IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10957/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2016	**On 4 April 2016**
Prepared 18 March 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MS IPC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Davison, Counsel, instructed by Regal Law Solicitors
For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Zimbabwe, date of birth [ ] 1983, appealed against the Respondent's decision, dated 11 February 2014, to refuse to issue a derivative

residence card as the primary carer of a British national resident in the United Kingdom, with reference to Regulations 15A(4A), 15A(7)(b) and 18A(1)(b) of the Immigration (European Economic Area) Regulations 2006 as amended (the 2006 Regulations).

2. The requirements of Regulation 15A(4A) are as follows. It is necessary that

(a) the applicant is the primary carer of a British national (the relevant British citizen);

(b) the relevant British citizen is residing in the UK; and

(c) the relevant British citizen would be unable to reside in the United Kingdom or in another EEA State if the applicant was required to leave.

Under Regulation 15A paragraph (7)(b) the applicant must be a person who has primary responsibility for that British citizen's care or who shares equally the responsibility for the relevant British citizen's care. The Secretary of State must issue a person with a derivative residence card on application and on production of proof that the applicant has a derivative right of residence under Regulation 15A of the 2006 Rules. The issue taken in the Reasons for Refusal Letter was that the Appellant's evidence was insufficient, her criminal history showed that she was undesirable with reference to paragraph 322(5) of the Immigration Rules HC 395 (as amended) and that the Appellant had failed to provide sufficient evidence to demonstrate that she was the primary carer of a relevant British citizen, namely her daughter P-RD.

3. The Appellant's appeal against that decision came before First-tier Tribunal Judge Kaler, the (judge) who on 6 November 2014 dismissed the appeal under the 2006 Regulations and also with reference to Article 8 ECHR.

4. Permission to appeal against that decision was granted by First-tier Tribunal Judge J M Holmes and that was opposed by the Secretary of State in a Rule 24 response dated 15 January 2015.

5. On 25 November 2015 I promulgated a decision in which I found that the Original Tribunal had made an error of law failing to properly analyse the material under Regulations 15A and 18A, not least with reference to the case of Zambrano (C-34/09). I also made an anonymity order because of the age of P-RD (date of birth 19 June 2012 and a British national).

6. I gave directions for the further hearing.

7. The Presenting Officer and I were provided with a copy letter from Regal Law Solicitors to the father of P-RD, Mr JMD, dated 17 December 2015. The solicitors wrote asking if JMD intended to take any active in the upbringing of P-RD bearing in mind the absence of contact previously and secondly whether he wished to take an active role in the future in her life and if the Appellant was required to leave the United Kingdom whether he would play a pivotal role in bringing up P-RD in the United Kingdom. There was no reply to that letter. On 27 January 2016 Regal Law Solicitors again wrote to JMD referring to their letter of 17 December 2015 and noting the absence of a response and asking for confirmation as to his position in relation to P-RD. The Appellant confirmed that the address in Forest Gate to which JMD was written was the correct address.

8. It is of course to be noted that at the hearing before the First-tier Tribunal Judge Kaler the Appellant appeared but JMD did not and made no representations in writing as to the issues arising let alone in respect of his interest in or willingness to take responsibility for the care of P-RD in the future.

9. The position therefore was that the Appellant has the burden of proof of showing upon a balance of probabilities that she was the sole carer for P-RD and that there

was no-one to whom P-RD could be handed for care and upbringing were the Appellant to have to remove from the United Kingdom.

10. The Appellant gave evidence in which she confirmed her witness statement previously made and indicated that JMD was, as a result of CSA action, paying the minimum basic maintenance figure of 15% of his gross earnings which was £390 per month for the child's maintenance. There is according to the Appellant no communication between herself and JMD since those CSA arrangements have been made and no contact would be obtained through the CSA unless it was necessary to make a change in maintenance payment. In which case the CSA would make direct contact with JMD and then he would communicate with CSA and the CSA would communicate with the Appellant.

