IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49211/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 3rd December, 2014	**On 19th December, 2014**
Signed 16th December, 2014	

Before

Upper Tribunal Judge Chalkley

Between

MS THI HOA NGUYEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Singh, Greater Manchester Immigration Aid Unit
For the Respondent: Mr G Harrison, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Vietnamese citizen who on 27th December, 2012 made application to the Secretary of State for a derivative residence card as the primary carer of an EEA national, namely her son Ricky Lee Tran, a British citizen. Her application was refused and she appealed to the First-tier Tribunal.

2. The appellant's appeal was heard on 3rd April, 2014 by First-tier Tribunal Judge Hague. He allowed her decision.

3. On his behalf Greater Manchester Law Centre applied for permission to appeal on the basis that having allowed the appellant's appeal under Regulation 15(a) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations"), the judge failed to deal with the appellant's Article 8 rights. At the hearing before me Mr Singh referred me to paragraph 26 of the Regulations and in particular to sub-paragraph 7. He suggested that the Rules had changed with effect from 2nd October 2000 which was the same date that the Immigration (European Economic Area) Regulations 2000 were introduced. He reproduced a copy of the Immigration Rules as they were at July 2006 and drew my attention to former Immigration Rule paragraph 257(c) headed, "Requirements for leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child." At some point part of the EEA Regulations were in the Immigration Rules and Rule 5 was introduced, he submitted to ensure no duplication of either Rules.

4. He emphasised that it must have been the intention to avoid duplication of the Rules. He submitted, however, that an Immigration Judge has the power and duty to consider human rights appeals and this judge should have considered the appellant's human rights outside the Immigration Rules. Paragraph 5 of Statement of Changes in Immigration Rules HC 395 which says:-

> "Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules."

5. He submitted that it would be perverse if an Immigration Judge were prevented by Rule 5 of the Immigration Rules from considering a human right appeal. He submitted that Regulation 26(7) refers to the 2002 Act and by implication incorporates Section 83. He suggested that the judge's failure to consider and make findings under Appendix FM of the Immigration Rules to consider the appellant's Article 8 appeal outside the Rules was an error of law. Responding, Mr Harrison suggested that the Reasons for Refusal Letter of 30th August, 2013 addressed to the appellant made clear that should the appellant wish to rely on family or private life then she must make a separate charged application using the appropriate form. No such application was made by this appellant. Human rights was not raised in the application. There is a significant difference in the Home Office fees which are payable and a very much higher fee would have been charged if the appellant had made a human rights application.

6. Mr Harrison suggested that it would be extremely difficult for an Immigration Judge to deal with an appellant's Article 8 rights where there were no removal directions and therefore no interference. He submitted that the appellant had the opportunity to make an application under the Immigration Rules but had not done so.

7. Mr Singh submitted that Article 8 was raised in the grounds of appeal to the First-tier and were referred to in the written argument. He told me that Article 8 had been referred to in the submissions of the representative appearing on behalf of the appellant before the judge. I pointed out to Mr Singh that there was no mention at all in the judge's Record of Proceedings of Ms Tasselli having made any oral submissions in respect of Article 8 and that in the circumstances it appeared to me that the judge had not erred by not dealing with it. He told me that the judge's Record of Proceedings was challenged in those circumstances; Ms Tasselli had made oral submissions in respect of Article 8. Mr Singh referred me to a decision of the Upper Tribunal in **Ahmed Amos**. He told me that the citation was **[2013] UKUT 00089**. He referred me specifically to paragraph 43, but told me he did not have a copy of that decision for me. I asked him to ensure that he provided me with a copy.

8. I reserved my decision.

9. The appellant's application of 8th April, 2013 was made on form EEA2. It appears to have been submitted by South Manchester Law Centre. Following refusal of application, notice of appeal was given and in part 8 of the notice of appeal the following grounds were recorded:-

> "*The decision to refuse the applicant a derivative right of residence breaches her rights under the Community Treaties in respect of residence in the United Kingdom.*
>
> *The decision to remove the applicant is unlawful by virtue of Section 6(1) of the Human Rights Act and in breach of Article 8 of the European Convention on Human Rights (ECHR).*
>
> *The decision is otherwise not in accordance with the law.*
>
> *That the person taking the decision should have exercised differently a discretion conferred by the Immigration Rules.*
>
> *That the decision is not in accordance with the Immigration Rules*."

10. First-tier Tribunal Judge Hague heard oral evidence from the appellant which he found to be credible. He had concluded that

the appellant was the primary carer of her son and that her son's father and she were estranged and he plays no part in the life of the son. He found that the appellant satisfied the requirement of paragraph 15(a) as principal carer and allowed the appeal.

11. The Secretary of State's Reasons for Refusal Letter of 30th August refers to the appellant's application for a derivative residence card. It also makes it clear that any application to consider family or private life rights needs to be made in a separately charged for application. The letter suggests that there is no right of appeal against the decision, but the judge was satisfied that the appellant had provided sufficient evidence of relationship and did have a right of appeal under Regulation 26(3)(a).

12. Following the Secretary of State's decision she did not make any removal decisions.

13. Those representing the appellant had not sought permission to have a copy of the judge's Record of Proceedings made available to them. That is unfortunate. I have examined the Record of Proceedings which clearly records that the Presenting Officer made submissions that the appellant did not have a valid right of appeal. The judge recorded that he held there was a valid right if appeal and that the appellant gave evidence. I have only scanned the Record but can find no reference in it to the representative appearing before the judge to having made any submissions in respect of Article 8. I accept, however, that Article 8 was dealt with in what is referred to as a "skeleton arguments" but what is actually a written submission, comprising six pages with a further eight pages attached.

14. To the extent that the appellant's family and private life rights were raised in the skeleton argument, it was an error on the part of the judge not to deal with them. However, it cannot possibly be said that this amounted to a material error of law because, as Mr Harrison pointed out, there is no interference with the appellant's private or family life rights; no removal directions had been issued and the refusal of a derivative residence card cannot be said to amount to removal directions. In any event the judge had proceeded to allow the appellant's appeal and there cannot, therefore, be any possibility of the appellant being required to leave the United Kingdom.

15. I have concluded that the making of the decision by First-tier Tribunal Judge Hague did not involve the making of a material error of law. The judge's decision stands.

Richard Chalkley

Upper Tribunal Judge Chalkley