



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

**Appeal
Number**

IA/17028/2014

THE IMMIGRATION ACTS

Heard at Taylor House

**Decision and
Reasons**

On 23 October 2015

**promulgated
On 17 May
2016**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

**Secretary of State for the Home Department
Appellant**

and

**Randeer Harindu Sulakshan Liyanapathiran
(No anonymity order made)**

Respondent

Representation

For the Appellant: Ms A Brockleby-Weller, Home Office
Presenting Officer.

For the Respondent: Mr M Sowerby of Counsel instructed by Indra
Sebastian Solicitors.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Davey promulgated on 10 June 2015, allowing the appeal of Mr Randeer Harindu Sulakshan Liyanapathiran against a decision of the Secretary of State for the Home Department dated 22 March 2014 to refuse to issue a Derivative Residence Card.

2. Although before me the Secretary of State is the appellant and Mr Liyanapathiran is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Liyanapathiran as the Appellant and the Secretary of State as the Respondent.

3. The Appellant's personal details and immigration history are a matter of record on file and known to the parties; they are also set out in the body of the decision of the First-tier Tribunal. It is unnecessary to re-rehearse such matters here; I refer to any pertinent matters as is incidental for the purposes of this decision.

4. The Appellant's application for a Derivative Residence Card was based on his claim to be the primary carer of Ms Nawalage Harischandra, a British citizen born on 23 Aug 1932.

5. Although in the Appellant's application form at section 3.11 the Appellant described himself as the 'grand nephew' of Ms Harischandra, and he was also thus described in a supporting letter from Ms Harischandra dated 28 Nov 2013, the Respondent's 'reasons for refusal' letter ('RFRL') dated 22 March 2014 refers to Ms Harischandra as the Appellant's grandmother.

6. As such - and seemingly on the basis of a misconception of fact - no issue was expressly raised in the RFRL in respect of regulation 15A(7)(a) of the Immigration (European Economic Area) Regulations 2006, whereby in order to be a 'primary carer' of another person for the purposes of regulation 15A(4A) it is necessary to be either "*a direct relative or a legal guardian of that person*".

7. But for this misconception of fact, it is likely that the Respondent would have raised the issue in the RFRL because the Respondent's policy guidance document on 'Derivative rights of residence' states that "*Direct relatives include the following: parents; grandparents; spouse or civil partner...; children; grandchildren*", and further excludes stepchildren who "*are not considered to come within the definition of 'direct relative'... unless there is also an adoption order or legal guardianship order in place*".

8. I pause to acknowledge that the list of relatives is presented in the Respondent's policy guidance document as non-exhaustive (i.e. *"include the following"*).

9. The Appellant is the child of Ms Harischandra's brother's daughter – the child of her fraternal niece. He is thereby not amongst the categories of relative identified in the Respondent's guidance – and is not obviously in a category of similar familial proximity to those categories expressly identified.

10. The First-tier Tribunal Judge appears to have accepted that the Appellant was a direct relative on no other basis than mere assertion: see paragraph 4 (*"[Ms Harischandra] confirmed that the Appellant was a direct relative..."*), and paragraph 7 (*"I accept her statutory declaration, dated 13 January 2014, that the Appellant is a direct relative..."*).

11. In my judgement he was in error to accept such an assertion without any analysis of either the evidence by way of the various birth and marriage certificates tracing the relationship, or otherwise by giving consideration to the meaning of 'direct relative'.

12. Mr Sowerby has submitted that the Judge did not simply parrot the mistake of the Respondent, but made his own finding, open to him on the evidence, that the Appellant was the direct relative of Ms Harischandra. I acknowledge that the Judge does not expressly repeat the mistake of the RFRL – he does not describe Ms Harischandra as the Appellant's grandmother. But, neither does the Judge state what the relationship actually is, or make any reference to the possible meaning of direct relative. The Judge was faced with a mixed question of fact and law, and in my judgement has not made any relevant express finding of fact (i.e. as to the exact nature of the relationship), and has not apparently had regard to the question of law (i.e. what does 'direct relative' mean).

13. In the alternative, Mr Sowerby submits that any such error was not material, because the Appellant is indeed to be regarded as a direct relative of Ms Harischandra. In this context he relies upon the fact that there is no specific definition of 'direct relative' to be found in the EEA Regulations, or otherwise in Directive 2004/38/EC; that the Respondent's guidance is non-exhaustive in identifying categories of relative; and that the Appellant is indeed a relative of Ms Harischandra who can trace his bloodline directly to her.

14. The word 'direct' appears in regulation 7 in the context of the definition of a family member. So far as is relevant, regulation 7(1) provides:

"... the following persons shall be treated as the family members of another person

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partner

(d) [not relevant here]"

15. Regulation 8 provides definitions of categories of persons who are considered to be extended family members under the Regulations. In so far as any particular category refers to 'a relative', it is not qualified by the adjective 'direct'.

16. In such circumstances, in my judgement, the word 'direct' in the context of 'direct relative', must be seen as connoting a person in a closer familial relationship than that of an extended family member, and therefore one approximating the definition of a family member. Further, when one considers together the similar but slightly different stylisations found in regulation 7 - "*direct descendants*" and "***direct relatives** in [the] ascending line*" (my emphasis) - it is clear in my judgement that what the Regulations have in mind is 'a direct line'. I find that 'direct relative' means a relative in direct line.

17. On the facts here the Appellant is not in direct line with Ms Harischandra. He can trace a direct line back to Ms Harischandra's brother via his own mother, but that is not a direct line to Ms Harischandra.

18. Accordingly I am satisfied that paragraphs 5 and 6 of the Respondent's Grounds in support of the application for permission to appeal - which constituted the essential basis upon which permission to appeal was granted - are made out.

19. It follows not only that there is a material error of law requiring that the decision of the First-tier Tribunal be set aside, but that the decision in the appeal on remaking must inevitably be that the appeal is dismissed under the EEA Regulations.

20. As such it is unnecessary to consider the further grounds of challenge in respect of the issue pursuant to regulation 15A(4A)(c) – whether Ms Harischandra would be unable to reside in the UK or in another EEA State if the Appellant were required to leave. Were it necessary to consider this issue I would likely have found in the Respondent’s favour and concluded that the Judge had also erred in this regard. In particular, whilst the Judge has identified that Ms Harischandra is mentally strong and independent of character and as such would not wish to be cared for by social services or other strangers, it is not readily apparent that in circumstances where she gave no direct statement to the effect that she would quit the UK in the event of the Appellant’s departure, that the Judge has made any express finding that Ms Harischandra would not elect to accept care from social services if the alternative was relocation to Sri Lanka to live with the Appellant. The Judge arguably also did not make any critical examination of the benefits Ms Harischandra currently receives by virtue of living in the UK by way of, for example, medical assistance, compared to what might be available to her in Sri Lanka, as informing an assessment of whether she would more likely than not leave the UK: see **Ayinde & Thinjom (Carers - Reg.15A - Zambrano) [2015] UKUT 00560 (IAC)**. Rather the Judge’s analysis is essentially one of finding that comparative care to that currently received would not be available: that is not the test, and nor is it a determinative indicator that Ms Harischandra would leave the UK in consequence.

21. For completeness I note that whilst the First-tier Tribunal Judge made sympathetic observations in respect of the merits of an alternative submission relying upon Article 8 of the ECHR, he quite correctly ruled that he was not obliged to reach a decision in this regard. (Now see: **Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)**.) In any event the Appellant has raised no issue in this regard before the Upper Tribunal.

Decision

22. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

23. I remake the decision in the appeal. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 9 May 2016