



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41482/2014

THE IMMIGRATION ACTS

Heard at Taylor House
On 20 October 2015

Decision & Reasons Promulgated
On 24 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MISS. MERCY STEPHENS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Karim of Counsel
For the Respondent: Ms. E. Savage, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge C. M. Phillips promulgated on 29 May 2015 in which he dismissed the Appellant's appeal against the Secretary of State's decision to refuse to issue a permanent residence card to the Appellant under the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations").
2. Permission to appeal was granted on the ground that it was arguable that the judge should have considered the Appellant's rights bearing in mind that on his findings,

the Appellant was the mother and primary carer of an EEA national child, and the Appellant did not need to make a separate application for such rights to be considered. Other grounds were advanced, but the grant of permission was limited to this issue.

Error of law

3. Mr. Karim provided a skeleton argument prior to the hearing with two cases, MDB and others (Article 12, 1612/68) Italy [2010] UKUT 161 (IAC), and Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC). He submitted in the skeleton that these cases were authority for the fact that the judge should have considered the Appellant's rights under regulation 15A.
4. Paragraph (v) of the headnote to MDB states:

"In a case concerned with an EEA decision the tribunal judge is obliged by section 84(1)(d) of the Nationality, Immigration and Asylum Act 2002 to decide whether the decision breaches any of the appellant's rights under the Community Treaties in respect of their entry to or residence in the United Kingdom (emphasis added); see also s.109(3). Where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence".
5. Paragraph 61 of Amirteymour states:

"That is not to say that section 85 (4) has no effect in an EEA appeal. It permits the tribunal to take into account evidence that an appellant is entitled to a residence card on a basis other than that on which the application was made or another type of card."
6. Ms. Savage, having had a chance to consider these, accepted that she was "in some difficulty".
7. I find that these cases show that the judge should have considered the Appellant's circumstances under regulation 15A. Evidence was before the Tribunal of the Appellant's son who has Portuguese nationality, and the judge had found that the father was not involved in his life.
8. I announced that I found that the decision involved the making of an error on a point of law, and that I would proceed to remake the decision. I announced that I did not intend to set aside the findings of the judge in relation to other issues on which permission to appeal had not been granted, but that the error of law consisted in the failure to go on to consider the Appellant's circumstances with reference to regulation 15A.

Remaking

9. I heard brief oral evidence from the Appellant, who adopted the contents of her witness statements dated 8 October 2015 and 20 February 2015. Ms Savage asked her a few questions. There was no re-examination. I heard oral submissions from both representatives. I have taken into account the Appellant's bundle provided for the appeal (106 pages) and the skeleton argument. At the end of the hearing I reserved my decision.
10. The burden of proof lies on the Appellant to show on the balance of probabilities that she meets the requirements of regulation 15A. The Appellant's representative submitted that she met the requirements of regulation 15A(4) with reference to 15A(3). He referred to the headnote in MBD, submitting that the Appellant satisfied this.
11. Regulation 15A(3) and (4) provide:
- (3) P satisfies the criteria in this paragraph if –
- (a) P is the child of an EEA national ("the EEA national parent");
 - (b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and
 - (c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.
- (4) P satisfies the criteria in this paragraph if –
- (a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and
 - (b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave."
12. Paragraphs (i) to (iv) of the headnote to MDB state:
- (i) In London Borough of Harrow v Ibrahim Case C-310/08 and Maria Teixeira v London Borough of Lambeth Case C-480/08 the European Court of Justice ECJ confirmed the principle established in the Baumbast Case C-413/99 [2002] ECR I-7091, namely that in order to confer on a child a right of residence Article 12 of Regulation 1612/68 requires only that he has lived with his parents or either one of them in a Member State while at least one of them resided there as a worker.*
- (ii) Although simply seeking employment may be sufficient to make an individual a worker in Union law for a limited period, it is not enough to engage Article 12, since this provision requires that the parent concerned is someone who is or has been employed in the territory of another Member State.*
- (iii) If there is a parent who meets the requirement of employment, then his child can*

acquire an Article 12 right of residence. But under the Baumbast principle such a right of residence for a child can only start to run from the date he or she begins in education; it cannot commence from the child's date of birth. (The same is true in respect of the derived right of residence of a parent carer of such a child).

(iv) On Baumbast principles, a child in education can continue to have an Article 12 right of residence even if the said parent later ceases to be a worker."

13. I find that the Appellant has two sons. It is the eldest son, David, with whom I am concerned for the purposes of this application. He is Portuguese. The Appellant's youngest son does not yet have a passport as the Appellant is required to provide her passport with his application for a Portuguese passport, and the Respondent is currently in possession of the Appellant's passport.
14. As found by the First-tier Tribunal, I find that the Appellant is the primary carer of her son who is a Portuguese national. I have taken into account not only the Appellant's own evidence that she is the primary carer, but also the evidence in the bundle (pages 35 to 54). In particular I have taken into account the letter from Heather Scott, Occupational Therapist, dated 12 August 2015 which states "David lives with his mother and younger sibling, his mother is his primary carer" (page 38).
15. I have also taken into account the letter from Dr. John Loftus, Consultant Community Paediatrician, dated 30 July 2015 which states:

"I also confirm that Ms Mercy Stephens who is David's mother, is his primary care giver based on the following:
-she has brought him to multiple appointments at Hackney Ark as his sole carer
-she knows details about his health, development and past history that only a primary care giver can know
-she has been observed to have a warm and loving relationship with David at all appointments and assessments."
16. I find that the Appellant's son satisfies the requirements of 15A(3). I find that he is the son of an EEA National, Mr. Filipe Ferrao-Tavares. I find that the Appellant's son resided in the UK when his father was here as a worker. Evidence of the Appellant's father's employment was provided to the Respondent with the application (see A8, A14, A27 and A28-29). I find that, by reference to paragraph (i) of the headnote to MDB, he has therefore acquired a right of residence.
17. I find that the Appellant's son is in education in the United Kingdom, and was in education when his father was in the United Kingdom. I find that therefore the Appellant's son meets the requirements of paragraph 15A(3). Following MDB, I find that a child in education can continue to have an Article 12 right of residence even if his parent has ceased to be a worker (headnote paragraph (iv)). I find that the Appellant's son therefore has a right of residence.
18. Turning to regulation 15A(4), I find that the Appellant is the primary carer of her son, who meets the criteria in regulation 15A(3). I find that, were the Appellant to

leave the United Kingdom, her son would be unable to continue to be educated here. His father is not involved with his care. If the Appellant, as his primary carer, were required to leave the United Kingdom, I find on the balance of probabilities that her son would also have to leave the United Kingdom, preventing him from continuing his education here.

19. I therefore find, on the balance of probabilities, that the Appellant meets the requirements of regulation 15A(4) of the EEA Regulations such that she is entitled to a derivative residence card.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law as the judge failed to consider the Appellant's rights to a derivative residence card under Regulation 15A. The decision is not set aside in relation to the findings on other matters, the error of law was in failing to consider the Appellant's derived rights. The decision dismissing the appeal under the EEA Regulations is set aside.

I remake the decision allowing the appeal under the EEA Regulations. The Appellant is entitled to a derivative residence card.

No anonymity direction is made.

Signed

Date 20 November 2015

Deputy Upper Tribunal Judge Chamberlain