



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: EA/09142/2016

THE IMMIGRATION ACT

Heard at Field House

Decision & Reasons Promulgated

On 13th June 2018

On 19th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

TA

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant appeared in person

For the Respondent : Mr Tarlow Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge G Clarke promulgated on the 10th January 2018 whereby the judge dismissed the appellant's appeal against the decision of the respondent to refuse the appellant's application for a derivative residence card.
2. I have considered whether or not it is appropriate to make an anonymity direction. As concern the status and rights of a child, it is appropriate to make an anonymity direction.
3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge PJM Hollingworth 12th April 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

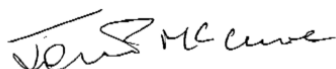
4. In essence the appellant's case is that he attended at the hearing centre at Hatton Cross and had been told to wait. Thereafter his appeal appears to have been called on without the appellant being told that it was to be dealt with by the judge. The judge dealt with the appeal on the basis of the papers lodged in the mistaken belief that the appellant had not attended.
5. I would note that the appellant was seeking a derivative residence card. In effect the application for a derivative residence card was on the basis that the appellant was the primary carer of a British citizen child, who was present in the United Kingdom. The derivative right is based on the case of Ruiz Zambrano (C-34/09), which was given effect in the regulations under regulation 15 A of the Immigration (European Economic Area) Regulations 2006 (as amended) [regulation 16 of the 2016 Regulations. Whilst this appeal is under the 2006 regulations, there is no practical difference between the provisions].
6. The relevant provisions of Regulation 15 A provide: –
15A A Derivative Right of Residence
1) A person ('P') who is not an exempt person and who satisfies the criteria in paragraph.. (4A), (5) of this regulation is entitled to a derivative right of residence in the United Kingdom for as long as P satisfies the relevant criteria.
...[Subparagraph 2 to 4 are not applicable to the appellant]
4A) P satisfies the criteria in this paragraph if
 - a) P is the primary carer of a British citizen ('the relevant British Citizen');*
 - b) the relevant British citizen is residing in the United Kingdom; and*
 - c) the relevant British citizen would be unable to reside in the UK or in another EEA state if he were required to leave.*
7. Within the Regulations, Regulation 15 A (7) in order to be entitled to a derive right an individual had to be a direct relative. At paragraph 41 of the decision the judge made a specific finding based upon the DNA evidence that the appellant was a direct relative namely the father of the child. That finding of fact stands unchallenged and deals with the relationship of the appellant to the child.
8. The issues thereafter were whether or not the appellant was the primary carer of a British citizen child and whether the child would be able to reside in the United Kingdom if the appellant were to leave
9. The evidence adduced had proved conclusively that the child in question, the child of the appellant, was a British citizen child. The evidence otherwise disclosed that the mother of the child was also a British citizen and therefore could not be forced to leave the United Kingdom or the EU area.
10. It was therefore for the appellant to adduce evidence that he was the primary carer of the child. The evidence adduced proved that the child resided with his mother. Whilst there was evidence that the appellant had played a significant role in assisting the mother of the child the evidence was not such as to show that he was the primary carer.

The evidence with regard to the appellant's role in the child's life came from the appellant and the child's mother. It did disclose that since 2011 the appellant had played a significant role in assisting her. There had been an agreed court order to establish a clear basis for contact between the appellant and the child. However the primary carer of the child was clearly the mother and the child lived with the mother. It has to be acknowledged that the appellant assisted but he was not the primary carer.

11. On the basis of the evidence presented the judge was entitled to conclude that the mother was the primary carer. Given that the mother could not be forced to leave the United Kingdom and the child would continue to reside with her whether the appellant was forced to leave the United Kingdom or not, the judge was entitled to conclude that the appellant did not meet the requirements of the Regulations.
12. I invited the appellant to make submissions. I indicated that if I were to rehear the appeal on the basis of the evidence presently before the Upper Tribunal the outcome would be the same. On the basis of the evidence lodged the appellant did not meet the requirements of the regulations and was therefore not entitled to a derived residence card. I invited the appellant to adduce any further evidence that he had with regard to his relationship to his child. The appellant accepted that he had no further evidence that he wished to submit.
13. Before me the appellant sought to argue that he had been ill advised by his representatives. He wished to raise matters under the Immigration Rules and under Article 8 of the ECHR.
14. With regard to whether or not his representatives had not advised him properly that was not a matter for me. Indicated to the appellant that I could not assist him in that regard.
15. With regard to the issues under the Immigration Rules and Article 8 I pointed out the cases of TY 2015 EWCA Civ 1233 and Amirteymour v SSHD 2017 EWCA Civ 353 which make the point that where the application is for a residence card under the Regulations and there is no removal, the appellant cannot seek to rely upon either the Immigration Rules or Article 8. It was for the appellant to make an application under the Immigration Rules and Article 8 to the respondent.
16. In the light of the matters set out the judge has not made a material error of law.

Notice of Decision

17. I dismiss the appeal.
18. I make an anonymity direction



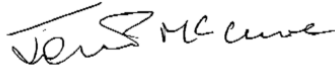
Signed

Date 15th June 2018

Deputy Upper Tribunal Judge McClure

Direction regarding anonymity- rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

A handwritten signature in black ink, appearing to read 'James McClure', written in a cursive style.

Signed

Date 15th June 2018

Deputy Upper Tribunal Judge McClure