



IAC-AH-DN-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/09817/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 7th October 2015**

**Decision & Reasons Promulgated
On 21st October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS THI THANH TUYEN NGUYEN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Imamovic, Counsel

For the Respondent: Miss C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Vietnam born on 24th January 1983. On 7th September 2007 the Appellant was issued with a residence card valid until 7th September 2012. On 9th December 2011 the Appellant applied for a permanent residence card and the application was rejected on 29th May 2012. On 5th September 2012 the Appellant applied for a permanent residence card as the former spouse of an EEA national and for a derivative residence card as the primary carer of a British citizen.

2. The Appellant appears to have been subject to two Notices of Refusal arising thereafter. On 5th September 2013 her application for permanent residence on the basis of being a non-EEA national who has retained a right of residence after the termination of her marriage to Pascal Bounaud was refused as was the Appellant's application pursuant to Article 8 of the European Convention of Human Rights. By supplementary Notice of Refusal it was recorded that the Appellant had appealed the decision dated 2nd September 2013 to refuse her application and the appeal was withdrawn prior to being heard by the Secretary of State to give consideration to Regulation 18A, Article 8 of the European Convention on Human Rights and because the child's father had provided evidence that he is not, and will not be, the child's primary carer.
3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Edwards on 30th June 2014. In a determination promulgated on 4th July 2014 the Appellant's appeal was dismissed both under the EEA Regulations and under the Human Rights Act.
4. On 15th July 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 3rd September 2014 First-tier Tribunal Judge Andrew granted permission to appeal. Judge Andrew noted that the grounds complained that the judge did not take notes of all the evidence that was before him when reaching his conclusions. In his findings the judge made no reference to the documents in the Appellant's bundle and thus it was not apparent whether or not he attached any weight to them in reaching his findings. In such circumstances he was satisfied there was an arguable error of law in the determination.
5. On 15th September 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response notes that the judge referred to the documents before him under the heading "material considered at paragraph 5." They contend that it was clear that the judge had the Appellant's bundle and further that the judge had noted that the bundle was chaotic which indicated that he must have considered it to have formed that view. The Rule 24 response contended that the judge was not obliged to list or refer to every document before him and that he had given clear reasons for finding that the Appellant did not discharge the burden of proof.
6. It was on that basis that the appeal came before me to determine whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. Thereafter I made the following findings. In order to qualify for a right to reside under the judgment of the European Court in *Ruiz Zambrano* (C34/09) the Appellant must demonstrate:-
 - (a) that he or she is the primary carer of a British citizen;
 - (b) that the relevant British citizen is resident in the United Kingdom; and
 - (c) the relevant British citizen would be unable to reside in the UK or in another EE state if the Appellant were required to leave.

7. The definition of primary carer is set out under Regulation 15A(7). The question arises as to whether or not as a matter of fact or law the judge has addressed this point. Witness statements were available but the judge chose allegedly not to refer to all of the evidence. It is incumbent upon a judge to give due consideration to all the evidence even if it is only read through consideration in the event that a witness fails to attend court. Neither of the legal representatives who appeared before me on the error of law hearing appeared before the First-tier Tribunal. It is difficult to ascertain what weight, if any, the First-tier Tribunal Judge gave in such circumstances to the witness evidence. His determination centres on three short paragraphs and does not address any alternative witness evidence. As to whether that evidence would or would not have been material remained a matter of conjecture.
8. However much was made of the manner in which the First-tier Tribunal Judge has or has not addressed the issue relating to Mr Hoang's letter. Whilst the judge was perfectly entitled to make findings as to his impression of the Appellant's evidence I was satisfied that he misinterpreted factually Mr Hoang's letter. He stated therein that Mr Hoang's role was minimised by the evidence of the Appellant. That is not consistent with what Mr Hoang stated in his letter. He stated:

"Amy's mother has looked after her since birth and has the sole responsibility for her. Nguyen lives in Manchester and has her own business there. She has solely been responsible for Amy's welfare and upbringing without any input from me. Due to the fact that we are not in a relationship and I live in London where I work, I am unable to share any parental responsibilities with Nguyen or look after Amy without her mother."
9. These are very clear, and seemingly, open and honest statements from Amy's father. They certainly do not sit well with the finding made by the First-tier Tribunal Judge at paragraph 24 that "the Appellant has not discharged the onus on her to establish that she has the primary responsibility for Amy's care." It is completely incumbent upon an Immigration Judge as set out in *MK (Duty to Give Reasons) (Pakistan) [2013] UKUT 641 (IAC)* that it is axiomatic that a determination discloses clearly the reasons for a Tribunal decision. If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.
10. That scenario it seemed to me occurred in this determination. Whilst acknowledging that the First-tier Tribunal Judge heard the evidence I was satisfied he failed to give adequate reasons for his decision which was based on three very short paragraphs. He was right in saying that it is a requirement of the Appellant to place credible evidence before him and for her to discharge the burden of proof. In all the circumstances it seemed that it was possible that there may well be clear evidence available that the Appellant meets the requirements of paragraph 15 of the 2006 Regulations but that is a matter for further argument. There was clearly a material error of law in such circumstances in the reasoning and finding of the First-tier

Tribunal Judge. Bearing in mind that the issue of Article 8 has already been conceded it seemed to me that the best and most just method of proceeding with this matter was to find material errors of law in the decision of the First-tier Tribunal Judge both with regard to his conclusions under the EEA Regulations and pursuant to Article 8 of the European Convention of Human Rights and to set aside the decision on both grounds and for me to proceed to re-hear the appeal.

