IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24627/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th June 2015	**On 6th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

F O
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs P Glass of Counsel instructed by Ronik Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal JDL Edwards (the Judge) promulgated on 12th February 2015.

2. The Appellant is a female citizen of Ghana born in May 1976 who applied for a derivative residence card to enable her to continue to reside in the United Kingdom

as the parent of a British child. The Appellant has a daughter to whom I shall refer as J, who was born in the United Kingdom on 5th September 2008. J is a British citizen because her father, GK, is a British citizen.

3. The application was refused on 29th May 2014. The Respondent considered the Immigration (European Economic Area) Regulations 2006, and the application was refused with reference to regulation 15A(4A)(c) as it was not accepted that J would have to leave the United Kingdom if the Appellant had to leave. The Respondent contended that GK would be able to assume primary responsibility for the child, and therefore J could live with her father if the Appellant had to return to Ghana. The Respondent did not accept that the appeal could succeed under the 2006 regulations.

4. It was noted that the Appellant wished, in addition, to rely upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) but the Respondent declined to consider this, on the basis that the Appellant had not made a valid application based upon Article 8.

5. The appeal was heard by the Judge on 9th February 2015 and dismissed under the 2006 regulations and the Judge found that Article 8 was not engaged as there was no suggestion that the Appellant should be removed from the United Kingdom.

6. The Appellant was granted permission to appeal to the Upper Tribunal and the appeal came before me on 22nd May 2015. In brief summary I found that the Judge had erred in law. The Judge did not make findings on all material matters, and made findings on some immaterial matters. The findings were brief and did not adequately analyse and make findings upon the relevant issues in the appeal. The Judge found that the Appellant had failed to provide sufficient credible evidence to discharge the burden of proof, but no adequate reasons were given for reaching that conclusion. The Judge had recorded at paragraph 21 of his decision that none of the documentation from J's school named either of her parents, but that was factually inaccurate. A letter from the school dated 29th January 2015 specifically referred to the Appellant, and confirmed that she attended school meetings and collected her daughter from school, and this was contained at page 18 of the Appellant's bundle which was before the First-tier Tribunal.

7. The decision of the First-tier Tribunal was set aside with no findings preserved. Full details of the application for permission, the grant of permission by Judge Lever, and my reasons for finding an error of law are contained in my decision dated 26th May 2015. The hearing on 22nd May 2015 was adjourned so that further evidence could be given.

Re-Making the Decision

Preliminary Issues

8. I ascertained that I had received all documentation upon which the parties intended to rely. I had the Respondent's bundle with Annexes A-K, the Appellant's bundle

comprising 106 pages, a witness statement prepared by the Appellant's aunt Mrs O dated 28th May 2015, and the Appellant's skeleton argument prepared by Mrs Glass.

9. Mrs Glass confirmed that the Appellant's case was that the appeal should be allowed with reference to the 2006 regulations, but if not, the Appellant relied upon Article 8, and in considering proportionality, the best interests of the child must be a primary consideration.

10. Ms Everett advised that the Respondent's position was that Article 8 was not engaged as this was an application for a residence card, and there was no removal decision.

11. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

12. I firstly heard evidence from the Appellant in English. There was no need for an interpreter. The Appellant adopted the contents of her witness statement dated 28th January 2015 which may be summarised as follows.

13. The Appellant is the biological mother of J, and she is a single parent. J is a British national who was born in the United Kingdom on 5th September 2008.

14. J's father, GK, and the Appellant did not marry. The Appellant and J were abandoned by GK and he has played no part in J's upbringing.

15. In 2011 the Appellant arranged through mutual friends to meet GK to ask him for financial support. She met him again in 2013 to ask him to make an application for child benefit for his daughter. The Appellant understood that she could not obtain child benefit as she did not have any legal immigration status in the United Kingdom. She had entered this country as a visitor and overstayed.

16. An arrangement was made that GK received child benefit payments into his bank account, and he then transferred money into the Appellant's account. This is the only link that the Appellant and J have with him. The Appellant does not have a telephone contact number for him.

17. The Appellant believes that GK receives £83 per month by way of child benefit, but he transfers less than this to her bank account, thereby keeping some of the benefit for himself. He makes no personal financial contribution towards the upkeep of his daughter.

