



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01523/2017

THE IMMIGRATION ACTS

Heard at UT (IAC) hearing at Field House
On 12th July 2018

Decision & Reasons Promulgated
On 19th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MS BIBIANA ANGELICA MALDONADO GUERRERO
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Thoree, Solicitor, Thoree & Co Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Colombia whose appeal was dismissed by First-tier Tribunal Judge Telford in a decision promulgated on 20th April 2018.
2. The Appellant had made an application for a derivative residence card on 1st August 2016 and the Secretary of State noted that she had applied for a residence card on the basis that she was a third country national upon whom a British citizen was dependent in the United Kingdom. The Secretary of State concluded that there was insufficient

evidence to show that the British citizen child M S would be unable to remain in the United Kingdom/EEA if she was forced to leave the United Kingdom. The reason given was that she had not provided evidence as to why the child's father was not able to care for the British citizen child if she was forced to leave here. The application was refused and the appellant exercised her right of appeal.

3. It was on that basis that the appeal came before First-tier Tribunal Judge Telford. The judge raised the issue of the link between the Appellant's child and the putative father which was not something raised in the refusal letter. The judge says he indicated clearly to both sides that following his reading of the evidence to be adduced everything was in issue and the parties were invited to consider the position and a short adjournment was allowed for instructions to be taken. No further application to adjourn was made by either party upon resumption of the hearing. The judge records (paragraph 21) that during the end of proceedings no objection was raised to his considering the issue of lack of evidence and the point of British nationality or citizenship of the Appellant's son. It was a matter that was fully canvassed before the Judge.
4. The judge was not happy with the credibility of the Appellant and gave reasons for that and concluded that the issue of whether the child was fathered by a person who was a British citizen was not made out. It was for this reason that he dismissed the appeal under the Regulations.
5. Grounds of grounds of application were lodged. The first ground was that every decision taken by the Respondent to the court must have regard to Section 55 "the best interest of the child" and the judge had not done that. There is no need to consider this point further as it is not sound given that the decision in **Amirteymour (EEA Appeals; Human Rights) [2015] UKUT 00466 (IAC)** where it was said that where no notice under Section 120 had been served and where no decision to remove had been made the Appellant cannot bring a human rights challenge.
6. However, the other grounds state that a striking feature of the decision was how the judge took it upon himself to question the validity of the Appellant's son's entitlement to a British passport which was not an issue that had been raised previously. The judge had fallen into error because the Passport Office had already scrutinised the application for the child's British passport and concluded that the child was entitled to have a passport. The judge's conclusion was said to be based on speculation and not on the documentary evidence that would have been before the Passport Office. Given that he had taken it upon himself to go behind the decision of the Passport Office justice could not prevail and the judge had failed to appreciate that there was a shift in the burden of proof given what was said in **R v SSHD ex parte Obi [1987] Imm AR 420**.
7. Permission to appeal was granted based on what was said in the grounds and thus the matter came before me on the above date.
8. Mr Thoree explained that he had appeared before Judge Telford and had taken instructions on the point raised about the British citizen father and had explained to the judge that everything was contained in the papers. For reasons put forward in the

grounds he asked that the decision be set aside and be remade in the Appellant's favour.

9. For the Home Office it was said that they were not taking the point that the child was not British as found by the judge. It was clear enough from the judge's decision that he had found the Appellant was the primary carer of the child which was the only point taken against the appellant by the Home Office in the refusal letter. If there was an error in law there was no objection to the appeal being allowed.
10. I reserved my decision.

Conclusions

11. It is not wholly clear why the judge decided to take the point that the child may not have been a British national. Nevertheless, he says he canvassed this with the parties who agreed that he could proceed in that way. However, what the judge then did was to note that the Appellant had not provided any copy passport for the claimed father of the child and had provided no passport number for that person. He then went on to criticise the evidence given by the Appellant. The difficulty with this finding is that no prior notice was given to the Appellant that this was an issue that would appear at the hearing before the judge. It was therefore unfair for the judge to criticise the Appellant for not producing further evidence on this point which was not a point in dispute prior to the hearing and by doing so he clearly erred in law. The terms of the refusal letter are quite clear - they refer to M S as a "British citizen child". This was a concession and the Appellant cannot be fairly criticised for failing to supply evidence to support that proposition which is what the judge did. It seems to me that the judge fell into further error in not appreciating the fact that the burden of proof was now on the Home Office as set out in the case of Obi referred to above.
12. In my view the judge therefore made material errors of law. As noted above for the Home Office it was said that they were not taking the point that the child might not be a British citizen. That issue had already been considered and determined by the Home Office. Given what the judge said in paragraph 60 of his decision that the issue of the Appellant's primary carer was "made out" there was no objection to the appeal being allowed.
13. It follows from this that the judge fell into error for the reasons given above and that the decision must be set aside and remade. The judge's findings on whether the appellant is the primary carer might be said to be not entirely clear but given his conclusion that the appellant *was* the primary carer and the proper concession of the Home Office this appeal can now safely be allowed on the basis that the child is accepted to be a British citizen and that the Appellant is the primary carer.

Notice of decision

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
15. I set aside the decision.

16. I remake the decision.

17. The appeal is allowed under the EEA regulations.

No anonymity order is made. I was not asked to make a fee award.

Signed *JG Macdonald*

Dated 19th July 2018

Deputy Upper Tribunal Judge J G Macdonald

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award but given the mixed credibility findings of the judge have decided to make no fee award.

Signed *JG Macdonald*

Dated 19th July 2018

Deputy Upper Tribunal Judge J G Macdonald