IAC-FH-CK/WYL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08520/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2015	**On 16 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MS EMMA ANSAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Noullet, Solicitor
For the Respondent: Ms Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana. She was born on 15 March 1962. She appealed against the appellant's refusal to grant her a residence card as the primary carer of a British citizen residing here dated 30 January 2014.

2. The appeal was dismissed by Judge A W Khan (the judge) in a determination promulgated on 2 September 2014.

3. The judge found that Regulation 15A(7) was relevant as there was a shared responsibility for the child between both the appellant and the child's father.

4. The judge went on to find that as the child's father was British and therefore an exempt person, the appellant was not entitled to a derivative right of residence under Regulation 15A(7)(b)(ii). The appellant's son would not in any event be forced to leave the United Kingdom as he was British and there was someone else who could look after him, that is, his father.

5. The grounds claim the judge misunderstood the facts, failed to make findings on material witness evidence, carried out a flawed assessment of the issue of primary care under Regulation 15A, failed to provide adequate reasons for a finding on a material matter, made a flawed assessment of where the best interests of the child lay and erred by failing to consider the appellant's entitlement under Section R-LTRPT of Appendix FM.

6. Judge Saffer in a decision dated 14 October 2014, refused permission to appeal. He found the grounds amounted to nothing more than a disagreement with facts the judge was entitled to come to on the evidence. In any event, there was no notice of decision requiring the appellant to leave the United Kingdom such as to engage Article 8.

7. When the grounds were resubmitted, Upper Tribunal Judge McGeachy granted permission to appeal on 24 January 2015. He had this to say:

> "The grounds of appeal assert that as the appellant is the mother of a British child she is entitled to remain as the carer of an EEA national and that the judge had erred in concluding that she was not the primary carer. Moreover, they assert that the Judge of the First-tier Tribunal erred in his assessment of the rights of the appellant under Article 8 of the ECHR.
>
> Given that the appellant's son is 13 and that he is, it appears, living with her I consider that the grounds of appeal are arguable."

8. Thus the matter came before me.

Submissions on Error of Law

9. Ms Noulett submitted that there was no issue that the appellant and her son Tyrone lived together. That had been accepted by the judge at [11], [26] and [27] of the decision.

10. She claimed that the judge erred at [18] of the decision in finding that Tyrone obtained British citizenship by registration due to his father's British nationality and my attention was drawn to pages 10, 120 and 127 of the appellant's bundle which indicated that the basis of his citizenship was that he was born here and had lived here in excess of ten years. It was true that Tyrone's father made an unsuccessful application on his behalf which the judge referred to at [12] of the decision although

he erred when he said Tyrone was granted British citizenship on 13 November 2001; that was Tyrone's date of birth. He was granted British citizenship on 21 June 2012.

11. Ms Noulett submitted that the judge's errors of fact I have set out above adversely affected his findings such that he erred in terms of who had primary care of Tyrone. The judge set out at [13] inter alia "*the documentary evidence thus far would appear to indicate that the appellant does not have the primary care of her son ……"*. At [16] the judge said he found that there was shared responsibility for Tyrone. Ms Noulett's argument was that the judge's errors of fact contributed to his finding of shared responsibility at [16]. Further, there was no analysis as to the extent of shared responsibility in terms of the respondent's guidance "Derivative Rights of Residence – Ruiz Zambrano cases dated 12 December 2012, Issue No. 21/2012".

12. Ms Noulett drew my attention to [16] and [18] of the guidance. It was not disputed that Tyrone lived with the appellant who made day-to-day decisions for him. There was no finding by the judge as to who had financial responsibility for Tyrone although there was evidence that his father provided him with £5 pocket money weekly. The judge found at [20] that Tyrone's father could look after him in the event that the appellant returned to her own country, however, the judge carried out no adequate analysis to reach that decision.

13. Ms Noulett submitted that the judge erred in failing to determine the appellant's appeal under R-LTRPT of Appendix FM on the sole basis that the appellant had not made a valid application under the new Immigration Rules. The judge found at [25] that the appellant "……*must have made a valid application for limited leave to remain as a parent which she did not*". That was an error. My attention was drawn to **Ahmed (Amos; Zambrano; reg 15A(3)(c) [2006] EEA Regs) [2013] UKUT 00089 (IAC)** at [80]. In that case the panel accepted that they were entitled to deal with Article 8 in such an appeal with reference to **JM(Liberia) [2006] EWCA Civ 1402** principles. They took into account that the appellant in **Ahmed** met all the relevant *material* (the panel's emphasis) requirements of the new Rules including those relating to immigration status. In any event, Section GEN.1.9. of Appendix FM provided inter alia that the requirement to make a valid application would not apply when the Article 8 claim was raised inter alia "***(iv) in an appeal***" (my emphasis).

14. Ms Brocklesby-Weller submitted that the judge's errors were not material. How Tyrone acquired British nationality was irrelevant.

15. There was nothing to suggest at [12] of the decision that any mistake made regarding who applied for citizenship for Tyrone and the confusion of dates I have set out at [10] above, infected the judge's decision. The judge raised his concerns at [12] regarding the appellant as primary carer. In particular, he said there was no explanation as to why the school did not have the appellant's present permanent address. There was a letter from the school dated 27 June 2014 from the Assistant Head Teacher which said that she had contact details relating to the father and Tyrone's aunt. The judge went on to say that the letter confirmed the appellant had attended all parents' evenings and she was the person with whom the form teacher

liaised directly. Put simply, the judge's finding was that Tyrone lived the majority of the time with the appellant but his father had input. The judge gave reasons at [20] and [22] as to why Tyrone could remain living in the United Kingdom in his mother's absence.

16. My attention was drawn to **MA and SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 00380 (IAC)** at [41]. In particular, [iii] and [iv]:

> (iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.
>
> (iv) Nothing less than such compulsion will engage Articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working ……"

17. The appellant's skeleton argument at [14] that there was no evidence that Tyrone's father was either able or willing or both to care for him in the event that the appellant was forced to leave the United Kingdom was the incorrect burden. It was for the appellant to show that his father was unable to care for him. The judge did not err in what he said at [20] and [22] as there was no explanation as to why the appellant's father could not assume responsibility for him.

18. Ms Brocklesby-Weller referred me to the Immigration (EEA) Regulations 2006 and in particular, to Regulation 26(7) Schedule 1 with regard to appeals to the First-tier or Upper Tribunal. See Phelan at page 1385:

> "Regulation 26(7)
>
> Schedule 1
>
> Appeals to the [First-tier Tribunal or Upper Tribunal]
>
> [1] The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the [First-tier Tribunal or Upper Tribunal] Asylum and Immigration Tribunal as if it were an appeal against an immigration decision under Section 82(1) of the Act:
>
> Section 84(1), except paragraphs (a) and (f) ……"

19. As regards Section 84 grounds of appeal, the only applicable provision relevant to the appellant's circumstances is 84(1)(c) "*that the decision is unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights*". 84(1)(g) was inapplicable given there was no removal decision.

20. The appellant was left with only Section 84(1)(c) but the decision was only against refusal to grant a derivative residence card. The appellant's circumstances did not get over the first hurdle of refusal in that there could be no interference with family

life if there was no prospect of removal. Having said that, even if there was interference, how could it be disproportionate in those circumstances?

Conclusion on Error of Law

21. Ms Brocklesby-Weller accepted that **Ahmed** included a concession at [43] that on **JM (Liberia)** principles, the Tribunal should consider the case on the basis that a putative consequence of the refusal decision was that the respondent would proceed to direct her removal to Pakistan.

22. The relevant provision the appellant needed to satisfy was 15A(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.

23. 15A(7) provides:

> "P is to be regarded as a "primary carer" of another person if
>
> (a) P is a direct relative or a legal guardian of that person; and
>
> (b) P
>
> (i) is the person who has primary responsibility for that person's care; or
>
> (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person."

