Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36447/2013

THE IMMIGRATION ACTS

Given orally at Field House	**Determination Promulgated**
On 5 September 2014	**On 12 September 2014**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS DORIS OSEI BOHSU

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: No representation

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission granted by the Upper Tribunal against the determination of First-tier Tribunal Judge Place sitting at Nottingham on 25 April 2014 who in a determination promulgated on 2 May 2014 allowed the claimant's, Miss Bohsu's, appeal against the refusal of the Secretary of State to issue

her with a document recognising her entitlement to reside in the United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2006. The basis of the claimant's application for such a document was that she satisfied the requirements of paragraph 15A of the Regulations in that she was the primary carer of a British citizen; that the British citizen is residing in the United Kingdom; and that "the relevant British citizen would be unable to reside in the UK or in another EEA state if [she] was required to leave".

2. The grant of permission by the Upper Tribunal specifically required the Secretary of State to assist as to whether there is any authority on the point of what is meant by "unable to reside in the UK". Through no fault of Mr Whitwell who appears on behalf of the Secretary of State before me, that has not been complied with. Mr Whitwell indeed has not had sight of the grant of permission until the hearing today. That does place the Tribunal in some difficulty and certainly precludes it from enjoying submissions by reference to authority or any other relevant materials. The difficulty is compounded by reason of the fact that Miss Bohsu is unable to afford legal representation and appears before me unrepresented.

3. The First-tier Judge made findings on the basis of oral evidence from Miss Bohsu. There was also cross-examination of Miss Bohsu by the Presenting Officer who appeared at the First-tier Tribunal. We note from paragraph 10 that the Presenting Officer asked the claimant when she last had contact with child E's father, child E being Miss Bohsu's son. The claimant replied that they were not in real contact now and that the father, as soon as he had found out that she was pregnant, said he did not ask for this and when the baby was born he did not want to know. Recently he had been doing what he could but it was not enough. He would occasionally pick child E up, maybe fortnightly, maybe once a month. He might buy him something like shoes from time to time. The claimant did not know where the father lived and he was not aware when she made the application for residence. She had only been able to discuss the application with him recently, "he told her that he is not ready to take full responsibility for child E and that it would be easier if she were able to work". The evidence continued by the claimant describing how she lived with her cousin who was like a sister to her and she helped with the cousin's child care. Her cousin provided nearly everything financially. Child E's father would make occasional contributions. Around Christmas he lost contact for several months although he had given £100 for the upkeep of child E. He had also attended child E's baptism in May 2010.

4. The judge's findings begin at paragraph 18 of her determination. She noted that the Presenting Officer submitted that the claimant was not a credible witness and that it could not be accepted that Child E's father was not actively involved in his life. The judge found this: "To the contrary, I found that the appellant's evidence was consistent and plausible. It is true that she was not able to be precise about the amount of involvement that child E's father had had in his son's life but I find that this is because of the haphazard nature of that involvement rather than any attempt on the appellant's part to dissimulate". I note in this regard that this credibility

finding has not been challenged by the Secretary of State; in any case, it could only have been challenged on limited grounds, essentially those relating to irrationality. That however has not been done. The judge then continued by finding that child E's father had occasionally made contact with the claimant but there had been "no consistency or reliability about the frequency or nature of that contact". Whilst the father has made the occasional little more than token contribution to the cost of child E's upbringing, "on the whole he has sought to avoid his responsibilities as a father and left the appellant as child's Es sole carer". The judge then went on to find that she had "no hesitation in finding that the appellant is child E's primary carer for the purposes of paragraph 25A(4A). She cares for him physically and emotionally. She takes all responsibility for his health and education. She is assisted with the financial costs of this responsibility by friends and family". The judge then went on to consider whether child E would be unable to reside in the United Kingdom if the claimant were required to leave. The judge noted in this regard that it was unreasonable to expect a British citizen to leave the United Kingdom. She also noted that child E's best interests were "clearly tied up with the appellant, he is still a very young child". She noted that child E was completely dependent on the claimant in every sense, "even if his father were to have an overnight change of character and become willing to shoulder his responsibilities as a father, it would be detrimental to child E to take him away from the appellant who has intimately cared for him all his life. If the appellant were required to leave the United Kingdom child E would have to go with her".

5. The Secretary of State challenges those findings. She does so by contending that the test of whether the British citizen child would be unable to reside in the United Kingdom is a stringent one and that mere disinclination and reluctance were not itself to satisfy the substantial requirement of the regulations.

6. Before me Mr Whitwell submitted the European Operational Policy Team Caseworker Directions which govern matters of this kind. There is no indication that this document was submitted to the First-tier Tribunal Judge. I note that the directions take the line adopted by the Secretary of State in her grounds of application for permission to appeal. In particular, we find this at paragraph 29: "A lack of financial resources or an unwillingness to assume care responsibility would not, by itself, be sufficient for the primary carer to assert that another direct relative or guardian is unable to care for a British citizen. Caseworkers must start from the assumption that where there is another direct relative or legal guardian in the UK, that they can care for the British citizen unless there is sufficient evidence to the contrary". As I have stated, for various reasons, I am not assisted by any further material or submissions in determining this matter.

7. I fully accept the overall thrust of the Secretary of State's point, which is that the test of whether the British citizen would be unable to live in the United Kingdom if the primary carer were to be required to leave is a stringent one. To require anything less would dilute the meaning of the Regulations. However, since those Regulations were put in place as a direct response to the judgment of the Court of Justice of the

European Union in the case of Ruby Zambrano (European citizenship) [2011] EUECJ C-3409, it is important to bear in mind that at paragraph 45 of the judgment in that case the European Court states that "it must be assumed that such a refusal would lead to a situation where those children citizens of the Union would have to leave the territory of the Union in order to accompany their parents". That assumption based on the evidence in the Zambrano case, makes it clear that the meaning of unable to reside falls to be determined by reference to whether, if the primary carer were to leave, that would mean that the British citizen child would also have to leave the United Kingdom and the more general territory of the European Union. That is precisely the wording used by the First-tier Tribunal Judge in the last sentence of paragraph 22 of her determination. That test, as is plain from Zambrano is one of fact. It cannot be said that inability to live in the United Kingdom requires it to be shown that the British citizen would legally have to leave. On the contrary, as a British citizen child E has a right to reside in this country. Furthermore, if child E were to be left without any parental means of support, he would be looked after by relevant social services. That, however, cannot mean that he is or would thereby be able to live in the United Kingdom with the result that paragraph 15A(4A) could not be complied with. Plainly the European Court was looking at the matter by reference to whether there would be people in a parental relationship with the relevant child who could care for him if one of the parents was required to leave.

8. I note what is said in that regard in the Caseworker Directions to which I have made reference. Had those directions been in front of the judge they may have played some part in her decision. However, they cannot be used at this stage in the proceedings in order to demonstrate that in making the findings of fact that she did the judge somehow erred in law. On the contrary, as I have already noted, she made positive credibility findings regarding the claimant's evidence. Those credibility findings have not been challenged. The judge's conclusion was plainly that, as a matter of fact, if the claimant were required to leave the United Kingdom, then, in Zambrano terms, child E would have to go with her.

9. In all the circumstances, bearing in mind her positive credibility findings and notwithstanding that the father had played some limited part in looking after the child in the past, I do not consider that the judge can be said to have reached a decision that was not open to her. Accordingly, I find that on the facts of this case and bearing in mind its procedural history, the Secretary of State has not shown that the determination contains an error of law such that I should set it aside. For this reason the appeal of the Secretary of State against the determination is dismissed.

Signed Date

Upper Tribunal Judge Peter Lane