Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/13345/2013

THE IMMIGRATION ACTS

Heard at Laganside Courts Centre, Belfast	**Determination Promulgated**
On 13 January 2014	**On 21 January 2014**

Before

The Hon. Mr Justice McCloskey, President

Between

ANNE DARLINGTON-BOMS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Mrs O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant did not appear and was unrepresented. Having considered all of the papers, the uninformative Rule 24 response and the submissions of Mrs O'Brien, I decide as follows.

2. I record, at this juncture, that the Appellant is aged 35 years and is the mother of 'S' the relevant EEA national, who is aged 9, having been born on 16th December 2004. While both parents and child are of Nigerian origin, 'S' holds both British and Irish nationality. This appeal originates in a decision on behalf of the Secretary of State for the Home Department (hereinafter "*the Respondent*"), made on 25th February 2013, whereby the application of Anne Darlington-Boms (hereinafter "*the Appellant*") for a residence card which would enable her to enter and reside in the United Kingdom was refused. The Appellant's appeal to the First-Tier Tribunal ("*the FtT*") was dismissed in a determination promulgated on 5th July 2013.

3. The Respondent's refusal decision rehearsed, firstly, that the application for a residence card had been made on the basis that the Appellant is the parent of an EEA national child who claims to be exercising Treaty rights as a self-sufficient person as defined in the Immigration (European Economic Area) Regulations 2006 (hereinafter "*the EEA Regulations*"). The application was said to be based on the decision of the CJEU in Chen (Case C-200/02). Next, reference was made to the derivative residence provisions inserted, by amendment, in Regulation 15A(2). The kernel of the Respondent's decision is found in the following passage:

> "*The evidence fails to demonstrate that 'S' has sufficient funds that would be sustainable over a period of time during their period of residence in the United Kingdom and comprehensive sickness insurance cover in the United Kingdom. Based upon these factors the Secretary of State does not consider that you satisfy the requirements of ..... Regulation 15A(2) .....*"

This became the focus of the grounds of appeal to the FtT which contended, *inter alia*:

> "*..... The SSHD failed to properly evaluate all the evidence presented with the application ..... The father of 'S' ..... is a petroleum engineer and works on oil rigs. As evidence of* [the daughter's] *self sufficiency we submitted his wage slips, bank statements and contract of employment ..... since the arrival of 'S' ..... and her mother in the UK the father has continued to support them from his income without recourse to public funds ..... the mother has up to date comprehensive sickness insurance .....*"

4. In a compact determination, made on paper, the FtT dismissed the ensuing appeal in the following terms:

> "*It seems to me, however, that the difficulty of the matter is that a child who is supported by her father is a dependant on her father rather than being a self sufficient person. I do not consider that it has been shown that 'S' meets the criteria to be classified as a self sufficient person .....*"

The grant of permission to appeal to this Tribunal recorded that the FtT had, arguably, erred in law having regard particularly to regulation 4(1)(c)(i) of the EEA Regulations.

5. The provisions of regulation 15A of the 2006 Regulations are assembled under the heading "*Derivative Right of Residence*". The material elements are the following:

> "*(1) A person (P) who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who satisfies the criteria in paragraph (2), (3), (4) or (5) of this Regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.*
>
> *(2) P satisfies the criteria in this paragraph if –*
>
> *(a) P is the primary carer of an EEA national .... and*
>
> *(b) The relevant EEA national -*
>
> *(i) is under the age of 18;*
>
> *(ii) is residing in the United Kingdom as a self sufficient person; and*
>
> (iii) *would be unable to remain in the United Kingdom if P were required to leave.*"

The remaining provisions of regulation 15A do not arise for consideration in the present context. The term "*self sufficient person*" is defined in regulation 4(1) as:

> "*.... A person who has –*
>
> *(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence ; and*
>
> *(ii) comprehensive sickness insurance cover in the United Kingdom.*"

Thus, in the Appellant's application for a derivative residence card, it was incumbent on the Respondent to address and determine two questions:

(i) Does 'S' have sufficient resources not to become a burden on the social assistance system of the United Kingdom during her period of residence here?

(ii) Does 'S' have comprehensive sickness insurance cover in the United Kingdom?

In the refusal letter, it was simply stated – without particulars, elaboration or reasoning – that the evidence failed to demonstrate that 'S' satisfied either of these requirements.

6. Strikingly, the determination of the FtT also did not address either of these requirements. Rather, as the relevant passage (reproduced above) demonstrates, the Judge applied a quite different test not contained in the statutory regime. A clear error of law is thus established. It consists of a combination of a failure to apply the appropriate statutory tests, an ensuing failure to make the necessary findings and conclusions and the espousal of an incorrect test. The materiality of these inter-related errors is indisputable, as they were germane to the Judge's decision. Accordingly, the FtT determination must be set aside and remade.

DECISION

7. I decide as follows:

(i) The appeal is allowed to the extent that the decision of the FTT is set aside.

(ii) A properly made first instance decision, taking into account fully the analysis above, is plainly desirable. Accordingly, I remit the case to a freshly constituted First-tier Tribunal.

(iii) The Appellant should be notified that an oral hearing, with representation if possible, is desirable.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 20 January 2014