



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

Appeal Number IA/10907/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2014**

**Decision and Reasons
promulgated
On 22 June 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Y. B.
(Anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Ms. J. Kyakwita of Hounslow Legal Services.

For the Respondent: Mr. S. Whitwell, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Wilson promulgated on 19 September 2014, dismissing the Appellant's appeal against a decision dated 10 February 2014 to refuse to issue her with a Residence Card as confirmation of a derivative right of residence.

Background

2. The Appellant is a national of Jamaica born on 12 December 1972. She claims to have entered the UK in 1997 with leave to remain as a visitor for 6 months. She became an overstayer, and on 4 October 2011 was served with a removal notice. Be that as it may, she was still in the UK on 23 July 2013 when she applied for a 'derivative residence card'. as the primary carer of a British Citizen resident in the UK. The application was based on the Appellant's care for her son JAM (d.o.b. 13/03/2003).
3. In this context I pause to note that the Certificate of registration as a British Citizen issued in respect of Master M on 17 May 2013 cites section 1(3) of the British Nationality Act 1981. It would appear that this is in error. Section 1(3) confers nationality on the basis of a parent becoming a British citizen or becoming settled: however, necessarily Master M's mother, the Appellant, has no such status, and the indication in the Respondents decision letter was that the father only had discretionary leave to remain. It seems likely that citizenship was conferred upon Master M pursuant to section 1(4) as a person born in the UK who had spent the first 10 years of life in the UK. Mr Whitwell acknowledged that there would appear to be an error on the face of the Certificate of registration. However, for the avoidance of any doubt, nothing turns on this distinction for the purposes of these proceedings.
4. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') with reference to regulations 15A(4A)(a) and (c), 15A(7) and 18A of the Immigration (European Economic Area Regulations 2006, and a Notice of Immigration Decision was issued accordingly.
5. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the appeal for reasons set out in his determination.
6. The Appellant sought permission to appeal to the Upper Tribunal which was granted by Designated First-tier Tribunal Judge MacDonald on 4 November 2014.
7. The Respondent has filed a Rule 24 response dated 7 November 2014 resisting the challenge to the decision of the First-tier Tribunal.
8. The essential facts and circumstances of the Appellant's case emerged from the various documents identified in the preceding paragraphs - and in particular the Respondent's decision letter and the decision of the First-tier Tribunal. All such documents are a matter of record on file, and the pertinent facts are known to the parties: accordingly I do not rehearse them in detail here, but I make reference to such matters as is incidental for the purposes of this decision.

Consideration

9. Permission to appeal was essentially granted on the basis of a 'reasons' challenge: specifically that it was arguable the reasons given by the First-

tier Tribunal Judge for concluding that the Appellant was not a primary carer for the purposes of Regulation 15A(4A)(a) were not adequate.

10. I address this issue below. However I have in any event come to the conclusion that the Judge's reasoning in support of his conclusion that the Appellant had not shown that her son's father could not look after the child was entirely adequate, and accordingly the application and appeal in any event failed by reference to regulation 15A(4A)(c).
11. In this context it is to be noted that the Judge sets out the relevant issues, claimed factual matrix, and evidence over paragraphs 1 and 2 of his decision. Although paragraph 2 is of considerable length, lacks a degree of structure, and makes for difficult reading in some respects, it is not seriously suggested on the Appellant's behalf that it does not encompass all relevant factual matters advanced as part of the Appellant's case.
12. As part of the factual matrix it is to be noted that the Appellant and her son had lived with her son's father up until July 2013 when the relationship between the Appellant and Mr M broke down because of his violent behaviour towards her. Injunction proceedings had taken place which had resulted in an order which included provision for contact between father and child. The Appellant confirmed in her oral evidence that contact was continuing.
13. At paragraph 3 of the decision the Judge found "*In this particular case I am not satisfied on a balance of probabilities that the Appellant can show that [the child's] father could not care for [him]*". The Judge then gave four reasons for this conclusion, albeit attaching little weight to the fourth:

