



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

Appeal Number: IA/27069/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 13 June 2014**

**Determination**

**Promulgated**

**On 16 June 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

**DANE PATRICK TEMPLE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Usher, Solicitor

For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Jamaica born on 29 November 1979, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal M R Oliver, who dismissed his appeal against a decision of the respondent to refuse to issue a derivative residence card under Regulation 18A of the Immigration (European Economic Area) Regulations 2006, as amended, because his application did not meet the requirements of Regulation 15A. In particular, his application did not meet the requirements of Regulations 15A(4A) or 15A(7).

2. The judge heard oral evidence from the appellant and his wife, Ms Gemma Lorraine French. He noted the couple have two children, Milan, born on 17 July 2010, and Caisan, born on 6 August 2012. Both boys are British citizens by birth. The judge concluded as follows:

“19. The application made by the appellant is inappropriate because his children have British citizenship and are therefore not EEA citizens. For this reason the appeal must fail. This decision does not lead to his immediate removal which must now be considered by the respondent. It appears to me from the refusal that although section 55 has been mentioned it has not been considered properly or in any depth and in any consideration whether to remove him the children’s claim on his presence in this respect are likely to have a substantial impact.”

3. Permission to appeal was granted to the appellant on three grounds:

- (1) The judge’s apparent exclusion of the children from consideration under the *Zambrano* point on the basis that they are British citizens was erroneous.

- (2) The judge failed to make any assessment under article 8 of the Human Rights Convention.

- (3) The judge failed to make any assessment of the best interests of the children.

4. The respondent has filed a Rule 24 response opposing the appeal. The determination read as a whole showed the judge decided the appeal by reference to Regulations 15A and 18A. Furthermore, it was not incumbent on the judge to consider article 8 because the decision did not render the appellant liable to leave the UK. He had never made a claim to the respondent to consider article 8.

5. I heard submissions on the question of whether the judge’s decision contains a material error of law. Mr Usher accepted the appellant could not bring himself within the EEA Regulations, although he argued there were practical reasons the appellant’s British partner could not stay alone in the UK with the children. He focused his submissions on the failure of the respondent and the judge to consider article 8 and the best interests of the children. Mr Bramble argued there was no consequence for the appellant as a result of the refusal of a residence card which could engage article 8 of the Human Rights Convention. He should submit a charged application under Appendix FM, as the refusal letter had invited him to do.

6. Mr Usher said no section 120 notice had been served. I asked whether the case of *Lamichchane v Secretary of State for the Home Department* [2012] EWCA Civ 260 applied so as to prevent the Tribunal considering new grounds not raised in response to a section 120 notice. I gave Mr Usher further time to consider this and made available copies of *Lamichchane* and *Jaff* (s.120 notice; statement of “additional grounds”)

[2012] UKUT 00396 (IAC) available to him. Both representatives made further submissions, which I have recorded.

7. The judge plainly erred in law in finding the application “inappropriate” for the reason he gave in paragraph 10 of his brief determination. The EEA Regulations read in relevant part as follows:

“15A. Derivative right of residence

(1) A person (“P”) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4) , (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

...

(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 P were required to leave.”

8. Contrary to what Judge Oliver thought, the Regulations are concerned precisely with the situation of British children, in line with the *Zambrano* judgment. However, his error was not material because the appellant could not in any event satisfy the requirements of the Regulation as set out above. His partner, with whom he shares care responsibility for the children is British and would not be required to leave the UK as a result of the appellant having to. The children would be able to remain with her.
9. As for the question of whether the judge erred by failing to consider article 8 and the best interests of the children, it is clear that the decision under appeal could not have caused any interference with the current living arrangements of the appellant and his family. He is not being removed. A residence card is no more than a document recognising an existing state of affairs and it does not of itself grant any rights. Furthermore, there having been no section 120 notice in this case, the Tribunal could not determine an article 8 ground for the reasons set out in paragraphs 35 to 41 of *Lamichchane*. I find therefore that Judge Oliver did not materially err in law in failing to determine the article 8 ground put forward by the appellant. He had no jurisdiction to do so.

## **DECISION**

The Judge of the First-tier Tribunal did not make a material error on a point of law and his determination dismissing the appellant's appeal shall stand.

No anonymity direction has been made.

No fee award.

**Signed**

**Date 13 June 2014**

**Upper Tribunal**                      **Neil Froom, sitting as a Deputy Judge of the**