IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48047/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th November 2014	**On 14th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIMBOLA MOROLAKE ADEFOLAJU

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr J Wells of Maliks & Khan Solicitors

DETERMINATION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Thomas promulgated on 7th July 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the claimant.

3. The claimant is a female Nigerian citizen born 7th January 1974 who in December 2012 applied for a Derivative Residence Card on the basis that she is the primary carer of her daughter, who is a British citizen, and if the claimant was required to leave the United Kingdom, this would mean that her daughter would be unable to reside in this country. The claimant's daughter was born on 9th November 2010.

4. The application was refused on 25th October 2013 with reference to regulation 15A of The Immigration (European Economic Area) Regulations 2006 (the 2006 regulations). The Secretary of State did not accept that the child currently lived with the claimant, nor that she is her primary carer, and it was not accepted that if the claimant left the United Kingdom the child would also have to leave, as the child's father is a British citizen and no evidence had been submitted as to why he would not be in a position to care for her.

5. The claimant's appeal was heard by Judge Thomas (the judge) on 26th June 2014. The judge found, that the child lived with the claimant, that the claimant is the primary carer of the child, and that if the claimant was not allowed to live in the United Kingdom, then the child would also have to leave this country. The claimant's appeal was therefore allowed with reference to regulation 15A of the 2006 regulations.

6. The Secretary of State applied for permission to appeal to the Upper Tribunal and relied upon two grounds.

7. Firstly it was submitted that the judge had made a material misdirection of law in that she had not correctly addressed the meaning of the term "unable". It was contended that the judge had erred by combining the two limbs of regulation 15A(4A) because even if the child was primarily cared for by the claimant, there was a separate test which involved considering whether the child would be unable to reside in the United Kingdom if the claimant had to leave. The Secretary of State noted that the claimant last had contact with the child's father in January 2014, that his residential address was known to the claimant, and the child's father had contributed financially. The Secretary of State submitted that the provision in regulation 15A(4A)(c) that the British child would be unable to reside in the United Kingdom, imposed a high threshold.

8. The second ground submitted that the judge had failed to provide adequate reasons for her findings, and had failed to adequately explore the reasons for accepting the claimant had primary responsibility for the British child, and the judge had not examined whether the situation presented at appeal had been engineered for immigration purposes.

9. Permission to appeal was granted by Judge of the First-tier Tribunal Ransley and I set out below paragraphs 4 and 5 of the grant of permission;

> "4. The 'Findings' section of the determination is brief. The judge did not properly consider whether the two distinct requirements of Reg 15A(4A) are both met. The judge appeared to have accepted all the

evidence relied upon by the Appellant about her role as the child's carer and the alleged lack of recent contact with the father without proper evaluation of the veracity of the evidence.

5. The grounds have disclosed arguable errors of law that might have made a material difference to the outcome of the appeal. Permission is granted; all grounds may be argued."

10. Following the grant of permission the claimant lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was contended, in summary, the grounds amounted to a disagreement with the findings made by the judge, who had made findings open to her on the evidence, and given adequate reasons for those findings.

11. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Secretary of State's Submissions

12. Mr Melvin relied upon the grounds contained within the application for permission to appeal, and the grant of permission. Mr Melvin submitted that the evidence was scarce, and I was asked to find that the judge had erred in relying upon that scarce evidence, to find that the claimant is a primary carer of a British child.

13. Mr Melvin submitted Hines [2014] EWCA Civ 660 and relied upon paragraphs 25 to 27 of that decision.

The Claimant's Submissions

14. Mr Wells relied upon the rule 24 response. I was asked to conclude that the judge had not erred in law, and had made findings which were open to her on the evidence, and had given sustainable reasons.

15. Mr Wells pointed out that at the date of hearing the child was 3 years 8 months of age, and the judge had made a finding that the child was dependent upon the claimant. The evidence given by the claimant was that the relationship between herself and the child's father had not continued. Mr Wells submitted that although it could be said that the judge had given brief reasons, they were adequate and did not disclose an error of law.

The Secretary of State's Response

16. Mr Melvin submitted that the judge had not made findings in relation to the child's father, and that even if the claimant was the primary carer of the child, there needed to be findings made about the father's involvement in the child's upbringing.

17. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

18. I firstly consider the Secretary of State's first ground of appeal, that being the contention that the judge made a material misdirection in law. I do not find that the judge materially erred for the following reasons.

19. I do not accept that the judge combined the two limbs of the test in regulation 15A(4A). The test referred to by the Secretary of State is whether the claimant is the primary carer of a British citizen, and whether a British citizen would be unable to reside in the United Kingdom or in another EEA state if the claimant were required to leave.

