



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

Appeal Numbers: IA/10550/2014

THE IMMIGRATION ACTS

Heard at Field House

On 5 January 2015

Determination

Promulgated

On 21 January 2015

Before

UPPER TRIBUNAL JUDGE LATTER

Between

SR

(Anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal, instructed by Burney Legal Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant, a citizen of Pakistan born on 19 September 1987, against a decision of the First-tier Tribunal dismissing her appeal against the respondent's decision made on 10 February 2014 refusing her application for a derivative residence card as the primary carer of her British child born on 17 July 2011. In the light of the fact that it is clear from the papers before me that there have been proceedings before the Family Court about the appellant's daughter. I make an order

under rule 14(1) of the Upper Tribunal (Procedure Rules) 2008 prohibiting the disclosure or publication of any information relating to the proceedings or any matter leading members of the public to identify the appellant's child. Failure to comply with this order may lead to contempt proceedings.

Background

2. In brief outline the background to this appeal is that the appellant entered the UK with leave as a student on 12 December 2009 and this was extended on two occasions to 11 April 2014. On 17 April 2013 she applied for a derivative right of residence as the primary carer of her child who she claimed was a British national on the basis that his father had indefinite leave to remain in the UK at the time of her birth.
3. The appellant claimed that she was the sole carer of her daughter who was fully dependent on her. But her application was refused because she had submitted no evidence as to why the child's father was not in a position to care for her if the appellant was required to leave the UK. Further enquiries by the respondent revealed that the child's father had applied for naturalisation on 22 October 2013 and his ceremony was approved on 11 December 2013. The address he had given was the same address as given for the appellant on her application for the residence card. It was the respondent's view that this suggested that the child's father currently lived with the family and that there was insufficient evidence why he could not continue to do so and care for the child if the appellant was required to leave the UK. The full reasons for the respondent's decision are set out in the decision letter dated 10 February 2014.
4. The appellant appealed against this decision and at the hearing before the First-tier Tribunal she gave evidence that the relationship with her child's father had broken down and that he had divorced her in February 2012. She had formed a relationship with the landlord where she was living, they subsequently married and she was pregnant with his child. She also gave evidence about her former husband continuing to use the external mail box at her home.
5. At the hearing the presenting officer confirmed that the appellant's current husband had a human rights appeal outstanding and noted that he had submitted an affidavit which corroborated key aspects of the appellant's case [9].
6. The judge summarised his findings as follows:

"11. While I accept that the appellant is the primary carer of the British child and that the post box at her home is accessible from outside the building it was made clear in the refusal that the decision to refuse her derivative residence card did not require her or the child to leave the United Kingdom.

In these circumstances the appeal must fail. Further for the same reason her Article 8 rights are not engaged at this stage.

12. Her claim should be considered at the same time as her current husband's. At that hearing she may have to explain why her husband would go to the trouble of checking her mailbox for his mail rather than giving out his own arguably much more convenient address. Without such an explanation I find reason to doubt evidence that her ex-husband plays no role in the child's upbringing. I am also surprised that she did not bring the children to the hearing alternatively made no attempt to provide alternative childcare arrangements so that her current husband could attend the hearing."

The Grounds and Submission

7. In the grounds it is argued that the judge erred in law in that having found that the appellant was the primary carer of a British child he should then have concluded that she was entitled to a right of residence in the light of the provisions of para 15A of the Immigration (European Area) Regulations 2006 as amended. It is then argued that the only findings the judge made with respect to the child's biological father related to the evidence about him checking the mailbox but there was no reference to the Family Court proceedings. Further, it is argued that simply because the decision to refuse the application did not require the appellant or the child to leave the UK it did not follow that she was not entitled to an order and the judge was wrong in law not to deal with the appeal accordingly. The grounds also challenge the decision on Article 8 grounds.
8. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge had erred in law in basing his decision that the appellant was not entitled to derivative residence card on the fact that she and the child were not being required to leave the UK.
9. Ms Iqbal adopted the grounds maintaining the argument that having found that the appellant was the child's primary carer, the judge should have gone on to allow the appeal. However, she accepted in discussion during submissions that the judge had failed to deal adequately if at all with the issue of whether the child would be unable to reside in the UK or another EU State if the appellant was required to leave. Mr Tarlow conceded that the judge had erred in law in the way he had dealt with the appeal in [11] on the basis that regardless of whether the decision required her to leave the UK, she was still entitled to a decision on her application under the regulations.

The Error of Law

10. I am satisfied that the judge did err in law by dismissing the application under the regulations for a derivative residence card simply on the basis that the decision did not require the appellant or her child to leave the UK. That might well be a proper reason for not considering the separate

appeal under Article 8 but it is not a justification for failing to make a finding on whether the relevant requirements of the regulations relating to derivative rights of residence were met.

11. The judge commented in his decision that the appellant's claim should be considered at the same time as her current husband's. On that basis, the proper course in these circumstances would have been for the appeal to be adjourned so that it could be heard with an appeal by her husband.
12. For the avoidance of doubt, I do not accept the submission that having found that the appellant was the child's primary carer it followed that the appellant could meet the requirements of the regulations. The onus was on the appellant to show that her child would be unable to reside in the UK or another EEA State if she were required to leave: para 15A (4a)(c). It is clear from the judge's decision that he had very considerable concerns about the role the child's father played in her life and whether and to what extent he had contact. However, he made no findings on those matters and did not address the issue of whether he would be able to provide the relevant care were the appellant to have to leave the UK.
13. I am satisfied that these errors of law are such that the decision should be set aside. Both Ms Iqbal and Mr Tarlow agreed that the appeal should be remitted to the First-tier Tribunal for the decision to be re-made afresh by a different judge. I agree that this is the proper course and the appeal will be remitted accordingly for a full rehearing.

Decision

14. The First-tier Tribunal erred in law and the decision is set aside. The appeal is remitted to the First-tier Tribunal for the decision to be re-made afresh. An anonymity order is made as set out in paragraph 1 above.

Signed

Date 20 January 2015

Upper Tribunal Judge Latta