IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39323/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2015	**On 29 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS AGUEDA CALLE
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Ms S Vidyadharan, Specialist Appeals Team
For the Respondent/Claimant: Mr Boyle, Counsel instructed by the Bar Counsel Pro Bono Unit

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to issue her with an EEA residence card as confirmation of her derivative right of residence in the UK under Regulation 15A of the Immigration (EEA) Regulations 2006. The First-tier Tribunal did not make an anonymity

© CROWN COPYRIGHT 2015

direction, and I do not consider that the claimant or her daughter needs to be accorded anonymity in these proceedings before the Upper Tribunal.

2. The claimant is a national of Ecuador, whose date of birth is 1 February 1969. She entered the United Kingdom on 16 June 2003. On 16 November 2007 she gave birth to a child, Julia. Julia's father was Mr Masimo Laurenza, an Italian national exercising treaty rights in the United Kingdom. On 18 November 2010 District Judge Wicks made a financial order in the Uxbridge County Court under the Children Act 1989. He ordered that the respondent father (Mr Laurenza) pay the applicant mother (the claimant) for the benefit of the child (Julia) periodical payments of £180 per month, the first payment to be made on 15 December 2010 by way of standing order until the child attained the age of 17 years, the death of the father or further order of the court, whichever event occurred first.

3. In 2011, 2012 and 2013 the claimant made three successive and unsuccessful applications for a residence card as the primary carer of Julia.

4. In the third and last refusal dated 3 September 2013 the Secretary of State advanced two main reasons for rejecting the claimant's application. The first was that the claimant did not satisfy Regulation 15A(2). This was because Julia was not residing in the UK as a self-sufficient person. The evidence submitted failed to demonstrate sufficiently that Julia had sufficient funds or had an income from another source that would be sustainable over a period of time during her period of residence in the United Kingdom.

5. Alternatively, the claimant did not satisfy Regulation 15A(3). There was no evidence that Julia's father was a legitimate EEA national. Furthermore, the department had requested evidence to demonstrate the daughter's father was residing in the United Kingdom and exercising treaty rights after his daughter's birth and on her entrance into education. The department required evidence that Mr Laurenza resided in the UK as a worker in September 2012, when her daughter formally entered education, and this evidence had not been provided.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The claimant's appeal against the third refusal decision came before Judge Dineen sitting at Hatton Cross in the First-tier Tribunal on 26 June 2014. Mr Boyle appeared on behalf of the claimant, and the respondent was represented by Ms Carver. In his subsequent decision, Judge Dineen said at paragraph [5] that the only outstanding matters between the parties were whether the claimant satisfied the requirements of subparagraph 4 of Regulation 15A by establishing that she was the primary carer of her daughter Julia, and that if the claimant was required to leave, Julia would be unable to continue to be educated in the UK.

7. In paragraphs [6] to [17] of his decision, Judge Dineen set out the claimant's case. In paragraphs [18] and [19} he summarised the case put forward by Ms Carver on behalf of the Secretary of State as: (a) relying on the contents of the refusal letter; and (b) making no admission as to whether the claimant was Julia's primary carer.

8. The judge's findings are succinctly set out at paragraph [20] onwards. He had taken into account all the evidence, and he was satisfied that the claimant was a truthful witness. Her evidence was consistent within itself, and consistent with the available documentary evidence. He was satisfied that Mr Laurenza played no part in Julia's life, and that there was no other person who did so with regard to her day-to-day care. If the claimant had to leave, Julia would clearly have to accompany her back to Ecuador. She would therefore not be able to continue her education in the UK. So the judge allowed the appeal under the Immigration (European Economic Area) Regulations 2006.

The Application for Permission to Appeal

9. A member of the Specialist Appeals Team settled an application for permission to appeal on behalf of the Secretary of State to the Upper Tribunal. The judge had materially misdirected himself in law in stating that the only outstanding matter between the parties was whether the claimant was the primary carer of Julia. In the refusal letter, the claimant was advised that as there was no evidence to show that the father of the EEA national child was exercising treaty rights when the child entered into formal education, the Secretary of State did not consider that Regulation 15A(3) had been met. Furthermore, the refusal letter stated that the claimant had not produced evidence to show that the EEA national had comprehensive sickness insurance cover in the UK, or sufficient resources not to become a burden on the social assistance of the United Kingdom during her period of residence. So Regulation 4(1)C had also not been complied with.

The Grant of Permission to Appeal

10. On 1 December 2014 First-tier Tribunal Judge Levin granted permission to appeal for the following reasons:

> Given that the judge failed to consider and make findings upon whether the [claimant] met the criteria of Reg 15A(3)(b) and (c) of the EEA Regs as he was required to do by Reg 15A(4)(a), it is arguable that the judge's finding that the [claimant] was entitled to derivative right of residence was as a result of a material error of law.

The Hearing in the Upper Tribunal

11. At the hearing before me, Mr Boyle drew my attention to his extensive Rule 24 response and to the evidence which had been served on the Upper Tribunal casting further light on the proceedings in the First-tier.

12. The claimant's appeal before the First-tier Tribunal was originally listed for hearing at Hatton Cross on 3 March 2014. On that day Judge Behan granted an adjournment request made by Mr Boyle and directed the Secretary of State to use her powers to obtain evidence (including evidence from other governmental bodies) as to whether Mr Masimo Laurenza continued to reside in the UK; the times at which he had exercised treaty rights in the UK; and the fact that he was an Italian national.

13. In advance of the hearing before Judge Dineen, the Home Office Presenting Unit served a witness statement from Phillip Morris of HMRC setting out the results of his examination of HMRC computer records with regard to Mr Laurenza's employment as an airport baggage handler. The records showed that he had been continuously employed in the UK from the child's birth to date, and that his residential address remained the same as the address he had given in the financial statement which he had made in the maintenance proceedings heard by the county court in 2010.

Discussion

14. As a result of the evidence tendered by HMRC, the point raised by the Secretary of State under Regulation 15A(3) fell away, and apparently Ms Carver conceded this. Also, Mr Boyle did not argue in the alternative that Julia met the requirements for self-sufficiency contained in Regulation 4. Thus for the reasonable reader of the decision who was not privy to what passed at the hearing, it was misleading for Judge Dineen to indicate that the Respondent continued to rely on the contents of the refusal letter. In fact, Ms Carver's stance on behalf of the Secretary of State was merely a non-admission of a point which had not been put in issue in the refusal letter, which was whether the claimant was Julia's primary carer.

15. However, I do not find that the lack of clarity in the decision translates into a material error of law. The judge is shown to be correct in holding earlier in his decision that the sole issue before him under Regulation 15A was whether the claimant met the requirement of being Julia's primary carer, and whether in consequence Julia would be unable to continue to be educated in the United Kingdom if the claimant was required to leave. The judge gave adequate reasons for finding in the claimant's favour on these questions.

16. Even if there had not been satisfactory evidence of the father exercising treaty rights at the time that Julia entered into formal education, the claimant would still have qualified for a derivative residence card. This is apparent from **Ahmed (Amos; Zambrano; Reg 15A(3)(c) [2006] EEA Regs) [2013[UKUT 00089 (IAC)** which Mr Boyle was going to deploy at the hearing in March 2014 if his adjournment request had been unsuccessful. In **Ahmed**, a panel consisting of Mrs Justice Lang and Upper Tribunal Judge Storey said this at paragraph [73]:

> In **Teixeira** the Court of Justice made plain that it is not necessary for the child to be in education in the UK at a time when an EEA national parent is continuing to meet the condition that he is exercising treaty rights in the host member state.

17. The panel went on in paragraph [74] to cite with approval the opinion of Advocate General Kokott in **Teixeira (European citizenship) [2009] EWECJ C-480/08** as follows:

> Contrary to the view taken by some of the parties at the proceedings, the exercise of a right of access to education cannot, therefore, in any way be predicated on the child's retention throughout the period of its education of its special right of residence under Article 10(1)(a) of Regulation no.1612/68, and thus on its continuing right to settle with

> a parent who is a migrant worker. If that were not the case, children of former migrant workers in particular, would for the most part lose the right of access to education under Article 12, since the parent who 'has been employed' in the host member state will frequently have left that state after having been employed there, and it will therefore no longer be possible for that parent simply to live with the child in a common family home.

18. The significance of this passage is that the claimant did not have to show that the claimant's father was even in the United Kingdom, let alone exercising treaty rights in the United Kingdom, at the date of Julia's entry into formal education.

19. Finally, the panel noted at paragraph [77] that there was a governmental concession acknowledging that the child did not have to be in education at a time when the EEA national parent was working in the UK. This was made by the DWP in the context of the **Czop** litigation.

Notice of Decision

20. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Anonymity

No anonymity direction made.

Signed Date **21 January 2015**

Deputy Upper Tribunal Judge Monson