IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00173/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th January 2015	**On 22nd January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS JULIET YEBOAH AGYARKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Akohene (Solicitor)
For the Respondent: Ms J Isherwood (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Dineen, promulgated on 17th October 2014, following a hearing at Hatton Cross on 6th June 2014. In the determination, the judge allowed the appeal of Mrs Juliet Yeboah Agyarko. The Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Ghana who was born on 7th April 1975. She had entered the UK on a family visit visa on 5th May 2007 and the visa was to expire on 29th June 2007. She overstayed. She did not leave the UK in accordance with the requirements of her visa. In May 2010, she met Joseph Buckman, a Ghanaian national, with whom she started living together in June 2010. Mr Buckman then on 18th September 2001 joined the British Army and he was posted to Germany in 2012. A child was born to them on 24th July 2012, by the name of Ethan-Joseph Buckman, and he is a British citizen. This is because the father, Mr Joseph Buckman, is subject to the exemption Rules, as a serving British Army soldier. On 11th February 2013, the Appellant applied for a derivative residence card under Regulation 18A of the Immigration (European Economic Area) Regulations 2006 alleging that she was the primary carer of Ethan-Joseph, who would be unable to reside in the EEA, if the Appellant was required to leave the UK.

The Judge's Findings

3. The judge considered the case for the Respondent, but there was no sufficient evidence to show that Mr Buckman does not have a primary care of Ethan-Joseph; that it was not credible that Mr Buckman would not assume care of Ethan-Joseph if the Appellant were to leave the UK; and that the Appellant had a bad immigration history, having been in the UK since 2007 unlawfully.

4. The judge held that the Appellant was a "truthful witness, because her evidence was consistent, and clearly in accordance with the realities of service life, particularly where it involves service outside the UK." The judge held that this was borne out by a letter dated 23rd January 2013, from Mr Buckman's unit welfare officer, which was contained in the Respondent's bundle (see paragraph 20). The judge held that the Appellant has remained in the UK with Ethan-Joseph while the father, Mr Buckman, has been committed to service abroad. Accordingly, "she is and always has been the primary carer of Ethan-Joseph" (paragraph 21). Since, "Ethan-Joseph has no other family in the UK, he would have to accompany the Appellant if she were removed" (paragraph 22). The judge held that the requirements of Regulation 15A(4A) were satisfied and the appeal must be allowed.

Grounds of Application

5. The grounds of application state that the judge was wrong to rely upon the letter of 23rd January 2013 from the Sponsor's welfare officer because this was about a year old before the hearing and it could not be said at the date of the hearing that the father of the child would not be present in the United Kingdom to look after the child.

6. On 2nd December 2014, permission to appeal was granted by the Tribunal.

Submissions

7. At the hearing before me on 14th January 2015, Miss Isherwood, appearing on behalf of the Respondent Secretary of State, stated that one had to start with the refusal letter because this set out the lack of evidence which had led the Secretary of State to refuse the application. This was exactly the same position before the judge at the time of the hearing. The following points had been made.

8. First, that any unwillingness to assume care responsibility (in the case for example, of the father, Mr Buckman, here) is not, by itself, sufficient for the claimed primary carer to assert that another direct relative or guardian is unable to care for the British citizen.

9. Second, to be considered the primary carer would require submission of evidence to show that the child lives with the primary carer or spends the majority of the time with the primary carer and that the primary carer is financially responsible for the child. The Appellant had provided a letter from the Queen's Road Partnership to indicate that she was registered at that surgery, but this did not show that she was financially responsible for the child.

10. Third, if the Appellant wished for the Home Office to consider an application on the basis of paragraph 276ADE of Appendix FM, and the right to family life, a separate child application should be made using the appropriate specified application form (FLRM).

11. Fourth, the Appellant had not made a valid application for Article 8 consideration and so consideration had not been given to whether her removal from the UK would breach Article 8. In addition to this, Miss Isherwood submitted that the hearing was in June 2014 and yet the Appellant's own witness statement had made the point that Mr Buckman was going to be back from Germany within the jurisdiction by June 2014. If that was the case then she could not point to "primary care" being with her. Miss Isherwood accepted that the Immigration Act 2014 did not come into effect until 28th July 2014. Given that the hearing before the judge was on 5th June 2014, arguments with respect to Section 117B could not be made before the judge.

12. For his part, Mr Akohene submitted that paragraph 20 of the determination sees a reference by the judge to the letter of 23rd January 2013 from Mr Buckman's unit welfare officer. There is no logical reason why this letter could not be relied upon. It is not as if one could say that circumstances had changed and a further letter was required from the unit welfare officer addressing the changed circumstances. The Appellant's circumstances remained the same. The letter remained good. The judge properly took it into account. He made his findings on that basis. The judge then heard oral evidence. He concluded that, "I am satisfied that the Appellant is a truthful witness ..." As a serving army soldier the Sponsor, Mr Buckman, was liable to be posted anywhere in the world, and

if he were to be so posted, he would clearly be outside the jurisdiction, and in no position to look after the child.

13. In reply, Miss Isherwood submitted that there was no evidence presented that the child's father would be posted elsewhere at short notice. If one looked at B1, it is clear from this that the army policy is to protect the right to family life and to acknowledge that soldiers have a right to such life. The army would have been sensitive to this.

No Error of Law

14. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision. There is a fundamental misconception about this appeal. It is one thing to say that a family member has "primary care" (as the Rules require to be demonstrated in Regulation 14A(4A) of the EEA Regulations). It is quite another to say that one or the other parent has legal custody. It is also quite another thing to say that the parents enjoy a "shared responsibility." The arguments put forward by the Respondent confuse this distinction.

15. The child's father, Mr Buckman, may well be in a legal position of loco parentis with Ethan-Joseph Buckman. This is not say, however, that Mr Buckman has "primary care" of this child. The child, Ethan-Joseph Buckman, is 2 years of age. There is no evidence that he has been living anywhere other than with his mother. In the ordinary course of things, such a child would be given "primary care" by the mother, and this was the evidence before the judge, who found the Appellant to be a "truthful witness." Whether or not Mr Buckman was able to come into and go out of the United Kingdom as a serving British Army soldier has nothing to do with where "primary care" lies. The judge found it to lie with the Appellant.

16. On the evidence, he was plainly entitled to so conclude. The Respondent's case, as highlighted by the judge in the determination all too clearly, "it was submitted that there was no sufficient evidence to show that Mr Buckman does not have primary care of Ethan-Joseph" is, accordingly, misconceived. The judge was entitled to reject it as he did. His conclusion was that, "because Ethan-Joseph has no other family in the UK, he would have to accompany the Appellant if she were removed" (paragraph 22). It is not possible to say that that conclusion was not open to the judge.

Decision

17. There is no material error of law in the original judge's decision. The determination shall stand.

18. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st January 2015