



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

Appeal Number: IA/51313/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 20 November 2014**

**Decision and Reasons
Promulgated
On 23 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**COLINE CASSANDRA BANJAMIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Goddard of Southwark CAB

For the Respondent: Mr T Melvin of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Jamaica born on 22 April 1986. She claims to have been in the United Kingdom since 6 July 2002. She has a child born in 2007 who is a British citizen by reason of his father having been naturalised as a British citizen in 2005. The Appellant states she and her child's father have never set up home together. She believes at the date

of the birth of her child the child's father was married and states that now the father has no contact with his child.

2. On 15 January 2013 the Appellant sought a residence card to evidence a derivative right of residence as the primary carer of her child under Regulation 15C of the Immigration (EEA) Regulations 2006 as amended (the EEA Regs.). On 11 November 2013 the Respondent refused her application on the basis that the Appellant had not shown sufficient evidence that if she were removed her child would be unable to remain in the United Kingdom or within the European Union or European Economic Association because there would be none to take responsibility for the child's care. The child's father was an exempt person for the purposes of the EEA Regs. The Appellant had failed to provide any evidence to show she was the primary carer and that no one else could, if necessary, care for her child. The Respondent noted the burden of proof was on the Appellant.
3. The Respondent noted the Appellant could make a further application on the basis of the Immigration Rules or make an application for consideration of her claim by way of reference to Article 8 of the European Convention. The Respondent considered no such issues were before her and having taken into account the state's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard the welfare of the Appellant's child found the Appellant did not have any basis to stay in the United Kingdom. Details of arrangements for voluntary removal were given but no removal decision was made.

The First-tier Tribunal's Determination

4. By a determination promulgated on 18 July 2014 Judge of the First-tier Tribunal Pears dismissed the appeal under the EEA Regs., under the Immigration Rules and under Article 8 of the European Convention. He noted no anonymity direction had been requested and made none. The Appellant was unrepresented before him. He referred extensively to the documentary evidence which the Appellant had put before the Tribunal and that she and her child's father had never lived together and that at all material times the child's father had been married to someone else. She claimed she did not know this fact when she became pregnant. He referred at paragraph 11 of his determination to the very limited contact between child and father. He considered Regulation 15A and separately the jurisprudence relating to claims under Article 8 of the European Convention. The Appellant had lived the majority of her life in Jamaica. Her last leave to enter or remain had expired in 2004, some considerable time before the birth of her child. She did not meet the requirements of any relevant Immigration Rule. She had not shown the Respondent's decision was disproportionate to the legitimate objective of proper immigration control. He also noted the Appellant's child had now spent the entirety of its some seven years of life in the United Kingdom and was attending school.

5. The Appellant then consulted the Southwark CAB who on 5 September 2014 lodged an application for permission to appeal to the Upper Tribunal. On 8 October 2014 Judge of the First-tier Tribunal Pooler extended time for the making of the application and granted permission to appeal because it was arguable Judge Pears had made an error of law by failing to give any or adequate reasons for finding the Appellant did not meet the requirements of the Immigration Rules and in his assessment of the proportionality of her claim outwith the Rules under Article 8 it was arguable he had failed to make adequate findings what were the best interests of the Appellant's child and whether it would be reasonable for the child to leave the United Kingdom.

The Hearing in the Upper Tribunal

6. The Appellant and her child attended the hearing at which she was represented by Mr Goddard of the Southwark CAB.
7. He relied on his skeleton argument and submitted the Judge had not given proper consideration to the nationality of the Appellant's child. The Appellant met the requirements of the Immigration Rules which the Judge had not taken into account and the Judge's consideration of her claim under Article 8 of the European Convention had been unsatisfactory. Additionally, the fact that the Appellant met the requirements of the Immigration Rules should have been a factor taken into account in the assessment of the proportionality of the Respondent's decision in the Appellant's Article 8 claim.
8. For the Respondent, Mr Melvin relied on the Respondent's response under Procedure Rule 24 and noted that the Appellant's skeleton argument had been submitted at the hearing in Upper Tribunal and was not before the Judge. The burden was on the Appellant. The Appellant's application was under the EEA Regs. and she had failed to show the Judge had made an error of law in his consideration of the derivative residence right claim under the EEA Regs. At paragraph 21 of his determination the Judge referred to the Appellant's failure to make sufficient efforts to trace her child's father and to give greater information about his current circumstances to the Tribunal. Effectively, this amounted to an adverse finding that the Appellant could have done more and so had not been sufficiently frank with the Tribunal. Additionally, there was no information before the Tribunal why there was no one in her immediate or extended family able to assist with the care of her child if the Appellant were to leave the United Kingdom without her child.
9. In the light of his findings of fact the Judge's treatment of the Appellant's claim under Article 8 outside the Immigration Rules at paragraph 27 of his determination was adequate and sustainable. Additionally, the Judge had not made any finding that the Appellant was the primary carer of her child. It was open to the Appellant to make another application for consideration for leave outside the Immigration Rules. That she was unrepresented at

the First-tier Tribunal hearing was not reason to grant her a re-hearing of her appeal.

10. For the Appellant, Mr Goddard submitted the Judge was required to make a full assessment of the Appellant's claim under Article 8. She had not approached her child's father because she was afraid of him and she was even too afraid to ask him for maintenance although he had made a claim for child benefit: see paragraph 11 of the determination. The Appellant's claim under the EEA Regs. might fail but she was still entitled to a consideration of her claim under Article 8 of the European Convention. She may have been in the United Kingdom since about the age of 16 but she had had no leave since early 2004. Nevertheless, when asked Mr Goddard confirmed that the Appellant was not seeking to disturb the Judge's finding that her appeal under the EEA Regs. had to fail. Her present claim was that the Judge's treatment of her Article 8 claim contained a material error of law.

Findings and Consideration

11. The Judge referred to the five stage process described in *R (oao Razgar) v SSHD [2004] UKHL 27* and noted the observations about decisions affecting children in *Azimi-Moayed and Others (decisions affecting children: onward appeals) [2013] UKUT 00197 (IAC)*. However, the Judge made no express reference to the State's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 and had not specifically mentioned the need to consider the best interests of the child as a primary concern. His assessment of the Article 8 claim at paragraph 27 referred to a need for the Appellant to show compelling circumstances why the Appellant's child could not go with her to Jamaica. The Judge said the Appellant had failed to give any reason other than the age of her child and that the child has been in school since 2011 as a reason for allowing her claim under Article 8. This does not indicate the Judge has given proper consideration to what might be in the best interests of the Appellant's child.
12. This is a material error of law. I considered whether any resumed hearing should be in the Upper Tribunal and in consultation with the parties concluded that a more appropriate course would be for the matter to be remitted to the First-tier Tribunal for hearing afresh before a Judge other than Judge Pears.

NOTICE OF DECISION

The determination of the First-tier Tribunal contained a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than Judge Pears.

DIRECTIONS

The Appellant is to consider what additional evidence she wishes to file about her child's father and her attempts to contact him relating to the period since September 2011.

The Appellant is to submit bank statements for all her bank accounts for the period since September 2011 to support her claim not to have received any child benefit for her child.

The Appellant is to submit evidence from her child's school to show the degree and extent of the involvement of the child's father in her child's education.

The Respondent is to file and serve details of all relevant guidance and directions to case workers and policies about the removal of United Kingdom citizen children outside the EEA and on decisions relating to third parties which would have the likely or inevitable result of a UK citizen child being taken for settlement outside the EEA.

No anonymity direction is made.

Signed/Official Crest

Date 02. xii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal