Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24511/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 May 2017	**On 06 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MISS C G E B
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid, Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cameroon who applied on 2 March 2013 for a residence card as confirmation of a derivative right of residence under the *Immigration (European Economic Area) Regulations 2006* ("the EEA Regulations"). The respondent refused her application on 23 June 2015. The appellant's appeal against that decision was dismissed by Judge of the First-tier Tribunal I Ross ("the FTTJ") in a decision promulgated on 24 October 2016.

2. Given my references to the child of the appellant, I make an anonymity direction.

3. Permission to appeal was granted by First-tier Tribunal Judge Colyer on 24 April 2017. Thus the appeal has come before me.

Submissions

4. Ms Reid, for the appellant, submitted the FTTJ's findings were perverse in the light of the evidence, there was no evidence the appellant was not the sole carer for her daughter. The FTTJ had placed unreasonable expectations on the appellant to establish that her daughter's father was not involved in her care. It was incorrect to state the appellant had accepted she had seen her child's father after making the declaration of sole responsibility. The FTTJ had failed to give reasons for finding the appellant not credible. He had failed to give weight to the evidence of the second witness, Miss Amvouna, without giving reasons for this. The FTTJ had incorrectly cited Regulation 18A indicating a lack of care in the drafting of the decision. The FTTJ had erred in failing to make findings about a material issue, namely whether the appellant's daughter was living in the UK, addressing only the issues of whether the appellant was the sole carer for her daughter and whether her daughter could remain in the UK without her. It was also submitted that the FTTJ had failed to consider the best interests of the child pursuant to s55 of the Borders, Citizenship and Immigration Act 2009. She said there was no finding in the decision that the relationship between the appellant and her former partner was subsisting.

5. Mr Nath, for the respondent, submitted that the FTTJ had been entitled to agree with the respondent's assessment that the appellant had not demonstrated she was no longer in a relationship with the father of the child. The findings of the FTTJ were open to him on the evidence and he had reasoned his findings adequately, albeit briefly. Mr Nath submitted that the existence of contact between the appellant and her former partner after the signing of the declaration was relevant to an assessment of the credibility of the appellant's evidence.

Analysis – Error of Law

6. The FTTJ referred to Regulation 18A at [12] of his decision. He paraphrased Regulation 18A but, whilst there is room for criticism in his summary (in that the respondent would be obliged to issue a derivative residence card to an non-EEA national if they fulfilled the relevant criteria), this is not a material error of law because the FTTJ then goes on to consider the appeal by reference to the criteria in Regulation 15A. In fairness to Ms Reid, she conceded as much, notwithstanding the grounds of appeal to this tribunal.

7. It is implicit from the FTTJ's determination that he considered the appellant's child to be in the UK; there was no need for him to make a specific finding on the issue. He makes it clear at [12] of his decision that "the only issues in the appeal are whether the appellant has shown that she is the sole carer of her child and that the child could not remain in the United Kingdom without her". This reflects the requirements in Regulation 15A(4)(a) and (c).

8. The grounds of appeal suggest there was no basis for the finding at [8] that "the appellant accepted that she had seen the child's father after she had made that declaration". A copy of the notes of evidence of Ms Nizami, counsel for the appellant in the First-tier Tribunal, have been produced. She has also provided a witness statement to support this appeal. I showed Ms Reid and Mr Nath the FTTJ's record of the evidence of the appellant. Counsel's note is ambiguous in that she has summarised two questions put to the appellant by the FTTJ. Opposite these questions there is a question mark which appears to relate to both questions, with the word "no". Ms Nizami says in her statement that her "recollection is that [the appellant] was clear that her relationship with the father of her baby ended suddenly at the end of February 2015. My note indicates that [the appellant] said that she had not seen him after she made the Declaration of Sole Responsibility". In contrast, the FTTJ's note records that the appellant told him "I saw him after I swore that declaration". Ms Nizami's note and statement are inconclusive as to the evidence of the appellant whereas that of the FTTJ is conclusive. Ms Nizami says only that her client confirmed "her relationship" ended at the end of February 2015. Ms Nizami makes no reference in her statement as to whether the appellant

had said she had seen the father of her child after signing the declaration. Furthermore, Ms Nizami's note of the question posed by the FTTJ and the answer given to it by her client is incomplete and contains a question mark which suggests she did not record it accurately. I am satisfied that the appellant did indeed tell the FTTJ that she had seen the father of her child after signing the declaration of sole responsibility on 25 February 2015. It was therefore appropriate for him to make a finding to that effect. That said, for the reasons I set out below, this finding has little impact on the outcome of the hearing.

