IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11652/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20th February 2015	**On 26th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MRS AUREA FULCHER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Iken, instructed by Moorehouse Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, Mrs Fulcher is a citizen of St. Lucia whose date of birth is recorded as 2nd October 1963. On or about 2nd July 2013 she made application for a Derivative Residence Card having regard to Regulations 15A(4A)(a) and (c) as well as Regulation 18A(1)(b) of the Immigration (European Economic Area) Regulations 2006.

2. By Regulation 15A(4A) the Appellant would be entitled to the Derivative Residence Card were she able to establish on balance of probabilities that she is -

> "(a) the primary carer of a British citizen ("the relevant British citizen");
>
> (b) the relevant British citizen is residing in the United Kingdom; and
>
> (c) the relevant British citizen would be unable to reside in the United Kingdom or in another EEA state if [she] were required to leave."

3. On 3rd March 2014 the Respondent refused the application. The Appellant appealed. Her appeal was heard on 17th October 2014 by Judge of the First-tier Tribunal Finch sitting at Taylor House. Judge Finch heard the evidence and accepted the case as advanced, namely that the relevant British citizen, the Appellant's husband, was very ill, undergoing medical treatment for prostrate cancer and other medical conditions. It is clear reading the Decision and Reasons as a whole that Judge Finch found each of the requirements of Regulation 15A(4A) met.

4. At paragraph 15 of the Statement of Reasons, Judge Finch, said as follows:

> "Having read their witness statements and heard the Appellant's oral evidence I also find on balance of probabilities that the Appellant (sic) [for which the judge clearly meant the Sponsor] would not be able to remain living in the United Kingdom if the Appellant were not granted a derivative residence card and would have to return to St. Lucia with her even though this would deprive him of the on-going hospital treatment, which is essential to maintain his health and well-being. Taking this and the totality of the evidence into account and applying a balance of probabilities I find that the Appellant is entitled to a derivative residence card."

5. Somewhat surprisingly Judge Finch then, under the heading 'Notice of Decision' dismissed the appeal. On any view reading the decision as a whole Judge Finch clearly erred and intended to allow the appeal. That is not an issue, indeed Mr Tarlow was for submitting that the matter should be dealt with under the slip rule and be re-promulgated.

6. Whilst it was open to the Appellant's representatives to suggest that the matter might be remedied under the "slip rule", application was made for permission to appeal to the Upper Tribunal. The grounds touched upon the inconsistency between the finding and the reasoning and also submitted that the judge had failed to deal with Article 8 ECHR. Whether the issue of Article 8 would arise in circumstances in which a derivative card is being granted is not a matter that I need to concern myself with today, though it might be argued that if no decision has been made to remove the Appellant then it cannot be argued that the decision interferes with her family or private life.

7. On 23rd December 2014 Judge of the First-tier Tribunal McDade granted permission so the matter comes before me. I have to determine whether there is an error of law which is material. Clearly there is. The error of law is that the judge dismissed the appeal when clearly he intended to allow it. That much, as I have said, is not really in dispute and whilst I could have dealt with that under the slip Rule there is no reason why I should not simply re-make the decision on the basis of the judge's clear intention.

8. However, in re-making the decision I now have to have regard to the submissions made on behalf of the Secretary of State in the response. The "Rule 24 Notice", which is the reply to the grounds, is dated 9th January 2015. At paragraph 3 the Secretary of State sets out her position which is as follows:

> "In summary, the Respondent relies on Upper Procedure Rule 24(3)(e) [which appears to be a reference to the Procedure Rules before amendment) and will submit that the judge has failed to give any adequate reasons as to why there would not be available to the Appellant's husband suitable medical care from the various applicable agencies in the United Kingdom. This was a major issue in the refusal of the application of the Appellant. The judge singularly fails to deal with this issue in paragraph 14."

9. It was the Secretary of State's position that in respect of Regulation 15A(4A)(c) of the 2006 Regulations, the Statement of Reasons was inadequate.

10. The matter was stood down in order that I might remind myself of the witness statements that were before Judge Finch and for Mr Tarlow to do likewise. Whilst Mr Tarlow had indicated a desire to cross-examine the Appellant in the remaking of the Decision, having read the statements and the Decision and Reasons, I saw no reason why the findings should be interfered with or any additional evidence be admitted.

11. I note that at paragraph 6 of the Decision and Reasons that counsel for the Respondent was said to have made very brief submissions. Judge Finch was referred to the letter dated 4th September 2014 from Ms Hoad, Cardiac Liaison Sister at Guy's and St Thomas' NHS Foundation Trust, but otherwise submitted only that the credibility of the oral evidence given by the Appellant and her husband was a matter for Judge Finch. That was the extent, it would seem, of the submissions. I have looked at the judge's notes; there is no more.

12. What the judge did have however, were witness statements from the Sponsor and the Appellant. Those witness statements are each dated 17th October 2014 and without rehearsing the contents of them, as indeed Judge Finch did not do, each said that it would not realistically be possible for the Sponsor, given all the medical conditions and the care that he was receiving from his wife, for him to remain in the United Kingdom were she required to leave. The threshold is high but meaningless if impossible to meet. Each case is fact specific. The test, based upon the evidence, was whether the Sponsor would be compelled to leave the United Kingdom because no other *adequate* arrangements could be made: Maureen Hines v London Borough of Lambeth [2014] EWCA Civ 660. That was a case involving a child but the general guidance holds good.

13. It was for the judge at first instance to form a view and make a finding. The question for me is whether the finding made by the judge was one that was open to him. It would not seem that he was particularly well-

helped by the Presenting Officer, given the limited submissions but I am not able to say, having read the witness statements that the finding of the judge was not one that was open to him. In my judgment it was.

14. Since the finding was one that was open to the judge the submissions made now on behalf of the Secretary of State that there is sufficient medical care in the United Kingdom and more particularly that Mr Tarlow on behalf of the Secretary of State would wish to take issue with the witness statements are matters that should and could more forcefully have been taken before Judge Finch. In the circumstances I re-make the decision of the First-tier Tribunal such that the Appellant is entitled to the relief sought and is entitled to the derivative card.

Notice of Decision

15. The appeal to the Upper Tribunal is allowed. The Decision is remade such that the decision of the First-tier Tribunal to grant a Derivative Residence Card is affirmed. It follows that the Decision of the First-tier Tribunal is set aside and remade such that the appeal to the First-tier Tribunal is allowed.

Signed **Date 26th February 2015**

Deputy Upper Tribunal Judge Zucker

TO THE RESPONDENT
FEE AWARD

I do not make any fee award. None was asked for but in any event it was open to the Appellant's representatives to have invited the First-tier Tribunal to repromulgate the Decision in the First-tier rather than bring the matter before the Upper Tribunal.

Signed **Date 26th February 2015**

Deputy Upper Tribunal Judge Zucker