18. The Appellant and J live with the Appellant's aunt, and the Appellant is the only person who takes decisions about her daughter's health, maintenance and welfare. She collects her daughter and picks her up from school, and the only other person who plays any role in this, is the Appellant's aunt.

19. Other than brief meetings with her daughter's father in 2011 and 2013, the Appellant and her daughter have had no contact with him since he attended to register his daughter's birth in 2008.

20. In answering questions put by Mrs Glass the Appellant confirmed that GK has no involvement in his daughter's upbringing. They have never lived together as a family. The Appellant and J live in a property owned by the Appellant's aunt. GK has never lived there.

21. When cross-examined the Appellant stated that she understood she had no right to apply for child benefit for her daughter, because of her lack of legal immigration status. The Appellant does not know where GK lives and has no contact with him.

22. I then heard evidence from Mrs O the Appellant's aunt who adopted her witness statement dated 28th May 2015 which may be summarised as follows.

23. Mrs O is a British national and lives with her niece, the Appellant, and the Appellant's daughter J. Mrs O confirmed that J's father has not been in contact with his daughter. It is the Appellant who cares for all her daughter's essential needs, which includes material and emotional needs, and taking her to and from school and attending parents' and teachers' meetings at school.

24. In answering questions put by Mrs Glass, Mrs O confirmed that J's father had never lived with the Appellant and J to her knowledge. The only people who pick J up from school are the Appellant and Mrs O. She had never seen J's father play any role in her life.

25. When cross-examined Mrs O said that she had only seen J's father once, which is when they were going to register J's birth. Mrs O said that the Appellant and J had been living with her for approximately seven years.

The Respondent's Submissions

26. Ms Everett relied upon the reasons for refusal letter dated 29th May 2014. I was asked to find that J's father played a role in her life, as evidenced by the fact that he received child benefit for her, and thereafter transferred it to the Appellant. Ms Everett submitted that J's father could therefore look after her, if the Appellant had to leave the United Kingdom.

27. Ms Everett therefore argued that the appeal could not succeed with reference to the 2006 regulations, and as Article 8 was not engaged, the appeal should be dismissed.

The Appellant's Submissions

28. Mrs Glass relied upon her skeleton argument with the exception of the concluding paragraph which had been included in error. I was asked to accept the evidence given by both witnesses at the hearing as credible and to accept that J's father had played no part in her upbringing, and that his only involvement was to transfer some of the child benefit payments he received to the Appellant. I was asked to find that if

the Appellant had to leave the United Kingdom, J would not be able to remain and live with her father. I was asked to note that documentary evidence in the Appellant's bundle, contained letters from J's school, and medical letters, and none referred to or were addressed to GK. I was therefore asked to allow the appeal with reference to the 2006 regulations.

29. In the alternative, if the appeal was dismissed under those regulations, I was asked to consider Article 8 outside the Immigration Rules, and allow the appeal on the basis that it would be in the child's best interests to remain with her mother in the United Kingdom.

30. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

31. I have taken into account all the evidence, both oral and documentary, that has been placed before me, and taken into account the submissions made by both representatives.

32. I have considered the evidence in the round, and taken into account that when considering the 2006 regulations, the burden of proof is on the Appellant, and the standard of proof is a balance of probability.

33. I set out below regulation 15A(4A) of the 2006 regulations;

'(4A) P satisfies the criteria in this paragraph if –

(a) P is the primary carer of a British citizen ("the relevant 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 EEA State if P were required to leave.'

34. The Respondent refused the application, taking the view that the British citizen child would be able to continue to reside in the United Kingdom if her mother, the Appellant, were required to leave, because she could reside with her British citizen father GK.

35. It is common ground that GK is a British citizen, and because of this so is J.

36. Regulation 15A(4A)(7) defines "primary carer" as being a direct relative or legal guardian of a person, who has primary responsibility for that person's care, or shares equally the responsibility for that person's care with one other person who is not an exempt person. A British citizen is an exempt person.

37. I find that the Appellant is her daughter's primary carer. I am satisfied that they are related as mother and daughter, and the Appellant has primary responsibility for her daughter's care. I find that there is no satisfactory evidence that GK has had, or has, any responsibility for his daughter's care. I make this finding having placed weight upon the evidence of the Appellant, and her aunt Mrs O. In particular I accept Mrs

O's evidence, that the Appellant and her daughter have lived with her for approximately seven years, and in that time Mrs O has been GK only once.

