IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26512/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th March 2015	**On 25th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS VALENTINA AHMATAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Lam (Counsel)
For the Respondent: Mr T Melvin (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge David Taylor, sitting in a panel with First-tier Tribunal Judge Manyarara, promulgated on 4th December 2014, following a hearing at Hatton Cross on 19th November 2014. In the determination, the judge allowed the appeal of Valentina Ahmataj. 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 female, a citizen of Albania, who was born on 23rd May 1990. She appealed against the decision of the Respondent dated 11th June 2014, refusing her application for a derivative residence card as a primary carer of a British citizen child born on 17th September 2013, by the name of Arli, to the Appellant herself. The refusal letter stated that the Appellant was unable to show that the child lived with her, or spent the majority of his time with her, and that the Appellant had the day-to-day decisions to make in regard to the child's health and education.

The Judge's Findings

3. The judge made the following findings (at paragraph 29). First, that the Appellant was the biological mother of this British citizen child, Arli. Second, that her husband was an exempt person as a result of having a right of abode in the UK. Third, that the Appellant was a primary carer of the child of the Sponsor and herself. Fourth, the Appellant's husband was working and remained with the child on a day-to-day basis. Fifth, the Appellant's husband worked from 8 a.m. to 7 p.m. during the summer time and 8 a.m. to 6 p.m. during the winter time, rendering it impossible for him to care for the child due to his work commitments. Sixth, that this led to the conclusion that the Appellant "who provides care for the child and, on the facts of this case, there is no one else who can care for the child". Seventh, that the removal of the Appellant from the United Kingdom would result in the child being required to leave the United Kingdom and the EEA area and that "this is because the British citizen is 1 year old and is clearly at an age where he is reliant on the Appellant. It is therefore unreasonable in the extreme to expect the Appellant to be separated from him" (paragraph 29). The appeal was allowed under the Regulations. Furthermore, with regard to Article 8, the panel heard that there were good grounds also for considering that the Appellant's case would succeed outside the Regulations. Furthermore, with respect to the "best interests of the child" it was further accepted that the Appellant would succeed on this basis as well.

Grounds of Application

4. The grounds of application state that in allowing the appeal the panel erred because it gave inadequate reasons for concluding that the Appellant was a primary carer of the child, rather than that the responsibility was shared between both parents, and for concluding that the child would be unable to remain in the United Kingdom if the Appellant were required to leave. Furthermore, the panel wrongly found that the Respondent had rejected the Appellant's claim under Appendix FM of paragraph 276ADE when those decisions had been made.

5. On 23rd January 2015, permission to appeal was granted.

6. On 5th March 2015, a Rule 24 response was entered by the Appellant's representative, Mr C Lam.

Submissions

7. At the hearing before me on 9th March 2015, Mr Melvin, appearing on behalf of the Respondent Secretary of State, submitted that the judge had failed to apply the requirements of Regulations 15A(7) of the 2006 Act. Second, the judge had wrongly concluded that the Appellant mother was the "primary carer" of the child, Arli. This is because the question of who is to be a primary carer was a question of choice between the mother and the father, and they had deliberately decided this by choosing that the mother would be the primary carer. The judge's conclusions were therefore inadequate and borderline irrational. There was no reason why the Sponsor could not return to the home country and make a fresh application to re-enter from there. Second, as far as Article 8 was concerned the Appellant could not succeed because Section 117B had to be applied and the proportionality exercise undertaken on the basis of the public interest considerations. It was clear that any analysis and evaluation of Article 8 had to be done through the prism of the Immigration Rules.

8. For his part, Mr Lam submitted that he would rely upon his Rule 24 response. He submitted that the judge had clearly given reasons in specific paragraphs under paragraph 29 setting out exactly why the mother was the primary carer. The main reason was that the Appellant's husband was in full-time self-employment. This was set out at paragraph 29(v). His hours of work were such that he would not be able to be the "primary carer" of the child. He was away for practically the whole of the daylight hours during the day working. The child, Arli, was born on 17th September 2013 and was now 1½ years old, and it was the Appellant's view that "it is unreasonable in the extreme to expect the Appellant to be separated from him" (paragraph 29(vii)). The judge had also been correct as to Regulation 15A(7) of the 2006 Act because the Tribunal had held clearly that the Appellant's husband was an exempt person.

9. As far as Article 8 was concerned, the panel was entitled to consider family under Article 8 and under Section 55 of the BCIA 2009. If one looked at the Immigration Directorate Instruction (Appendix FM, Section 1.0B) dated November 2014) it was clear at pages 52 and 53 that the instruction given to immigration decision makers was that

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of the child".

It was the Tribunal's finding, properly arrived at after analysis of the facts, that this would indeed be the case if the mother was required to leave the UK, given that the child was just a year old. All in all, the decision could not be said to unreasonable.

10. In reply, Mr Melvin submitted that the Appellant and her husband had decided as a matter of choice that the primary carer would be the mother, this being so, it could not be said that the decision arrived at was an irrational one. Mr Lam interjected to

say that if this was the case, it made nonsense of having a provision dealing with "primary carer".

No Error of Law

11. I am satisfied that the making of the decision by the panel in this case did not amount to 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. In what is a careful and comprehensive determination, the panel, headed by Judge David Taylor, had made specific findings of fact that are unassailable. The Appellant's husband works a good ten to eleven hours a day. He is away from home. The primary responsibility for the child, Arli, rests with the Appellant. She is the biological mother. In general a child's wellbeing is best assured with the natural parents and this is well-established under the jurisprudence with respect to Section 55 BCIA.

12. The panel was clear that "removal of the Appellant from the United Kingdom would result in the child being required to leave the United Kingdom .... It is therefore unreasonable in the extreme to expect the Appellant to be separated from him" (see paragraph 29(vii)). It is difficult to see how this is an inadequate finding.

13. Second, any suggestion that the Tribunal was unaware of Regulation 15A(7) of the 2006 Act is misconceived because Regulation 15 is specifically set out from paragraph 24 to paragraph 27 (inclusive). If the appeal is allowed under the Regulations, it was unnecessary for the Appellant to go on to consider Article 8 and the "best interests of the child". However, the panel did so, and in so doing it had regard to well-established authorities such as **Huang [2007] UKHL 11**, and **EB (Kosovo) [2008] UKHL 41**, together with **ZH (Tanzania) [2011] UKSC 4**. The decision arrived at was plainly open to this Tribunal and it gave good reasons for concluding as it did. There is no error.

Notice of Decision

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

No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 23rd March 2015