11. I handed down directions re-listing the matter for re-hearing pursuant to the Appellant's appeal under the EEA Regulations 2006 and Article 8 of the European Convention on Human Rights reserved to myself on the first available date after 1st April 2015 with an estimated length of hearing of three hours. I granted leave to either party to file an up-to-date bundle of evidence, skeleton arguments and authorities upon which they intended to rely.
12. It is on that basis that the appeal returns before me for re-hearing. The Appellant appears by her instructed Counsel, Miss Imamovic. The Secretary of State appears by her Home Office Presenting Officer, Miss Johnstone. There are up-to-date bundles served in accordance with my directions from the Appellant's legal representatives. Miss Imamovic provides me with a skeleton argument and up-to-date bundles including a further witness statement from the Appellant dated 7th October 2015. I am also particularly referred to the European Operational Team's Directive on derivative rights of residence issued in December 2012 and by Miss Johnstone to Appendix FM of the Immigration Rules in particular Section E-LTRPT.
13. There is one preliminary issue. Back in January I granted permission to appeal both under the EEA Regulations and pursuant to the European Convention on Human Rights. Subsequent to that finding the Upper Tribunal ruled in *Amirteymour and Others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC) that where no notice under Section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an Appellant cannot bring a human rights challenge to removal in an appeal under the EEA Regulations. Miss Imamovic concedes that position and advises that the appeal therefore that is extant before me is solely one relating to the Appellant's appeal pursuant to the EEA Regulations and that the appeal pursuant to Article 8 of the European Convention on Human Rights is abandoned.

Evidence

14. The Appellant relies on the evidence given before the First-tier Tribunal and in addition her witness statement dated 7th October 2015. The Appellant states that she arrived in the United Kingdom legally from France on 29th May 2004 along with her ex-husband who was a French national. However in 2008 her ex-husband left the UK in order to see his mother in France and never came back and despite several attempts the Appellant was unable to contact him. The Appellant started her own business as a nail technician in or about 2011. Prior to that she had entered a relationship with a British citizen Mr Huy Quang Hoang. As a result of a relationship between them the Appellant's daughter Amy was born on 24th May

2010. However her relationship with Mr Hoang was not sustained and since her birth Amy has lived with the Appellant in Manchester while her father lives and works in London. She contends that she has had sole parental responsibility for the child and that Amy's father has had very few contacts with her and has never provided any financial or moral support.

15. In additional evidence-in-chief the Appellant advises that at the birth of Amy two friends and an interpreter were present but not Amy's father and that since her birth Mr Hoang has only seen Amy on a few occasions and that he has never been left alone with her. She emphasises that the last time there was any contact between Amy and her father was two years ago and that it has been Mr Hoang's choice rather than her own for there to be no contact maintained. She states that she has heard via friends that his life has changed in that he has a new family and a new life.
16. She advises that she set up her own business as a nail technician because she wanted to create a future for herself and her child and that she was responsible for registering Amy with the authorities and for the obtaining of her NHS medical card. Further she has arranged for Amy to be baptised because she is a member of the Catholic faith. She refers to evidence produced within the bundle relating to her daughter's registration with the NHS and her baptism. In addition she states that she has set up a trust fund for Amy and that she saved money to put into this account.
17. The Appellant is referred to the letter from Mr Hoang from September 2013 with regard to contact. The Appellant acknowledges that letter and states that she has tried to make efforts for contact to be arranged by contacting Mr Hoang's place of employment but that she was unable to speak to him because his employer said he was not there. Further she has left a message on his last known contact number but he has not responded. She emphasises that she has not spoken to Amy's father for over two years and that it was through friends of hers she was advised that he has a new family. She emphasises that Mr Hoang knows where she lives and that it is open to him to contact her should he seek to have contact but again emphasises that all contact that had ever taken place with Amy has been supervised.
18. Under cross-examination the Appellant confirms that she has never approached the CSA and that she does not claim tax credit or any benefits other than child benefit and that the reason that she does this is that she prefers to support herself and her daughter. She advises that she has an income in the region of £1,200 to £1,300 a month and that she lives in rented accommodation. She confirms that she speaks to Amy in Vietnamese but she also speaks to her in English and that Amy attends school where the language spoken is English. She advises that she has taken an English language course albeit only to level 1 and refers to the certificate relating to same to be found within her bundle.
19. Miss Johnstone makes reference in cross-examination to an alternative route that the Appellant could take for immigration status pursuant to Appendix FM of the Immigration Rules by making an application for leave to remain as a parent of a

British citizen. It is clear from the response given by the Appellant that she is unaware of this route and that the advice given to her as to how she should make her application has come from her legal representatives.

