make can only be to allow the claimant’s appeal on EEA grounds.

9. In light of this decision it is unnecessary for me to address the Article 8 grounds of appeal brought by the SSHD, which Mr Deller conceded “fell away”. Allowing the claimant’s appeal on Article 8 grounds as well would add nothing to my decision, in terms of status or outcome.

10. R S submitted that I should also allow her appeal under regulation 8 of the 2006 EEA Regulations on the basis that she met the requirements relating to extended family members (other family members). I pointed out to her that she was not able to meet those requirements because (i) she was not a dependent on her son; (ii) she was not a

member of her son's household; rather he was dependent on her and a member of her household.

11. R S submitted that she may be forced to appeal my decision to the Court of Appeal because it left her without an effective remedy for her present situation in relation to access to housing benefits and other welfare benefits and efforts to get a fee waivers in relation to her FLR(O) application. I pointed out to her that my jurisdiction was confined to the issue of her appeal against an EEA decision.

12. At the same time, I would record my concern that if R S is right and a grant of a derivative right of residence will not entitle her to have access to housing and other welfare benefits in the same way as other persons with EEA residence rights, then there may well be a real issue as to whether the relevant government departments and local authorities are acting in compliance with EU law. There may well be issues relating to unequal treatment as between two different types of EEA residents and indeed, as between persons with derived rights of residence and persons with a right of residence pursuant to FLR(O).

13. For the above reasons:

The First-tier Tribunal judge erred in law and his decision is set aside.

The decision I re-make is to allow the claimant's appeal on EEA grounds, specifically on the grounds that she has established she has a derived right of residence under reg 15A of the 2006 EEA Regulations.

I would also direct that she be issued with a derivative residence card forthwith upon application.

Signed

Date:

Dr H H Storey
Judge of the Upper Tribunal