

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



Appeal Number:

IA/20469/2013

THE IMMIGRATION ACTS

Heard at Field House

On 4 March 2014

Determination

Promulgated

On 12 May 2014

.....

**Before
JUDGE DRABU CBE**

**Between
MS SHABANA SHABANA**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ANONYMITY DIRECTION NOT MADE

DETERMINATION AND REASONS

Representation:

For the appellant: Ms R Duley of Counsel Instructed by Sky Soliitors ltd

For the Respondent: Mr G Saunders., Senior Home Office Presenting Officer.

1. The appellant, born on 16 April 1967. She is a national of Afghanistan. The respondent refused her application for further leave to remain on 17 May 2013. Her appeal against the respondents' decision was heard on 22 October 2013 by First Tier Judge, Judge Owens. After hearing oral evidence from the appellant, and taking account of the relevant documentation, the judge allowed the appeal, giving his reasons in a 12 paged typed determination. The respondent has brought this appeal by permission to the Upper Tribunal contending that decision of the First Tier Judge is in material error of law for reasons advanced in the grounds of appeal. Judge A K Simpson granted permission. She took the view that the decision of the First Tier Judge was based on his wrong understanding of the principles in **MA & SM (Zambrano: EU Children outside Iran [2013] UKUT**, drawing upon paragraph 19 of **Jamil Sanneh [2013]ECWA 793 (Admin)**. The Judge accepted that "there must be some form of compulsion rather than choice before Article 20, 21 of the TFEU are engaged and that in this case compulsion is not made out even where

there would be stark consequences on the working access of the other carer.”

2. At the hearing before me, Mr Saunders representing the respondent relied upon the written grounds of appeal. He further said that I need to bear in mind that the couple do not live together but the father does indeed play a considerable part in the upbringing of the children. However he argued that this was not caused by necessity of compulsion.
3. Ms Dulay in response submitted that the grounds submitted did not establish any material error of law in the determination. At the date of the decision, Ms Dulay reminded me that the youngest child was only 9 months old. He submitted that the facts of the present case were so different to those in the case of MA, In this context she drew my attention to the findings of fact made in paragraph 53 of the determination of Judge Owens, which she argued were clear, evidence based and materially different to those in MA and SA. Judge Owen had found quite correctly that the mother of the children had been their primary carer since their birth. Mr Saunders interjected to say that Judge Owens had not said that it would be impossible for the father to take care of the children. When I asked if impossibility was the legal threshold required, Mr Saunders resiled and said that mere difficulty would not be enough as threshold. Mr Saunders again reminded me that the father was playing a considerable part in the upbringing of the four children, youngest female born in 2012, second , female child born 2009, third a boy born in 2011 and the eldest , a boy born in 2008.
4. I have examined with care the reasons advanced in the letter of refusal by the Secretary of State. I note that the Secretary of State did not accept the appellant, (the mother of the four children) to be the primary carer for the children and a number of inferences from that followed. Judge Owens heard oral evidence from the appellant as well as her partner. He also considered all the documentary evidence which had been placed before him. After analysing all the evidence, oral and documentary, the Judge made clear and reasoned findings of fact. The Judge treated the evidence of the Appellant with great caution as can be see in paragraph 36. He found the “Appellant’s partners evidence as more reliable as it came across as being more plausible and consistent with the small amount of supporting evidence. He answered the questions readily without hesitation and gave open answers to difficult questions. His evidence was much more detailed and less evasive.” (Paragraph 37). At paragraph 44 of his

determination the Judge finds, "I find that as a matter of fact that the children all reside currently with their mother at the family home. I find that it is their mother who provides their day to day care particularly given their ages. The youngest child is nine months old and the eldest is five years old. All four children need a lot of physical care in terms of dressing, bathing, feeding, playing and supervision and I find that it is the Appellant who fulfils this role on a day to day basis. The two younger children given their ages are particularly reliant on her." Following analysis of facts and his findings in paragraphs 48, 49, 50, 51, 52, 53, the Judge quite correctly and properly finds in paragraph 58 that the Appellant satisfies Regulation 15A of the EEA Regulations and that she has a derivative right of residence on this basis.

4. The grounds advanced by the Secretary of State do not attack the findings as being unreasonable or irrational. The Secretary of State takes a different view of the facts which the Judge has with care found to be wrong.
5. In the circumstances I find the decision of Judge Owens was not in material error of law and his decision to allow the appeal should not be disturbed.

Judge K Drabu CBE
Deputy Judge of the Upper Tribunal
9 May 2014

TO THE RESPONDENT
FEE AWARD

I agree with Judge Owens for not making an award in this appeal although he had allowed it.