"Firstly there is the essential conflict in the evidence between the Respondent being satisfied indeed at one stage that the father was the primary carer. Secondly the Appellant's own evidence to some extent is tainted by her conviction for deception. Thirdly and importantly the father continues to exercise contact specifically provided for under the terms of the injunction. I also note but do not place much weight on it that it would appear to be within the context of a challenge within judicial review proceedings as to the decision of children's services that their view is that father could adequately care for the child".
14. As Mr Whitwell points out the potential removal of a child from the care of one responsible parent to the care of another responsible parent was given express consideration in the context of regulation 15A(4A)(c) in the case of **Hines [2014] EWCA Civ 660**, per Lord Justice Vos: see in particular paragraphs 23 and 24. It was considered all other things being equal that such a situation would not render the British citizen child unable to reside in the UK such that regulation 15A(4A)(c) would be engaged. In short, Mr Whitwell submitted, the findings of fact of Judge Wilson herein effectively upheld the Respondents decision, and justified his own conclusion that regulation 15A(4A) was not met.
15. The challenge in the Grounds in support of the application for permission to appeal for the main part focus on the Judge's conclusion in respect of

primary carer. Whilst this is relevant to regulation 15A(4A)(a), it is not relevant to regulation 15A(4A)(c), and an applicant must satisfy each of 15A(4A)(a), (b), and (c).

16. In so far as there is any challenge in respect of the finding that the child's father could look after him - "*The IJ has failed in his assessment of the facts and has relied upon his flawed assessment of the evidence*" - in my judgement in the absence of any due and proper amplification and particularisation, it seems to me that this amounts to no more than an assertion of disagreement with the First-tier Tribunal Judge's evaluation and the outcome of the appeal. No express error of law is identified, and the mere reassertion of the Appellant's case does not constitute an undermining of the reasons given by the First-tier Tribunal Judge. Before me, Ms Kyakwita was not able to articulate a challenge to the Judge's findings and reasons at paragraph 3 of the decision that was anything other than based upon disagreement and an attempt to reargue the case.
17. In all the circumstances I find no error of law, whether by reference to misdirection, a misunderstanding of the Regulations, a misunderstanding of the **Zambrano** principle, inadequacy of reasoning, or otherwise in respect of the finding that the Appellant had not shown that the child's father could not care for him. In such circumstances the Appellant could not succeed under regulation 15A(4A), and accordingly the Respondent's decision was in accordance with the EEA Regulations, and the First-tier Tribunal was correct to dismiss the appeal under the Regulations.
18. As noted above, the main focus of the Appellant's challenge, and the matter in respect of which express comment was made in the grant of permission to appeal, is in respect of the Judge's finding on the issue of primary carer.
19. In my judgement it appears that the Judge's analysis was incomplete in this regard. I consider that the First-tier Tribunal Judge has misdirected himself as to the meaning of primary carer. Indeed the Judge makes no express reference to the definition at regulation 15A(7), under which it is possible to be a primary carer where responsibility is shared equally with another person who is not an exempt person within the meaning of regulation 15A(6)(c).
20. The Judge concluded that the Appellant did not have primary responsibility because there was shared responsibility: e.g. see paragraph 4 "*They both have therefore exercise parental responsibility and my starting point has to be that the current provision of the care... reflects what the parents considered to be in [the child's] best interest*". However, the alternatives under 15A(6)(c)(i) and (ii) admit of two possibilities: either a person has *primary* responsibility or responsibility is *shared equally* between two persons. Although the Judge is clearly of the view that the child's father shares responsibility, there is nothing in his findings - and certainly nothing in the supporting evidence or the way in which the Appellant puts her case - that any such sharing is done *equally*. In my judgement the

First-tier Tribunal Judge was in error in concluding that the Appellant did not have primary responsibility for the simple reason that the father had *some* responsibility.

21. However, for the reasons already given, even if the Appellant should have had the benefit of a finding that she met the requirement of regulation 15A(4A)(a) this was not sufficient to meet the requirements for a derivative residence card because of the failure in respect of regulation 15A(4A)(c). Accordingly the decision under the EEA Regulations stands.

Notice of Decision

22. The decision of the First-tier Tribunal Judge involved no material error of law and stands.
23. The appeal remains dismissed on EEA grounds.

Deputy Judge of the Upper Tribunal I. A. Lewis 18 June 2015