Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32391/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th May 2014 by VIDEO LINK with Sheldon Court Birmingham	**On 5th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

Ms Dionne Marjorie Francis
(NO Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Norman instructed by J M Wilson & Co
For the Respondent: Mr J Richards, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State although I will refer to the parties as they were described in the First Tier Tribunal.

2. The appellant is a citizen of Jamaica born on 15th March 1970 who applied on 14th March 2012 for a derivative right of residence under The Immigration (European Economic Area) Regulations 2006EEA Regulations on the basis of her relationship with her son Sajay Cyvaughnie Blackwood Martin. The application was refused on 3rd January 2013.

3. First Tier Tribunal Judge Telford allowed the appeal with regard to the EEA Regulations and on human rights grounds.

Application for Permission to Appeal

4. An application for permission to appeal was granted by First Tier Tribunal Judge Reid in the following terms

'the judge's conclusions on credibility are perverse and lacking in reasoning especially given his remarks at paragraphs 31 and 35 of the determination'.

The Hearing

5. At the hearing Mr Richards essentially relied on the grounds of appeal. The judge had found that her evidence was not credible and in the light of his comments it was not clear what evidence had persuaded him to find in her favour. The burden of proof lay with the appellant not with the respondent and what was required was independent evidence. To find she was not credible and then accept her evidence and allow the appeal was perverse. The determination was flawed with respect to Article 8 as the judge made no reference to the Immigration Rules for an assessment. He failed to follow **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC). He effectively found that the appellant's son was a British citizen and this was a trump card which absolved the appellant satisfying any further requirements.

6. Ms Norman accepted that **Gulshan** had not been followed. She found that the judge had allowed the matter further to the EEA Regulations. She referred to the application form drafted by the respondent and this was not useful in terms of what needed to be provided. There was no place on the statement as to why the son's father was not in a position to care for his son. The issue of the whereabouts of the father had not been addressed in the application although it was stated she had failed to provide information. The passport, it was conceded by the Home Office, had been provided. The absence of evidence was cured at the hearing. The statement of the appellant was provided and she was subject to cross examination. The Judge did not have to accept all she said and indeed she had provided letters from the church, the school and the doctor. It was stated in the application form that both the father and child were British citizens. **JL (China)** [2013] UKUT 145 (IAC) was not relevant. There was no sign of the father at church or at school. There was evidence that the child was not in the father's life. All the judge was saying was that he had 'this evidence' and there was no evidence against it. Mrs Norman agreed that

the father did not have to live with the mother to be a primary carer for the child. She confirmed that the Regulation under consideration was Regulation 15A (4A).

7. Mr Richards submitted that the documents did not satisfy the burden of proof. The judge had made a damming finding on credibility and yet found that she had discharged the burden of proof. This was not logical.

Conclusions

8. Regulation 15A of The Immigration (European Economic Area) Regulations 2006 sets out the requirements for obtaining a derivative right of residence as follows:

> (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph
> (2), (3), (4)**,** (4A) **or** (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria…
>
> Further to the (4A) 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.

9. The burden of proof is on the appellant. She has to satisfy all three requirements listed above. In the application form the appellant identified that the father and the son were both British citizens. She claimed she was the primary carer but she also stated in her witness statement that the husband had left the UK and could not therefore care for the child in the UK.

10. The judge found the appellant [31] 'not particularly credible in her evidence' and at [32] he stated *'I find that there is evidence that the appellant is the primary carer of the child (who the respondents do not deny is a British Citizen). With credible evidence on that point alone I am able to find for the appellant*'. This is an error of law because at this point in the determination the judge had not found that the husband was not in the UK.

11. Later at paragraph 32 of the determination he states 'Nevertheless she has produced enough to found the basis for a case that her husband is not in the UK and has not been since 2011'. The judge did not give adequate reasoning for why he found that the husband was not in the UK bearing in mind the adverse credibility findings he made. He then stated at [34] 'it is sufficient for her to be able to show that she lives with the child and there is no evidence no one else does'. This attempts to reverse the burden of

proof but in addition does not adequately address all the requirements listed above.

12. The judge found that the appellant was not credible and yet gave inadequate explanation of why he found the father was not in the UK and had no part in the child's upbringing. The judge as to whether the father was in the UK at [38] merely states that 'this was not argued before me'. He did not engage with the evidence from the church, school or from the doctor none of which gave any information about the father. It was not clear what the judge did base his findings on having found the appellant essentially not credible. Thus it would appear from the determination that the judge reversed the burden of proof. Further, it is what those letters do *not* say rather than what they say which is of note. As the respondent noted in the application for permission to appeal the judge also failed to consider, having found the appellant essentially not credible, the extent to which the evidence was dependent on information given by the appellant.

13. The judge found that the appeal could succeed under the EEA Regulations but also went on to allow the appeal under Article 8. He made no findings under the immigration rules, made no reference to **'Gulshan (Article 8)** [2013] UKUT 640 (IAC*)* or **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC)] and gave no reason as to whether there were arguably good grounds to consider the appeal outside the immigration rules.

14. Even if this case did not need to address the immigration rules as it was an EEA appeal he based his findings with regards Article 8 on evidence, which as can be seen from above was in itself based the appellant's own evidence and the judge himself stated that she 'was not particularly credible'. He did not engage with the evidence from the church doctor or school and to what extent it was reliable as it was informed by the appellant herself.

15. I therefore find that there was inadequate engagement with the evidence and, if there was, this is not reflected in the determination.

16. As such there were errors of law in particular in the treatment of the evidence which is at the heart of this appeal. I set aside the determination and I find the matter should be remitted to the First Tier Tribunal for a hearing de novo.

Signed Date 28th May 2014

Deputy Upper Tribunal Judge Rimington