11. The thrust of the cross-examination in challenging the Appellant's evidence, pursued by Ms Isherwood, was essentially that the Appellant and JMD were in fact in a relationship which was a happy one, that he was taking a part in the upbringing of P-RD, he had provided a copy of his passport particulars to the Appellant to enable P-RD to obtain a passport and the absence of his presence or any correspondence or any direct evidence from him supporting the Appellant's claim was no more or less than a manifestation of them both pursuing courses designed to mislead and to misrepresent the nature of their relationship and conceal the presence of JMD in the care of P-RD. Ms Isherwood in her submissions relied upon the absence of direct reference to the Appellant by name in documents produced by the NHS Trust or from the health visitor or from the nursery school P-RD attended simply was a manifestation of the fact that there was nothing to indicate that she was the sole carer of P-RD.

12. In addition it was said that absence of evidence from third parties as to her being the sole carer was also indicative of the fact that JMD and the Appellant were bringing up P-RD together.

13. Given that the Appellant's daughter was being looked after on the hearing date by an aunt who was covering the school hours it seemed to me that there would have been sense in those who know the Appellant's situation to have written letters of support even if it might be said that they were self-serving. Nevertheless the Appellant candidly accepted that she had not been asked to obtain such letters, she relied upon her representatives nor had her family been asked to produce statements or a statement relating to the sole care provided by the Appellant to P-RD. The Appellant said that the NHS and GP correspondence was not addressed personally because that was the nature of the way they communicated. The Appellant indicated that she was the registered parent for the child and that if the child was, as might have been inferred in the custody of JMD, he would have been the one who registered her with his GP. The Appellant confirmed that there were discussions at some stage but JMD indicated he was to ready to be a father wanted no contact.

14. In addition the Appellant said that she had tried to have contact with JMD concerning the new school that P-RD will go to in September 2016 and invited him to go and visit the school but so far as anyone is aware that invitation was not taken up. The Appellant said that she had left messages on JMD's phone and sent text messages to which there had been no reply. The Appellant had not brought such documentation of the messages and texts and telephone bills to the hearing but did not do so because no-one had suggested that she should. The Appellant rejected that there was agreement with JMD that he would care for P-RD and the Appellant opined that P-RD would have to be cared for by a third party, e.g. Social Services, who had no bond with her, who was not a parent or relation and that she did not think that can possibly be in the best interests of her child.

15. It appeared from the Appellant's evidence that JMD's family, potentially a grandparent of P-RD, took no interest and maintained no contact with her. It was not known if P-RD's grandmother on the father's side was even alive. The Appellant said that although there was a time towards the end of December 2012 when JMD had had contact with P-RD he had ultimately decided that he could not manage such

a relationship with the Appellant or the child and accordingly apart from making the CSA payments that was effectively the end of contact.

16. Issue was taken by First-tier Tribunal Judge Kaler as to whether at that time the Appellant had been entirely truthful as to the extent of contact between her and JMD. It seemed to me that that was a point where there may have been reluctance to enlarge upon the extent of contact at that time but ultimately there is nothing to gainsay the evidence, other than doubt, or the absence of contact between the Appellant and JMD or JMD and P-RD.

17. I remind myself that the burden of proof is upon the Appellant to show on a balance of probability that the evidence is reliable that she gives concerning her being the sole carer for P-RD.

18. The Appellant admitted that she entered the United Kingdom as a visitor and overstayed. The Appellant admitted that she had wanted to become a nurse and therefore applied for leave to remain as a student which was refused. The Appellant used false documentation to undergo a training course as a nurse and she also obtained a bursary to which she was not entitled but which appears to have been an integral part of the application to become a student nurse. The Appellant admitted to obtaining false documents to enable her to work.

19. The same deception of false documents ultimately formed the basis for matters on which she was convicted before Snaresbrook Crown Court on 25 September 2009 and sentenced to imprisonment. As Ms Isherwood trenchantly put it, the Appellant had lied and lied again on a variety of different matters. The Appellant says that that is correct although they were really interrelated matters associated with her long wish to be a nurse and she denied any further use of deception. She was subject to disciplinary proceedings by the NMC (Nursing and Midwifery Council). The Appellant in 2011 pursued a claim seeking asylum and humanitarian protection which was found to be with no substance and an adverse view was taken of her

conduct in the misrepresentation she had made about her status in obtaining false documentation.