20. I find that the judge considered the issues raised in the Secretary of State's refusal letter dated 25th October 2013, by firstly making findings as to whether the child lived with the claimant, which had not been accepted by the Secretary of State.

21. In paragraph 11 of the determination the judge considered that the evidence proved, on a balance of probabilities, the child lived with the claimant. In making this finding, the judge stated that she had considered all of the evidence, which would have included the claimant's evidence, together with letters from Dr Shaffi, Michelle Richardson from the Victoria Pre-School Centre, and Michael Opoku.

22. The letter from Michael Opoku is undated and handwritten and does not add much, but states that the author of the letter has known the claimant for over four years and her daughter since her birth. There was no specific statement in the letter that the claimant and her daughter lived together.

23. The letter from Dr Shaffi is dated 2nd November 2012, and confirms that the doctor is the general practitioner for both the claimant and her daughter. The letter confirms that they are registered at the same address and that the claimant always brings the child to medical appointments.

24. The letter from Michelle Richardson is undated and explains that she is the team leader at Victoria Centre Preschool in Wellingborough, and confirms that the claimant is the main carer for her daughter who started at the centre on 10th September 2013. The letter confirms that the claimant and her daughter have the same address.

25. I conclude that the finding made by the judge that the claimant and her daughter live together was open to her, and that she did not err in law by making such a finding.

26. The judge went on in paragraphs 12 and 13 to consider whether the claimant is the primary carer of a British child. There is no dispute that the claimant is the mother of the child, and that the child is a British citizen.

27. Regulation 15A(7) states that an individual is a primary carer of another person if that individual is a direct relative of the other person, and is the person who has primary responsibility for the other person's care or shares equally the responsibility for that person's care, with one other person who is not an exempt person.

28. In my view the judge did not err in finding that the claimant is the primary carer of her daughter. The judge explained that she made this finding having taken into account the letters of Dr Shaffi and Michelle Richardson, who both gave their opinion that the claimant is her daughter's primary carer. The judge noted that these conclusions were based on the fact that the claimant was the only parent who had attended medical appointments and school consultations and the only parent named on the child's medical and school records. The judge was entitled to reach that conclusion.

29. The judge then considered, in paragraph 14 of her determination, whether the child would be unable to remain in the United Kingdom if the Appellant had to leave. The judge has therefore not combined the tests in regulation 15A(4A) but has recognised that there is a separate test, which relates to the ability of the child to remain in the United Kingdom without the claimant.

30. The Secretary of State contends that there is a high threshold. In my view paragraph 23 of Hines sets out the correct position which is set out below;

> 23. I have no doubt that the test applicable under regulation 15A(4A)(c) is clear and can be given effect without contravening EU law. The reviewer has 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.

31. The claimant's evidence, which reading the determination as a whole, appears to have been accepted by the judge, is that the child's father played no part in her upbringing save to enable the claimant to access the child benefit which was paid into the father's bank account. The relationship between the claimant and the child's father commenced in January 2010 and ended in April 2010, well before the child was born on 9th November 2010. The judge accepted the claimant's evidence that the claimant and her daughter had not seen the child's father since January 2014. The judge did make a finding as to the father's involvement in the child's upbringing, stating "that there is no evidence that her father plays a real role in her life".

32. In my view the judge was entitled to take into account the child's age when assessing whether she would be unable to remain in the United Kingdom if her mother had to leave. The judge in my view, was entitled to accept the evidence that the child had never lived with her father, and

overall was entitled to conclude that if the claimant left the United Kingdom, then practically, the child would also have to leave. This is clearly a decision with which the Secretary of State disagrees, and it may be said that not every judge in considering this issue would have reached the same decision. That however is not the point. In my view the judge has considered the evidence, and reached a conclusion that was open to her on the evidence, and has not made an error of law in reaching that decision.

33. Turning to the second ground relied upon by the Secretary of State, which relates to adequacy of reasons, I do not find that the determination discloses an error of law. The Upper Tribunal has given some guidance on the issue of adequacy of reasons and I set out below the first paragraph of the headnote to Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC);

> (1) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.

34. I also set out below the headnote to Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC);

> It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.

35. Mr Wells contended in his oral submissions, that the judge had given brief but adequate reasons for the findings that had been made. I agree. The findings made were open to the judge on the evidence, and she has given adequate reasons explaining those findings. It should be clear to both parties in this appeal, why the decision has been made in favour of the claimant.

36. In my view, the grounds contained within the application for permission to appeal amount to a disagreement with the findings made, but do not disclose an error law.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity, and the Upper Tribunal makes no anonymity order.

Signed Date 11th November 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The fee award made by the First-tier Tribunal stands.

Signed Date 11th November 2014

Deputy Upper Tribunal Judge M A Hall