24. I find the judge erred in overlooking the criteria for primary as opposed to shared responsibility for Tyrone as contained within the respondent's guidance I have referred to at [11]–[12] above. [18] of the guidance with regard to primary or shared responsibility for a child reads as follows:

> "18. In cases where the British citizen is a child under the age of 18, primary or shared responsibility will generally be established where that child is living with the primary carer(s) and the majority of their care is being provided for by that primary carer(s). Evidence to demonstrate this responsibility can include custody/guardianship orders, or if this is not available, any additional evidence which shows:
>
> - that the child lives with the primary carer(s) or spends the majority of their time there;
>
> - that the primary carer(s) makes the day-to-day decisions for that child, for example decisions relating to their education or health; and

- that the primary carer(s) has financial responsibility for that child."

25. The guidance goes on to say that how primary or shared responsibility is evidenced will vary depending on the facts of the case, but the primary carer(s) may submit letters from the child's school, GP or from a solicitor to demonstrate primary/shared responsibility.

26. The judge misunderstood the evidence with regard to how Tyrone came by his nationality. A passport had already been issued for the child at the request of the appellant when Tyrone's father unsuccessfully applied for a British passport for him. Tyrone obtained citizenship on the basis of his having been born here and having lived here continuously for ten years preceding the application made by the appellant. There was no issue regarding the fact that Tyrone lived with the appellant and spent the majority of his time there. Further, there was no issue that the appellant made day-to-day decisions for Tyrone, with regard to his education and health. The fact that the judge identified a letter from the school dated 27 June 2014 which said that the Assistant Headteacher had contact details relating to the father and Tyrone's aunt did not arguably affect that situation, particularly bearing in mind that the same letter confirmed the appellant had attended all parents' evenings and she was the person with whom the form teacher directly liaised.

27. There was evidence from the appellant's GP confirming the registration of herself and Tyrone and when they had both been last seen. The judge said such a letter did not "*prove*" (my emphasis) the appellant had the primary care of her son, however, that was arguably too high a burden to place upon the appellant.

28. There was additional evidence that Tyrone never stayed overnight with his father, saw him about once a week and sometimes went to his house to do homework. Clearly, Tyrone was in contact with his father but it did not follow that there was shared responsibility, particularly bearing in mind the financial evidence that whilst Tyrone's father provided him with pocket money and sometimes bought him clothes, the appellant provided for him financially. See [10] of the appellant's statement dated 13 August 2014.

29. I find the judge erred in his finding that the appellant and Tyrone's father shared responsibility for him bearing in mind that responsibility in the context of the EEA Regulations means equal responsibility. The judge fell into error in making that finding without giving adequate reasons for the same.

30. I find the judge misdirected himself by failing to determine the appellant's case under R-LTRP of Appendix FM bearing in mind **Ahmed** and **JM** I have referred to at [13] above. The judge had jurisdiction to deal with Article 8 notwithstanding that there was no removal decision. Further, **Ahmed** established that failure to make a valid application for limited leave to remain as a parent was not fatal to an appeal under R-LTRPT of Appendix FM as long as all the relevant **material** (my emphasis) requirements of that Section were met. How the appellant met all the relevant material requirements of R-LTRPT was set out at [22] of the appellant's representative's skeleton dated 18 August 2014.

31. Having rejected consideration of the appellant's circumstances under R-LTRPT at [25] of his decision, the judge went on to consider Article 8. The judge's finding that Tyrone could go to live with his father was not based upon the evidence before him. Indeed, there had been no evidence in that regard, notwithstanding that it was the appellant's burden to address that issue under 15A(4A)(c). The judge did not have sufficient information in terms of **ZH (Tanzania) [2009] EWCA Civ 691** to make a finding regarding Tyrone's best interests. The judge said that it was not a case where Tyrone would be abandoned with no one to look after him in the event of his mother returning to her own country, but there was no adequate evidence before the judge to enable him to come to that conclusion, which made his decision unsafe.

32. In the circumstances none of the findings of the judge shall stand. The appellant has shown errors of law in the decision such that it should be set aside and heard again in the First-tier de novo.

Decision

33. The decision of the First-tier Tribunal contains errors of law, is set aside, and shall be remitted to the First-tier to be heard again de novo by a judge sitting alone, not Judge A W Khan.

34. No anonymity direction is made.

Signed Date 7 April 2015

Deputy Upper Tribunal Judge Peart