Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/47270/2013**

THE IMMIGRATION ACTS

Heard at Field House
On 1st October 2015

Decision and Reasons Promulgated
On 7th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr AHMED El DESSOUK ADB RABBOU IBRAHIM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini (counsel) instructed by David Tang & Co, solicitors
For the Respondent: Ms A Brocklesby- Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Griffith promulgated on 5th May 2015, which dismissed the Appellant's appeal on all grounds .

Background

3. The Appellant was born on 1st July 1983 and is a national of Egypt.

4. On 24 June 2013 the Appellant applied for a residence card as confirmation of his derivative right of residence in the UK as the primary carer for his infant son, who is a British citizen. The application was made on the basis that the British citizen child has been reliant on the appellant since birth.

5. On 4th November 2013 the Secretary of State refused the Appellant's application.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Grifftih ("the Judge") dismissed the appeal against the Respondent's decision.

7. Grounds of appeal were lodged and on 13 July 2015 Judge Colyer gave permission to appeal

The Hearing

8. Mr Bazini, counsel for the appellant, argued that the decision contains material errors of law and focused [38] of the decision, telling me that the second sentence of [38] is irrelevant and that the judge's attempts to define the term "*primary carer*"were flawed. He noted that at 37 the judge drew parallels between the expression "*sole responsibility*"and "*primary carer*" - and argued that she should not have done so because the two expressions are discrete and distinct. He was critical of the judge for not considering regulation 15 A(4A)(c) of the 2006 regulations. He told me that there is no great dispute about the facts in this case and urged me to allow the appeal, set aside the decision and substitute a decision allowing the appeal.

9. Ms A Brocklesby-Weller, for the respondent told me that the decision does not contain any material errors of law, but that is a carefully worded, well-reasoned decision containing adequate findings leading to conclusions which were open to the judge to make. She that the judge had focused correctly on the primary responsibility for care and had not only arrived at a sustainable definition of the phrase "*primary carer*", but had also demonstrated the logic employed to reach that definition. She urged me to dismiss the appeal.

Analysis

10. Reg 15A(7) states that a person, P, is to be regarded as a "primary carer" of another person if (a) P is a direct relative or a legal guardian of that person; and (b) P— (i) is the person who has primary responsibility for that person's care; or (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

11. Regulation 15A(6)(c) defines an '*exempt person'* as a person who:

> (i) who has a right to reside in the UK as a result of any other provision of these Regulations; (ii) who has a right of abode in the UK by virtue of section 2 of the 1971 Act;(iii) to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or iv) who has indefinite leave to enter or remain in the UK.

12. The undisputed facts in this case are that the appellant's British citizen spouse is the breadwinner for this family and that the appellant stays at home to look after his children, who are both British citizens. At the time the decision was made in this case the appellant had only one child and the focus was on the relationship between the appellant and his firstborn. Because the appellant's spouse is a British citizen, she is an "exempt person" and so the test in regulation 15A(7)(b)(ii) cannot be satisfied.

13. It is beyond dispute that the appellant satisfies the test set out in regulation 15A(7)(a). The focus turns to regulation 15A7(b)(i). The focus in the decision promulgated on 5th May 2015 drew only on part of regulation 15 A(7), and not on the test as it is set out in its entirety there.

14. Between [36] and [38] of the decision, the judge wrestles with the definition of "*primary carer*" as the words are used in regulation 15 A(7)(b)(i). It is there that a material error of law is created. At [37] & [38} the judge, while searching for a definition, conflates the terms "*sole*" and "*primary*". The judge then expressly states that she will not consider regulation 15A(4A) of the 2006 rules, when a full consideration of this case requires consideration of that part of the regulations.

15. I therefore find that the decision is tainted by a material error of law. I set aside the decision.

16. The facts in this case are not in dispute. I find that I am able to remake decision on the information placed before me.

17. Regulation 15 A7(b)(i) defines "*primary carer*" as "*the person who has primary responsibility for that person's care*". The weight of evidence indicates that it is the appellant who shoulders the responsibility for the day to day care of his eldest child, who is a British citizen. The test is not one of "*sole responsibility*". The test is "*primary responsibility*". The primary carer, the person with primary responsibility, is the first person to whom one turns.

18. The weight of evidence indicates that the majority of the child care for the British citizen child is undertaken by the appellant. The weight of reliable evidence indicates that in the appellant's family it is the appellant who is relied on to take care of his oldest child. He is the first person responsible for the care and supervision of his oldest child. He must therefore be the primary carer; there is no carer who takes a position of precedence over the appellant in matters relating to the care of his British citizen child. He therefore fulfils the requirements of regulation 15 A(7)(b)(i).

19. But that is not the end of the matter. I must consider regulation 15A(4A)(c), which provides

> "15A(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."

20. In **Maureen Hines v London Borough of Lambeth [2014] EWCA Civ 660** it was said that, in applying the test under regulation 15A(4A)(c) is clear it was necessary to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child. For this purpose it was generally accepted that an available adoption or foster care placement would not be adequate because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. It was also said, however, that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would not normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK. Apart from anything else, he would, even if he did leave, still only have the care of one of his previously two joint carers

21. The case-law is against the appellant. The appellant is the primary carer of a British citizen child, and so satisfies regulation 15A(4A) (a) & (b). If he leaves the UK, he will leave his children in the care of a British citizen. The appellant's wife may suffer from back pain, but there is no reliable before me to indicate that the appellant's back pain prevents her from pursuing the ordinary activities of daily living. If the appellant leaves, his two children will still have their mother. There is no reliable evidence to suggest that either of the appellant's British children will be unable to continue to reside in the UK if the appellant is required to leave the UK.

22. The second ground of appeal challenged the adequacy of the consideration of the appellant's article 8 ECHR rights. In Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 it was held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature. The second ground of appeal is no longer arguable.

Decision

23. The decision of the First-tier tribunal is tainted by a material error of law.

24. I set aside the decision & substitute the following decision.

25. I dismiss the appeal under the Immigration (EEA) Regulations 2006.

Signed Date 5 October 2015

Deputy Upper Tribunal Judge Doyle