Submission/Discussion

20. It is Miss Johnstone's submission that the Notices of Refusal be considered and that the Appellant has not shown that Amy would have to leave the UK if the Appellant were required to leave and she relies on the letter from Amy's father from 2013. Further she acknowledges that the Appellant has given additional oral testimony today but states that there is little documentary evidence to support most of those contentions. She further emphasises that it would still be open to the Appellant to apply as a parent under Appendix FM of the Immigration Rules. She asked me to dismiss the appeal.
21. Miss Imamovic relies on her skeleton argument pointing out that the questions to be asked are whether or not the Appellant is the primary carer and if so would depriving her of her residence card require Amy to leave the UK. She submits that there has been sufficient evidence to show that responsibility is not shared pointing out that Amy has resided with her mother since birth, that the Appellant takes the major decisions in Amy's life and that she is even investing from her low income in Amy's future and that all the indications are the Appellant is Amy's primary carer. She points out that Amy's father now appears to have no contact whatsoever and that it would be wrong to deprive the Appellant of her residence card and invite her to leave particularly bearing in mind the lack of contact and that Amy's father has never had any care and control of Amy. She points out that it appears that Mr Hoang is both unable and unwilling to assist the Appellant and there is nothing before the Tribunal to suggest that the Appellant's testimony is not credible. She submits that the Appellant has given a reasonable explanation of her attempts to contact Amy's father and that the appeal should be allowed.

The Law

22. The Appellant's claim is based on paragraph 15A of the EEA Regulations 2006 which stipulates when a person who is not an exempt person is entitled to a derivative right to reside in the UK as long as they satisfy the relevant criteria. The relevant paragraphs herein are paragraph (4A) namely that a person satisfies the criteria in this paragraph if:
 - (a) the person is the primary carer of a 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 EE state if the person were required to leave.

Further under Regulation 15A(7)(a)(b)(i) a person is to be regarded as a primary carer if the person is a direct relative or legal guardian of that person and is the person who has primary responsibility for that person's care.

Findings

23. I am invited by Miss Imamovic to find that the Appellant is the primary carer of Amy who is an EEA child pursuant to Regulations 15A(4A) and 15A(7)(a)(b)(i). She emphasises that the Appellant does not share the responsibility with the EEA child's father. I have heard the evidence and I am totally satisfied that the Appellant is the primary carer of Amy and that there is no shared responsibility with Amy's father. Indeed Amy's father appears not to have any involvement with his daughter. I acknowledge that new oral testimony in addition to that in the Appellant's witness statement has been provided at this hearing. It is however wrong of Miss Johnstone to state that such evidence is totally uncorroborated particularly with regard to Amy's registration with the NHS and her baptism both of which have supportive documentary evidence provided within the Appellant's instructed solicitor's bundle.
24. I have given due consideration to the European Operational Policy Guidance set out at paragraphs 18 and 19. Further there is nothing to suggest that the testimony provided by the Appellant is not credible. Her credibility has not been challenged by Miss Johnstone albeit Miss Johnstone has quite properly pointed out that the new evidence produced should be given limited weight due to its lateness and lack of corroboration. However that is not to say that the Appellant is not credible. She has given reasonable explanations and it is difficult not to be impressed with this Appellant. She does not claim any form of working tax credit (albeit that it may well be on her income she is entitled to), she makes savings through a trust account for her daughter and it is clear that she is working hard as a self-employed nail technician with every intention of devoting seemingly her whole life to supporting her daughter and giving her a better future. She is equally clear that Amy's natural father has had no contact for over two years and even then that contact was supervised. It does not sit well for the Secretary of State to try and rely on a letter over two years old indicating that Mr Hoang would like to be in a position to play a part of Amy's life. The facts seem to state quite clearly that he does not do so.
25. It would be difficult in such circumstances to find a case where there is not clearer evidence that the Appellant is the primary carer. Amy's father neither contributes financially, physically or emotionally to Amy's upbringing. It is appropriate to mention the submission made by Miss Johnstone that it would be open under Section E-LTRPT of Appendix FM for the Appellant to apply for limited leave to remain as a parent of a British citizen. As Miss Imamovic points out that is true albeit that it would be necessary to meet the criteria therein. That does not mean that the Appellant has to do so. She has chosen, almost certainly on the advice of legal representatives, to go down the route of seeking a permanent residence card as the former spouse of an EEA national and for a derivative residence card as the primary carer of a British citizen. That is an option the Regulations allow her to follow. She cannot be criticised for so doing.
26. In all the circumstances and for all the reasons given above I am completely satisfied that this is an Appellant who meets the requirements of Regulation 15A of the 2006 Regulations and is the primary carer of Amy who is a British citizen who resides in

the UK and who would be unable to reside in the UK or in another EEA state if the Appellant were required to leave. Therefore for all the above reasons the Appellant's appeal must succeed.

Decision

The Appellant's appeal under the Immigration (European Economic Area) Regulations 2006 is allowed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT

FEE AWARD

No application has been made for a fee award nor is any fee award made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris