Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/10404/2014**

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**
On 4 December 2014 **On 23 June 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

N K N
(Anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: The Appellant in person.
For the Respondent: Mr. S. Whitwell, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Trevaskis promulgated on 19 September 2014, dismissing the Appellant's appeal against a decision dated 10 February 2014 to refuse to issue her with a Residence Card as confirmation of a derivative right of residence.

Background

2. The Appellant is a national of Uganda: her personal details are a matter of record on file and are not reproduced here in keeping with the anonymity order that has been made in these proceedings. She entered the UK on 7 November 2007 with limited leave as a student. Further leave to remain as a Tier 4 student was granted on 14 December 2009 valid until 15 August 2010. The Appellant applied for further leave as a dependent spouse on 11 February 2010, but her application was refused with no right of appeal on 15 January 2011. On 21 June 2013 the Appellant applied for a 'derivative residence card' as the primary carer of a British Citizen resident in the UK. The application was based on the Appellant's care for her daughter IB (d.o.b. 16/10/2012).

3. The application was refused on 10 February 2014 for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date, with reference to regulations 15A(4A)(c), 15A(7) and 18A of the Immigration (European Economic Area Regulations 2006, and a Notice of Immigration Decision was issued accordingly.

4. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the appeal under both the EEA Regulations and Article 8 of the ECHR for reasons set out in his determination,

5. The Appellant sought permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Colyer on 5 November 2014.

Consideration

6. Before addressing the substance of the grounds upon which permission to appeal has been granted, for completeness I make brief mention of the circumstances of the Appellant's non-attendance before the First-tier Tribunal. As observed by Judge Colyer, in the Notice of Appeal that was faxed to the Tribunal it is unclear as to whether the Appellant was electing for an oral hearing before the First-tier Tribunal or a consideration of her case 'on the papers'. The Grounds in support of the application for permission to appeal make it clear that the Appellant had wanted her case dealt with on the papers. In the event, the appeal was listed for an oral hearing, and Notice of Hearing duly issued. Notwithstanding the issuing of a Notice of Hearing the Appellant – perhaps understandably in circumstances where she had not wanted to attend in the first place – did not attend. The First-tier Tribunal Judge comments on this and gives consideration to whether or not to proceed in the absence of the Appellant at paragraph 10 of his decision. The Grounds in support of the application for permission to appeal seek to suggest that the Judge's misunderstanding as to the Appellant's intentions may have worked a prejudice against the Appellant (Grounds at paragraph 1). Having carefully considered the content of the Judge's

decision I can find no evidence that any adverse inference was drawn from the Appellant seeming – in the Judge's eyes – failure to attend. It is to be noted that the Appellant effectively had what she wanted: a determination on the papers, there being no oral evidence heard before the First-tier Tribunal. In any event Judge Colyer did not grant permission to appeal on this point, and it was not pursued any further before me.

7. As regards the substance of the case, I turn first to a consideration in respect of the EEA Regulations.

8. The First-tier Tribunal Judge made findings at paragraph 15 in respect of IB's father's involvement in her life, and concluded that he was "*not satisfied that he is not exercising primary responsibility for her care in the wider sense of that word*". In this context it is noted that in the Respondent's decision letter the father's nationality was identified as British, and he was "*thus an exempt person*" (i.e. pursuant to regulation 15A(6)(c)). That being so, the Judge's findings were such that the Appellant did not meet the definition of a 'primary carer' under regulation 15A(7). In such circumstances she could not meet the criteria of regulation 15A(4A), which requires the applicant to be "*the primary carer of a British citizen*" (15A(4A)(a)).

9. Moreover, at paragraph 16 the Judge made findings to the effect that "*the Appellant has failed to discharge the burden of proof... that [IB's father] is unable to assume care responsibility for [IB]*". This was in effect to uphold the Respondent's decision in respect of regulation 15A(4A)(c) – "*the relevant British citizen would be unable to reside in the UK or in another EEA State if [the applicant] were required to leave*".

10. The challenge to these findings and conclusions in the Grounds in support of the application for permission to appeal – upon which the Appellant placed reliance before me – is limited. It is pleaded that the Judge made an "*assumption*" as to the extent of the father's responsibility. In my judgement the First-tier Tribunal Judge made an assessment on the available evidence, and reached a conclusion in respect of which she stated clear and adequate reasons.

11. In all the circumstances I find nothing of substance in the challenge, and otherwise no basis to impugn the Judge's findings of primary fact, or her application of those findings to the Regulations. No error of law is disclosed in respect of the decision under the EEA Regulations, and accordingly the decision stands.

