



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/32652/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

**Determination
Promulgated**

On: 16 September 2014

On 14 October 2014

Prepared: 23 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR HAKIIMU SERUWAGI
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation

**For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms L Appiah, counsel (instructed by Bloomsbury
Immigration Specialists)**

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the secretary of state and the respondent as "the claimant."
2. First-tier Tribunal Judge James allowed the claimant's appeal against the secretary of state's refusal dated 22nd May 2013 to issue a derivative residence card under the Immigration (EEA) Regulations 2006 - the 2006 regulations. She found that on the totality of evidence, the claimant had discharged the burden of proof upon him and the reasons given by the

secretary of state did not justify the refusal of a derivative residence card under the regulations.

3. On 29th July 2014, First-tier Tribunal Judge Davidge granted the secretary of state's application to appeal on the basis that it was arguable that the Judge had failed adequately to reason how the claimant's circumstances met the requirements of Regulation 15A of the 2006, (the derivative provisions).
4. Ms Appiah, who also represented the claimant before the First-tier Tribunal Judge, appeared before the Upper Tribunal opposing the secretary of state's appeal.
5. On behalf of the secretary of state, Mr Walker contended that the Judge erred in finding the claimant to be the primary carer of his eldest child. He accepted that the claimant was a direct relative of his son. The parents lived together. It is not as though the couple have separated and live apart with only one parent looking after the child. He submitted that the child's mother, Ms Annet Lunkuse, also assumed caring responsibility for the child. It was clear that they all resided at the same address.
6. Ms Lunkuse was an exempt person for the purpose of the regulations.
7. In order to succeed under Regulation 15A(7) the claimant had to show that he was primarily responsible for the child's care. It had been submitted that there was not sufficient evidence to show that the child would be unable to remain in the EEA if the claimant were forced to leave the UK.
8. Mr Walker submitted that it is clear that the child's mother was involved in the children's lives. Simply because the claimant is involved in the day to day care whilst his wife goes to study or work does not result in his being regarded as "the primary carer" under the regulations.
9. On behalf of the claimant, Ms Appiah submitted that regard had to be had to the evidence before the First-tier Tribunal as a whole, including the statements from the appellant and his wife. The Judge had been alive to the evidence. At the commencement of the hearing before the First-tier Tribunal, the Judge noted that the only grounds of appeal to be proceeded with were those under the 2006 Regulations. She identified the issue to be whether or not the claimant is the primary carer of his eldest child. Ms Appiah confirmed to me that it had been agreed that the sole issue was whether the claimant was the primary carer.
10. She submitted that the Judge properly assessed the available evidence confirming the claimant's marriage to a British citizen and the fact that since then they have had two children from that marriage. She had

regard to the numerous payslips submitted for both the claimant and his wife. Both hold jobs. The claimant's wife's job is studying for a nursing degree as well as practical nursing placements at the same time.

11. She noted that the claimant works part time. This part time arrangement was in order to “allow” the claimant to care for his two children so that his wife could attend her university course.
12. His wife is currently studying at Canterbury University, confirmed by a letter offering her a placement as well as a recent letter confirming her attendance and enrolment on the nursing course. This is a degree course, which is full time with a completion date in 2016. She is also required to undertake practical, vocational nursing placements in various different geographical places as well as attending formal lectures and seminars at the University of Kent, some 70 miles distant from the marital home.
13. The Judge had regard to both their witness statements and the oral evidence to the effect that the Claimant's wife leaves her London home often as early as 5.30 in the morning to travel by car to Kent in order to undertake her vocational nursing placement and also to attend her lectures at the university. Ms Appiah confirmed that the evidence before the Judge was that his wife returned late at night, often close to 11pm.
14. The Judge had regard to the claimant's responsibility for ensuring that his two children are dressed and fed prior to taking them to school and nursery before he leaves for work himself. He commences work at 10am after dropping the children off at school, and picks them up after finishing work from an after school club at about 5pm. It is he who is responsible for taking them to doctors' and dental appointments in respect of which appointment cards as well as NHS cards have been produced; he also accompanies them to play in the park or to go to the zoo, cinema and play centres.
15. The Judge found from the documentation presented that the family was a hard working one and the wife was undertaking a degree some distance from her London home to better the opportunities for the family. In order for her to obtain a qualification, the family is prepared to juggle and alter child caring arrangements from the more traditional matriarchal role to the father undertaking the primary carer role.
16. On the entirety of the evidence before her, she found that the father was the primary carer for the children.

Assessment

17. The Judge has given a careful and detailed assessment in accordance with the evidence presented by the claimant and his wife, coupled with substantial documentary evidence.
18. It is asserted by the secretary of state that the Judge has erred in law in finding that the claimant was the primary carer. It was obvious that the children's mother was very much involved in their lives.
19. In order to be the primary carer, it is not a requirement that the other parent is not involved in the lives of their children at all. I accordingly do not accept Mr Walker's submission that 'it would be a different story' if the parties had been separated.
20. The evidence revealed that the claimant's wife is out of the house at about 5.30 am and returns late at night. This relates to the undertaking of her course which also includes the need to undergo placements of a practical nature.
21. The claimant also has a part time job which he is able to fit in around the needs of the children. It is he who is responsible for getting them up, taking them to school and fetching them. It is he who is responsible for the day to day needs of the children, including their medical needs. The fact that the children's mother will have contact with her children for part of the week does not detract from the finding that the father is responsible for their primary care. It is not a requirement that he have sole care of the children.
22. Although the mother is involved in their lives, this does not detract from the findings of the Judge that the claimant is their primary carer. That finding was available and is sustainable on the evidence produced.

Decision

The determination of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

No anonymity order made.

Signed
2014

Date 23 September

C R Mailer

Deputy Upper Tribunal Judge