9. The FTTJ's findings are said to be perverse in that there was no evidence before the tribunal that the appellant was not the sole carer of the child. The FTTJ was said to have placed unreasonable expectations on the appellant to establish that her daughter's father was not involved in her care and the child's birth certificate was not indicative of her father taking responsibility or care for her. It is also submitted that the FTTJ had failed to give reasons for finding the appellant's evidence not credible. He had, it is said, failed to give any reasoning for the finding that the child's father, being a traffic warden, would be "easy to trace". Nor, it is submitted had the FTTJ given any weight to the evidence of Ms Amvouna or reasons for failing to do so.

10. The FTTJ's decision is brief in terms of reasoning. It is right that he has not referred at all to the evidence of Ms Avmouna in his findings. She attended the hearing in support of the appellant and gave oral evidence. Her evidence is noted at [9] of the decision. At paragraph 49 of **MA (Somalia) [2010] UKSC 49**, it was said that "Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned". While the FTTJ has not specifically referring to considering all the evidence in this case, that is implicit from his summary of Ms Avmouna's evidence at [9]. Her witness statement contains only one sentence of relevance to the issues of whether the appellant was the sole carer and whether the child would have to leave the UK. She says "[the appellant] is a single mother and I have made attempts to enable the father of her child to play an active role in her life in vain". This is extremely vague and lacks detail. Her oral evidence was in a similar vein save that she added that the child's father was around for a couple of months. She also corroborated the appellant's evidence about attempting to look for the father. That is evidence to which the FTTJ referred in his decision at [13].

11. The FTTJ did not find the appellant to be a truthful witness. Insofar as the two sole issues are concerned, her evidence is sparse. In her witness statement, she refers to the birth of the child on 9 December 2014. The only other relevant evidence in her statement is as follows:

> "7. After 3 months of giving birth to baby …, I notice that the accommodation was overcrowded and suggested to [the child's father] that I would like to move to his accommodation with the baby. Initially, he seemed to be ok with it. As I was now planning when to move to his place, his behaviour changed. The frequency of his visits became far and in-between. The financial support was not forthcoming. My calls were not returned as before. It became one excuses to another. Finally, he braked [sic] the news that he was in fact a married man."
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> …
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> "12. I wish to state that I am the primary carer of baby … She lives with me full-time at … I make sure that she is kept clean, feed, taken to the GP as and when need be and I decide which church she attends and I will decide on the school she would attend when she is of school age.

> 13. [The child's father] works full-time and is married. In my view, it is not in baby … (British) best interest to be separated from me her natural mother that she is used to. Relocation to Cameroon with baby … will make her miss her only known family in the UK …"

12. There is no reference in that witness statement to the appellant's attempting to find the child's father by going to his property; this was new evidence given at the hearing. The FTTJ was entitled to treat this new evidence with some scepticism given the failure of the appellant and her aunt to refer to it in their appeal statements. The FTTJ has taken into account the appellant's visit to her former partner's property but notes she has "produced no evidence from anybody at her partner's address that he is no longer there and left". Such evidence would not have been difficult to obtain and it was not unreasonable for the FTTJ to consider the lack of such evidence when assessing the reliability of the evidence before him.

13. The grounds of appeal refer to there being "no evidence before the Tribunal" that "the Appellant is not the sole carer for her daughter". That is to reverse the burden of proof: the burden is on the appellant to demonstrate her entitlement to a derivative residence card and that she fulfils the criteria in Regulation 15A(4). It is not for the respondent to adduce evidence that the appellant is not the sole carer. It was for the appellant to demonstrate she was the sole carer. The appellant claimed (albeit in limited terms) to be the child's sole carer. The FTTJ was entitled to assess the evidence in support of that claim. The FTTJ noted at [14] that the letter from the medical practice did not confirm the appellant was her daughter's primary carer nor did the letter to the parent/guardian. Thus the only relevant evidence was that of the appellant and her aunt.