20. The Appellant's registration as a registered nurse was suspended on 25 March 2011 following a substantive hearing and was made for a period of twelve months with review and extension on 25 March 2012 for a further twelve months. Prior to the expiry of the order a review hearing was held by the NMC and it is clear from the Record of Proceedings that the panel was aware of the conviction and the issues raised, namely false accounting, using a false instrument, two counts of obtaining money transfers by deception, possessing a false identity document and two counts of processing an article for use in fraud. For each matter there was a sentence of eighteen months imposed concurrently but the sentence was reduced by the Court of Appeal to twelve months' imprisonment on each count. It was accepted that for the purposes of the criminal law at the date of conviction the Appellant was of good character. The panel noted that the Appellant

> "… took full responsibility and acknowledged your mistakes and accepted that it would be 'a lifetime of regret' for you. You told the panel that because of these decisions you may never be able to practise again and you had accepted this. However, you stated that when you considered fitness to practise you related it to one's inability to safe nursing practice. You told the panel that there had been no issues with your clinical practice in the past and in that regard, you told the panel your fitness to practise was not impaired. You told the panel that you had a lot to offer because you enjoy nursing and you give 100% from the heart. You stated that you want and hope to practise and cannot imagine not being able to."

21. The NMC panel was of course looking at this as stated in terms of the protection of patients, the protection of public confidence in the nursing profession and the upholding and declaring of proper standards of conduct and performance in respect of which dishonesty is a very serious matter which strikes at the root of patient-nurse

relationships. The NMC panel accepted that the Appellant had during the period of suspension gained insight into her past conduct, and had displayed a high amount of remorse for her actions. The panel also noted and were impressed by the Appellant's maintenance of her qualifications through CPD and she was returned to unrestricted practice, they being satisfied that the Appellant had taken all available steps to rehabilitate herself and keep up her skills and nursing knowledge. Notwithstanding those serious matters of dishonesty the NMC panel considered that the standing of the NMC as a regulator would not be undermined.

22. My impression at the hearing, having heard the Appellant's evidence and how she responded to cross-examination, was that the Appellant had insight into why her criminality was wrong and that she was telling the truth about her daughter and the role, as sole carer, she has in bringing her up. I appreciate that it would have been helpful if other witnesses had been called who knew the Appellant and daughter and could speak to their knowledge of that household. I note Ms Isherwood's line of attack upon the evidence but it seemed to me that if the Appellant and JMD are in a happy relationship, as Ms Isherwood submitted, there was really no point in them both pursuing a story littered with lies when she could simply make a spousal application under the Rules. If they were happily together whilst the route to remain under the EEA Regulations 2006 might have failed on the issue the fact of the matter was that there would have been another basis to remain under the immigration rules.

23. Equally if JMD had made a statement essentially saying that the child was solely in the care of the Appellant the Respondent could well reply that such a response as that was simply self-serving to show that the Appellant was the sole carer and therefore should be dismissed. Similarly the absence of statement from JMD was either confirmation that they were in a happy relationship or dismissed as self-serving to support the claim to remain. Looking at the evidence in the round therefore the argument of Ms Isherwood also identifies that if JMD had appeared to give evidence as to his lack of interest that was because they were happily together or that they were both seeking to mislead as to their true personal circumstances as

joint-carers of P-RD. If JMD had appeared at the hearing and said he was taking no interest that would simply be dismissed as self-serving in or/and part of the general exercise in deception to enable the Appellant to remain under the 2006 Regulations.

24. I formed the view on all the evidence in the round that if the burden of proof had been to the criminal standard this appeal would have failed through the lack of a third parties giving statements and additional evidence but I find on the lower standard of proof on the balance of probabilities that the Appellant has shown it is more probable than not that the Appellant was the sole carer for P-RD. The appeal should be allowed under Regulations 15A(4A), 15A(7)(b) and 18A(1)(b) of the 2006 Regulations.

25. In the light of the case law of **Amirteymour [2015] UKUT 466 (IAC)** there is no need to consider that issue of Article 8 ECHR since there are no removal directions and there is no Section 120 notice in existence.

NOTICE OF DECISION

The original Tribunal's decision cannot stand. The following decision is substituted. The appeal is allowed.

ANONYMITY ORDER

The anonymity order previously made is continued.

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date18 March 2016

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

In this case the appeal has succeeded through the need for a hearing and the evidence provided for those purposes. In the circumstances it does not seem to me that it would be appropriate to make a fee award against the Respondent.

Signed Date 18 March 2016

Deputy Upper Tribunal Judge Davey