IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37472/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2016	**On 10 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS THUY AN LUONG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Ms M Mac, Legal Representative, Mac & Co

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Boylan-Kemp promulgated on 27 July 2015 in which she allowed Ms Luong's appeal against the Secretary of State's decision to refuse to issue an EEA residence card as the primary carer of a dependent British national.

2. For the purposes of this decision I refer to Ms Luong as the Appellant and to the Secretary of State as the Respondent reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "2. The grounds allege failure to make reasoned findings as to the ability of the Appellant children's biological fathers to assume care of them. This is an extremely short decision in the context of which – in particular paragraph 24 – renders the grounds arguable."

4. At the hearing I heard submissions from both representatives following which I announced that I found that the decision involved the making of a material error of law. I set it aside to be remitted to the First-tier Tribunal. I set out my full reasons below.

Error of law

5. Paragraph [24] of the decision states:

> "The respondent has submitted that there has been no evidence provided to show that the children's fathers could not look at (sic) the children if the appellant was required to return to Vietnam. On inspection of the two children's birth certificates it is apparent that they have different fathers and so I find the children would need to be separated to reside with their own father, as there is no indication that either or both of the fathers reside with the appellant. The appellant has, in fact, submitted phone bills addressed to her and a Mr H Dao to demonstrate that she is living at the same address as the children but from this I can infer that she is also living with a different man to either father of her two children and therefore the inference can be drawn that the fathers are not involved in the care of the children to an extent that would usurp the appellant as their primary carer."

6. In the grounds of appeal the Respondent submitted that this conclusion was purely speculative, and seemingly arrived at without any input from the Appellant. As set out in paragraphs [16] to [18] of the decision, the Appellant did not attend the hearing. At paragraph [16] it records "Ms Mac had instructed the appellant not to attend the hearing on the assumption that the adjournment would be granted". However, there was no adjournment, so the judge did not hear any evidence from the Appellant.

7. At the hearing Ms Mac submitted that it was the evidence of the Appellant which would address the issue under Regulation 15A(4A)(c) that the children would be unable to remain in the United Kingdom if the Appellant were required to leave. She therefore accepted that no evidence of this had been before the First-tier Tribunal given that the Appellant had not been present to give oral evidence. She stated that it was "unfortunate" that the Appellant had not attended the hearing to give evidence, but it is clear from the decision, paragraph [16] that it was Ms Mac who had instructed the Appellant not to attend.

8. I find that there are insufficient findings to back up the inference at paragraph [24] that the children's fathers would not be able to care for them, and therefore that the children would have to leave the United Kingdom were the Appellant to leave.

9. In relation to the finding that the Appellant is the primary carer of the children, again I find that inadequate reasons are given for this finding. Ms Mac submitted that the evidence pointed to the fact that the Appellant was the children's primary carer, and that the documents inferred that this was the case. The judge finds that the nursery fee requests are addressed to the Appellant, but there was no evidence before the judge as to any financial input which the Appellant may receive from the children's fathers. The inference is also made that, as the Appellant lives with a different man, the children's fathers are not involved in their care [24]. I find that this is inference does not follow logically.

10. This is a very short decision in which the findings are confined to only two paragraphs, [23] and [24]. In paragraph [25] the judge concludes that the children's fathers would not be in a suitable position to become the primary carers for the children, but this is not the test set out under regulation 15A(4A). I was referred to the case of MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380, in particular paragraphs [41(ii)], [41(iv)] and [56]. It was submitted by Ms Fijiwala that there had been no evidence before the judge that the children could not remain with their fathers. Given the submission by Ms Mac that this issue would have been addressed by the oral evidence of the Appellant, who did not attend the hearing in the First-tier Tribunal, I find that this is the case. I find that the decision is inadequately reasoned.

11. I do not make an anonymity direction.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. I set it aside. No findings are preserved.

The appeal is remitted to the First-tier Tribunal to be reheard.

Signed Date 5 February 2016

Deputy Upper Tribunal Judge Chamberlain