14. I agree that the reasoning of the FTTJ is sparse but it is sufficient and based on the evidence. In any event, even if it were so deficient as to amount to an error of law it is not a material error for the following reasons. The child was born on 9 December 2014; the appellant's evidence in her statement is that three months after her birth she discussed with the father their accommodation arrangements. This must have been in early March 2015. She refers to the frequency of his visits becoming few and far between. By inference, this reduction in the number of visits must have occurred over at least two weeks, i.e. to mid-March 2015. In the meantime, the child's father attended the registry office with the appellant to register the child's birth on 7 January 2015; the child's passport was issued on 3 February 2015; the relationship was said to have ended in February 2015 and the appellant swore the declaration of sole responsibility on 25 February 2015. The latter was prior to the date on which the appellant says she discussed accommodation with the child's father, three months after the birth, and therefore at a time when they were still in a relationship, on the appellant's own evidence. Furthermore, the appellant told the FTTJ that she had seen the child's father after signing that declaration on 25 February. Whilst that contact may not have been in the context of an ongoing relationship it does call into question the reliability of the timeline in the appellant's evidence: that contact is consistent with their still being in a relationship and discussing accommodation in early March 2015 (according to timing in the appellant's witness statement). Furthermore, the appellant says in her declaration of sole parental responsibility that, as at 25 February 2015, that "I have been and still the sole guardian of [her child] since birth". This is not consistent with her witness statement which infers that financial support stopped three months after the birth (paragraph 7 of her statement).

15. Whilst I have a concern as to whether the FTTJ's finding that "the appellant's partner would have been easily traceable, given his job as a traffic warden" is sustainable, this does not amount to a material error of law given the significant discrepancies in the appellant's evidence. Even if the FTTJ's reasoning were inadequate, such as to amount to an error of law, the appeal could not have been successful on the evidence before the FTTJ. The only

possible outcome of the appeal was dismissal on the grounds that the appellant's evidence was not credible. The evidence did not support a finding that the appellant was, at the date of hearing, the sole carer of her child and that the child would be unable to reside in the UK if the appellant were required to leave.

16. It was also submitted that the FTTJ had failed to consider the best interests of the child pursuant to s55. The appellant had applied for confirmation of an EU law right, namely a derivative right of residence. The EEA Regulations set out specific criteria to be met for the applicant to be issued a residence card pursuant to Regulation 18. The applicant either has a right of residence or she does not. Regulation 2(1) sets out definitions of terms used in the Regulations. It states that an "EEA decision" means a decision that concerns "a person's entitlement to be issued with ... a … derivative residence card".

17. As Sales LJ says at [26] of **Amirteymour v SSHD [2017] EWCA Civ 353**

> "A right of appeal under regulation 26(1) is only a right to appeal "against an EEA decision". Regulation 26(1) creates no right of appeal against any other kind of decision. In particular, it does not create a right of appeal in relation to a claim for leave to enter or remain under the Immigration Rules or by exercise of the Secretary of State's discretion by reference to Article 8. Where the Secretary of State makes a relevant decision by reference to the Immigration Rules or Article 8, that is an "immigration decision" with a separate right of appeal under section 82(1).
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> 27. In my judgment, the natural meaning of the phrase "may appeal under these Regulations against an EEA decision", as used in regulation 26(1), is that the appeal right thereby created is in respect of an EEA decision and is to proceed by reference to grounds of claim and grounds of appeal of a kind recognised as creating entitlements under the Regulations themselves (reflecting, as they do, entitlements under EU law). This interpretation means that it was not within the jurisdiction of the FTT in this case to allow the appellant to introduce in his appeal under regulation 26 a claim directed to the exercise of the Secretary of State's discretionary powers under the 1971 Act and based upon Article 8. "

18. While **Amirteymour** is a case in which the Court of Appeal was considering the entitlement of an individual to introduce a distinct human rights claim for leave to remain in the United Kingdom, by analogy that reasoning must apply to the duty under s55. The only issue before the First-tier Tribunal was whether or not the appellant met the requirements of the EEA Regulations. The best interests of the appellant's daughter were not a relevant consideration. There was, therefore, no error of law in the First-tier Tribunal decision.

19. For these reasons, there is no material error of law in the FTTJ's decision and reasons.

Decision

20. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

21. I do not set aside the decision.

Signed ***A M Black*** Date 2 June 2017
Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14, 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 him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed ***A M Black*** Date 2 June 2017

Deputy Upper Tribunal Judge A M Black