



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/07952/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 26 November 2018**

**Decision and Reasons Promulgated
On 04 January 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR BALJIT [S]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Not present and not represented

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Foulkes-Jones, which was promulgated on 6 August 2018 following a hearing at Taylor House on 20 July 2018. For ease of convenience I shall throughout this decision refer to the Secretary of State who was the original respondent as "the Secretary of State" and to Mr [S] who was the original appellant as "the claimant".
2. The background can be stated briefly. The claimant is a national of India who was born in February 1981. He applied for a residence card pursuant to Regulation 16(5) of the Immigration (EEA) Regulations 2016 on the

basis that he was the primary carer of a child who was a British citizen. It is not disputed that his child is indeed a British citizen. The application was refused because the Secretary of State did not accept that the claimant was a primary carer.

3. As already noted the claimant appealed against this decision and it was this appeal which was considered by First-tier Tribunal Judge Foulkes-Jones.
4. The claimant was served with notice of the hearing at his last known address but did not attend and was not represented. The judge nonetheless made findings of fact which included that the claimant was the primary carer of a British citizen child as had been asserted. The judge did not consider the claimant's Article 8 position having regard to the decision of this Tribunal in *Amirteymour and Others (EEA Appeals: human rights)* [2015] UKUT 466.
5. The Secretary of State has been given permission to appeal against this decision the basis of the grant of permission being that it is arguable that in the absence of witness statements and/or any other evidence from the claimant, there was no basis upon which the judge could properly have found that the claimant had satisfied the burden which was on him to establish that he was a primary carer of the child as claimed.
6. The claimant has not appeared before this Tribunal either, and on behalf of the Secretary of State Mr Clarke has informed the Tribunal that the Secretary of State has no knowledge of where he now may be. However, I am satisfied that this Tribunal made attempts to serve notice of the hearing on the claimant by serving it at what was believed to be his last known address. Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provide as follows:

“Hearing in a party’s absence

38. If a person fails to attend the hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal –
 - (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
 - (b) considers that it is in the interests of justice to proceed with the hearing.”

7. Although I obviously cannot be satisfied that the claimant has in fact been notified of the hearing, I am satisfied that this Tribunal took reasonable steps to try to notify him of the hearing. To the extent that the claimant has removed himself from where it was believed that he was living, this is a decision he has made and it is in the interests of justice to proceed with the case. In the judgment of this Tribunal this claimant has had more than

adequate opportunity to put whatever case he wanted to put before not just the First-tier Tribunal but also this Tribunal.

8. I set out the relevant parts of Regulation 16 of the 2016 EEA Regulations, which provide as follows:

“Derivative right to reside

16 -

- (1) a person has a derivative right to reside during any period in which a person -
 - (a) is not an exempt person; and
 - (b) satisfies each of the criteria in one or more of paragraphs (2) to (6) ...
- (5) The criteria in this paragraph are that -
 - (a) the person is a primary carer of a British citizen (“BC”);
 - (b) BC is residing in the United Kingdom; and
 - (c) BC would be unable to reside in the United Kingdom or in another EEA state if the person left the United Kingdom for an indefinite period ...
- (8) A person is the “primary carer” of another person (“AP”) if -
 - (a) a person is a direct relative or a legal guardian of AP; and
 - (b) either -
 - (i) the person has primary responsibility for AP’s care; or
 - (ii) shares equally the responsibility for AP’s care with one other person who is not an exempt person.
- (9) In paragraph ... (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words ‘the person’ are to be read as ‘both primary carers’ ...”

9. As was submitted on behalf of the Secretary of State during the hearing before the First-tier Tribunal, the onus was and remains on an applicant to establish his or her right to a residence card. In other words, it was incumbent upon this claimant to provide evidence which was capable of being accepted that he was indeed a primary carer as alleged and that he was thereby entitled to a derivative right to reside pursuant to this Regulation. As he did not attend the Tribunal (and accordingly was not available for cross-examination and there was no way of testing his claim) and further did not provide evidence even in the form of a witness

statement, there was in the judgment of this Tribunal no proper basis upon which absent such evidence the judge properly could have found that he had satisfied the burden of proof which was on him. It follows that the decision will have to be remade.

10. Any applicant before this Tribunal is under a duty to make proper disclosure to the Tribunal and it now appears that the finding which the First-tier Tribunal Judge made, that this claimant was one of the primary carers together with his wife, was not correct because at the relevant time he was not looking after his child at all. This does not have a direct outcome on the decision because in the absence of evidence the claimant would be bound to lose in any event, but it now appears that even had the claimant been available to give honest evidence to this Tribunal, there would have been no basis upon which he could now honestly claim that he was a primary carer of his child. I make this observation because I have been provided with the extracts from the Secretary of State's file whereby it is evident that his wife, the mother of this child, has now been granted leave to remain on the basis of her exceptional circumstances which are set out within the Secretary of State's file as follows:

"BASIS OF APPLICATION

On 29 September 2017 you made a human rights claim in an application for leave to remain in the UK on the basis of your child ... and private life. In addition, you stated you have suffered domestic violence from your husband to include physical and mental torture and rape. You state you have reported this to the police, you left your husband and now reside with friends and family who are supporting you emotionally and financially.

You state you have lived in the UK for almost thirteen years and you and your family have developed strong emotional attachments and ties in the UK. You state you have integrated into the community and have become rooted and settled in the UK.

You state you have lost contact with most of your family and friends in India and consider your only family to be in the UK.

Based on the applicants' special circumstances they will be considered under:

Ten-year parent route;

Ten-year private life route;

Exceptional circumstances."

11. I am told that the applicant's wife has now been granted leave to remain.
12. Accordingly, on the basis first that the claimant has not provided any evidence in support of his claim to be entitled to a derivative right of

residence and secondly because in any event it appears that the facts are very far from what has been asserted within the grounds, I have no hesitation when remaking this decision in dismissing the claimant's appeal and I so find.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Foulkes-Jones as containing a material error of law and substitute the following decision:

The claimant's appeal against the Secretary of State's decision refusing him a residence card is dismissed under the 2016 EEA Regulations

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig", is written over a light blue rectangular background.

Upper Tribunal Judge Craig

Date: 27 December 2018