12. The First-tier Tribunal Judge went on to consider Article 8 of the ECHR (paragraphs 19–34). In my judgement it was entirely unnecessary for the Judge to do so: as she identified at paragraph 19 of the decision the Appellant had made no application under the Immigration Rules (i.e. no application by reference to Appendix FM or paragraph 276ADE), and moreover 'human rights' grounds were not raised in the Notice of Appeal. I return to these circumstances below.

13. However, having embarked upon an evaluation of Article 8, it seems to me that the Judge fell into error. In particular, there is an unresolved inconsistency between the premise of the decision under the EEA Regulations that IB could remain in the UK with her father (which the Judge takes forward to the first and second **Razgar** questions at paragraph 24 of her decision), and the premise of the Judge's proportionality evaluation where matters are evaluated on the assumption that IB will not remain in the UK but will accompany the Appellant upon her removal. Moreover, there is an inconsistency between the Respondent's own acknowledged position as indicated in the case of **Sanade [2012] UKUT 00048 (IAC)** where it was acknowledged that a British citizen child could not reasonably be expected to relocate outside the European Union, and the Judge's observation at paragraph 30(x) that "*it would be reasonable to expect the Appellant's children to leave the United Kingdom…*", repeated in similar terms at paragraph 33 – "*I find that, although IB is a British citizen, it would be reasonable to expect her to leave the United Kingdom with the appellant, because I have found that her best interests will be served by remaining with her mother*". This last quotation in itself suggests that the 'best interests' evaluation has failed to take into account the interests of IB in being able to take advantage of the circumstance of her British nationality.

14. In my judgement the unresolved tensions and inconsistencies in this context are such as to constitute an error of law on the basis of inadequacy of reasoning. This requires that the First-tier Tribunal's decision in respect of Article 8 be set aside.

15. I have considered the appropriateness of remaking the decision in respect of Article 8. As the First-tier Tribunal Judge noted, the Appellant had made no application under the Immigration Rules or otherwise in respect of Article 8, and had not pleaded Article 8 in her Notice of Appeal to the First-tier Tribunal. Nor is it apparent that any issue in respect of Article 8 was otherwise overtly raised before the First-tier Tribunal. For example, in this context, the Judge observes at paragraph 23 of the decision "*The Appellant has not provided any evidence of having established a private life in the United Kingdom*". Yet further, in respect of IB and the Appellant's other non-British citizen children, there were no express materials filed relevant to an evaluation of any of their best interests.

16. It is to be noted that the Respondent informed the Appellant of the procedures for making an application based on family or private life in the decision letter of 10 February 2014. The Appellant, to date, has elected not to make any such application, and also elected not to raise any Article 8 grounds or advance any relevant Article 8 materials or arguments before the First-tier Tribunal.

17. Were the Tribunal now to embark upon an Article 8 assessment, not only would it be doing so as a decision-maker of first instance rather than as an appellate authority, it would be necessary to issue Directions for the filing of further evidence in respect of the Appellant's private life and more particularly in respect of the best interest of her children. In circumstances where Article 8 has not been expressly pleaded, in my judgement this would be an inappropriate use of the resources of the Tribunal. On the particular facts here, the better procedure if the Appellant wishes to have her and her children's human rights under Article 8 (or indeed otherwise) assessed, is in the first instance for her to make an appropriate application to the Respondent.

18. There is no express application before me to amend the Grounds of Appeal submitted with the Notice of Appeal to the First-tier Tribunal, and nothing has been raised by way of a statement of additional grounds pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002. In so far as such an application might be implied by reason of the Grounds of appeal in support of the application for permission to appeal – which in my judgement in any event do no more than opportunistically 'pick up on' the Judge's own unnecessary consideration of Article 8 – I refuse such an application.

19. Accordingly, although the decision of the First-tier Tribunal in respect of Article 8 is set aside, I find that no Article 8 issues have been duly and properly raised before the Tribunal and accordingly it is not necessary to reach any decision on Article 8.

20. The overall effect is that the Appellant's appeal is dismissed under the EEA Regulations. No other decision is taken in the appeal.

21. It remains open to the Appellant to apply to the Respondent if she wishes Article 8 to be considered.

Notice of Decision

22. The decision of the First-tier Tribunal Judge in respect of Article 8 involved a material error of law and is set aside in that regard. However, no new decision is made in respect of Article 8, it not having been formally raised as a Ground of Appeal.

23. The decision of the First-tier Tribunal Judge in respect of the EEA Regulations involved no error of law and stands.

24. The appeal remains dismissed on EEA grounds.

Deputy Judge of the Upper Tribunal I. A. Lewis 17 June 2015