38. I place weight upon a letter from J's school dated 29th January 2015, at page 18 of the Appellant's bundle. This refers to the Appellant by name, and is addressed to the Appellant's solicitors. The letter confirms that J attends the school, and is written by the interim principal, who confirms having spoken to the teaching staff who verified that the Appellant attends school meetings, and brings and collects J from school for approximately 90% of the time.

39. I accept Mrs O's evidence, that when J is not collected from school by the Appellant, it is Mrs O who collects her. I note that there are letters at pages 34-36 of the Appellant's bundle from J's school, which although addressed generally to parents and carers, have been signed by the Appellant giving permission for J to attend Saturday school and giving her name as the individual who will pick her up, and giving permission for J to attend dance club on Wednesdays after school and confirming that Mrs O will pick her up, and naming the Appellant as a member of the parent representative group at school.

40. I note that there is a letter from J's general practitioner dated 13th January 2015, confirming that J has been registered with the surgery since 5th September 2008, and referring to the Appellant by name as being her mother.

41. There is no documentary evidence which makes any reference to GK having any responsibility for J.

42. I note regulation 15A(8) which confirms that a person will not be regarded as having responsibility for another person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

43. I do not find that J's father has made a personal financial contribution towards her care. I am satisfied that his only involvement has been to pass on to the Appellant some of the child benefit received. I accept that the Appellant believes that she is not entitled to receive the child benefit directly, because she is an overstayer in this country with no legal status.

44. I therefore have decided that the Appellant is the primary carer of her daughter because of a combination of the evidence given by the Appellant and Mrs O, together with the documentary evidence referred to above.

45. I then have to decide whether J would be unable to reside in the UK or in another EEA State if the Appellant was required to leave this country. It has not been suggested that the Appellant has the right to live in any other EEA country. If she had to leave the United Kingdom, she would have to return to Ghana, where she is a citizen. In considering this issue I have taken into account the guidance given by the Upper Tribunal in MA and SM (Iran) [2013] UKUT 380 (IAC) at paragraph 41, in which conclusions reached by Hickinbottom J in Jamil Sanneh v (1) Secretary of State for Work and Pensions and (2) the Commissioners for Her Majesty's Revenue &

Customs [2013] EWHC 793 (Admin) were adopted. I set out below paragraph 41(ii) in part, together with paragraph 41(iii) and (iv);

'(ii) The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.

(iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.

(iv) Nothing less than such compulsion will engage Articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; although

(a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the relevant ascendant relative, and hence the EU dependent citizen, to leave, and

(b) such actions as removal or prevention of work may result in an interference with some other right, such as the right to respect for family life under Article 8 of the European Convention on Human Rights.'

46. Applying the guidance set out above, I have to decide whether J's father can and will in practice care for her, if the Appellant has to leave the United Kingdom, and this is a question of fact for me to decide on the evidence.

47. I conclude that J's father will not in practice care for her. I base this finding upon the fact that I have found that he has played no meaningful part in her upbringing, and has not accepted any responsibility for her since she was born, other than to transfer some of the child benefit that he receives to the Appellant.

48. I have found both the Appellant and Mrs O to be credible on this issue, and the totality of the evidence indicates that J's father has never lived in the same family unit with her, has had no meaningful contact with her, and I find that his refusal to take responsibility to date, indicates on a balance of probabilities that he would not be willing, and would not in practice, care for J in the absence of the Appellant.

49. For those reasons I find that the criteria set out in regulation 15A(4A) are satisfied, as the Appellant is the primary carer of a British citizen child, who is resident in the United Kingdom, and who in practice would be unable to reside in this country, if the Appellant had to leave.

50. As I conclude that the appeal should be allowed under the 2006 regulations, it is not necessary for me to go on and consider Article 8 as an alternative.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

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

Anonymity

I was not asked to make an anonymity order, but I make such an order because this appeal involves consideration of the interest of a minor child. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her family. Failure to comply with this direction could amount to a contempt of court. This order is made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date: 23rd June 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

Because the appeal is allowed I have considered whether to make a fee award. I take into account that the appeal has been allowed because of evidence presented to the Tribunal that was not initially presented to the decision maker. I find that it is not appropriate to make a fee award and no fee award is made.

Signed Date: 23rd June 2015

Deputy Upper Tribunal Judge M A Hall