Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA010922015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th April 2017	**On 2nd May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MS THI HUYEN PHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Mac of Mac & Co Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Vietnam, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 23rd September 2015 to refuse her application for a derivative residence card under 15A(2) of the Immigration (EEA) Regulations 2006 (as amended) as the primary carer of an EEA national child. First-tier Tribunal

Judge C A Parker dismissed the Appellant's appeal. The Appellant now appeals with permission to this Tribunal.

2. The background to this appeal is that the Appellant's child is a Bulgarian national. The Appellant previously applied for a residence card as the child's primary carer on 10th August 2013. That application was refused on the basis that the Appellant had failed to provide documents to show that the child had sufficient funds that would be sustainable during his period of residence in the UK. The Appellant applied again on 13th April 2014 but that application was refused for the same reasons and no appeal against that decision was lodged. The Appellant applied again for a residence card on 18th April 2015 on the same basis. That application was refused on 23rd September 2015 on the basis that the evidence submitted failed to demonstrate that the child is a self-sufficient person as required by Regulation 15A(2). That decision is the subject of this appeal.

3. The relevant provisions of 15A of the 2006 EEA Regulations for the purposes of this appeal are as follows:

> **"Derivative right of residence**
>
> **15A.** (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) 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 ("the relevant 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.
>
> …
>
> (7) P is to be regarded as a "primary carer" of another person if
>
> (a)P is a direct relative or a legal guardian of that person; and
>
> (b)P—
>
> (i)is the person who has primary responsibility for that person's care; or
>
> (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.
>
> …"

4. The First-tier Tribunal Judge noted that the Appellant attended the hearing but did not give oral evidence, instead relying on the documentary evidence. The judge referred to the Home Office policy guidance for derivative rights of residence of 7th April 2015 in relation to how income from the primary carer should be treated in assessing whether the child is self-sufficient in accordance with regulation 15A (2)(b)(ii). The judge noted that the income from the Appellant could only be considered in the context of the Respondent's policy which states that the EEA national child must be self-sufficient first before the primary carer starts his employment in a **Chen** capacity (**C-200/02) [2004] ECR I-9925.**

5. The judge took into account the letter submitted after the hearing from the Appellant's landlady stating that she provides the Appellant and her son with free accommodation. The judge considered the Appellant's employment but considered that this income could not be considered because it did related to the tax years ending April 2015 and April 2016 and therefore did not arise from lawful employment from before the application for a derivative right of residence[15]. The judge concluded that there was no evidence that the Appellant's son was self-sufficient before the Appellant began working in the UK trading as Tan Nails Design and her income from this employment could not be taken into account when assessing whether her son was self-sufficient [17].

6. The judge noted at paragraph 19 that the Respondent's guidance states that income from other sources may be taken into account if the primary carer is not lawfully working in the UK. Other sources are noted as being described as bank statements showing income from other sources, for example family or friends or savings accounts showing funds which are accessible to the primary carer and child.

7. The judge noted at paragraph 20 that the deposits in the Appellant's bank account do not correspond with the amounts on her payslips. The judge noted that the Appellant's representative submitted that the Appellant had a large sum of money with her when she came into the country but there was no oral or documentary evidence of this nor was the amount specified. The judge said that in the absence of evidence concerning this source of funds she could not take it into account as income from other sources.

8. The judge said that having regard to all of the evidence in the round she was not satisfied that the Appellant is entitled to have her income from employment taken into account when assessing whether she and her son are self-sufficient as she did not have any permission to work when she made her **Chen** application to remain. The judge was not satisfied on the evidence that the Appellant had access to other funds nor that they were adequate in order to establish self-sufficiency [20].

9. The judge finally noted that the Appellant is required to demonstrate that she and her son have comprehensive sickness insurance. The judge said that the Appellant relied upon documents relating to "Aviva travel insurance covering herself and her son" [21]. The judge concluded:

> "Whilst this is evidence that some insurance is in place there was no evidence as to the content of the policy and the Appellant has not established, on a balance of probabilities, that this policy amounts to 'comprehensive health insurance'." [21]

Error of Law

10. The Appellant appeals against that decision on three grounds which were amplified at the hearing by Ms Mac. The first ground is that the judge erred in failing to take account of the HSBC bank statements from February and March 2015 showing deposits which came from independent sources which amounted to support from

friends and family. Although Ms Mac submitted to me that the judge had heard oral evidence from the Appellant as to the source of these funds I note that the judge stated at paragraph 8 that the Appellant did not actually give oral evidence. In her witness statement dated 15th September 2016 the Appellant made no reference to the funds in the HSBC bank account or as to the source of those funds. Ms Mac accepted that the Appellant was working in the UK from February 2014 following grant of permission to work in a **Chen** capacity. Ms Mac did not point to any evidence before the judge in relation to the source of any funds available to the Appellant separate from her earnings from her employment on foot of the permission granted by the Home Office pending the resolution of her application for a derivative residence card (granted on 28th April 2014 and 4th June 2015). In the absence of any evidence to the contrary before the judge I see no error in the decision by the judge at paragraph 20 that there was no evidence as to any other funds available to the Appellant. There is no error in the judge's decision in relation to this matter.

11. The second Ground of Appeal contends that the judge failed to take into account the fact that the Appellant's landlady provides free board and accommodation to the Appellant and not just free accommodation. The judge referred to this evidence at paragraphs 11 and 14. This was based on the letter from the Appellant's landlady dated 6th October 2016 submitted after the hearing. That letter states that the landlady provides the Appellant with rent-free accommodation in return for free housework. The judge took full account of this evidence at paragraphs 11 and 14. Contrary to Ms Mac's submission that letter does not refer to the provision of board, just to the provision of accommodation. There is no other evidence that the Appellant's landlady provides anything other than accommodation. The judge took full account of the fact that the Appellant was provided with free accommodation by her landlady. There is no error in the judge's decision in relation to this matter.

12. The third Ground of Appeal contends that the judge erred in her treatment of the evidence of sickness insurance with Aviva. I agree that it appears that the judge made a mistake at paragraph 21 where she referred to the documents as relating to Aviva 'travel insurance'. It is clear that the documents in the Respondent's bundle relate to Aviva health insurance. The judge appears to consider that the evidence shows that there is some insurance "in place". However, having considered the Aviva documents it is clear that the Appellant and her child have medical insurance. The documentation provided is sufficient to demonstrate that the medical insurance is comprehensive for the purposes of the Regulations.

13. In these circumstances I do consider that the judge made an error in relation to her treatment of the Aviva health insurance policy. However, this is not a material error in light of the judge's sustainable findings in relation to self-sufficiency. The Appellant must demonstrate that she meets all of the provisions of the EEA Regulations.

14. Considering all of the evidence before the First-tier Tribunal Judge I am satisfied that the judge made findings open to her on that evidence and no material error of law has been disclosed by the Grounds of Appeal.

Notice of Decision

The decision of the First-tier Tribunal Judge does not contain any material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 28th April 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 28th April 2017

Deputy Upper Tribunal Judge Grimes