IAC-AH-SAR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15695/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 14th January 2015	**On 3rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS PEACE OGONNAYA SMITH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G McIndoe, Legal Representative
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 11th March 1976. The Appellant has leave to enter the United Kingdom as a multientry visitor until 4th April 2016. On 21st August 2013 she made application for a derivative residence card on the basis that she is a third country national upon whom a British citizen is dependent in the United Kingdom on the basis of the Court of Justice of the European Union (ECJ) judgment in the case of *Ruiz Zambrano (C-34/09)*.

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2. On 17th March 2014 the Appellant's application was refused by the Secretary of State on the basis that there was insufficient evidence that the Appellant's British children Bradley and Hannah would be unable to remain in the United Kingdom if the Appellant were forced to leave on the basis that the Appellant had not provided evidence as to why the children's father is not in a position to care for his British children if the Appellant were forced to leave the United Kingdom.

3. The Appellant lodged Grounds of Appeal and the appeal came before Judge of the First-tier Tribunal Lever sitting at Manchester on 1st August 2014. In a determination promulgated on 18th August 2014 the Appellant's appeal was allowed under the Immigration (European Economic Area) Regulations 2006.

4. On 26th August 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 29th September 2014 Judge of the First-tier Tribunal Kamara granted permission to appeal. Judge Kamara noted that the grounds sought permission to argue that the judge had erred in finding that the requirement of Regulation 15A(4A)(c) of the 2006 Regulations had been met. In particular, the Respondent was of the view that there was another British citizen parent who would be able to assume caring responsibilities for the children of the Appellant. In addition criticism was made of the judge's treatment of Article 8 ECHR.

5. Judge Kamara found in an otherwise well reasoned determination (his words) that the judge had arguably erred in law in finding that the British citizen children would be unable to reside in the EU were the Appellant compelled to leave notwithstanding the fact that they lived with their British citizen father in the United Kingdom.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. This is an appeal by the Secretary of State for the Home Department. For the purpose of continuity within the legal process the Secretary of State is referred to herein as the Respondent and Ms Smith as the Appellant. The Appellant appears by her instructed legal representative Mr McIndoe. Mr McIndoe is familiar with this matter, having appeared before the First-tier Tribunal. He is also the author of a detailed Rule 24 response to the grant of permission to appeal served and filed on 8th December 2014. The Secretary of State appears by her Presenting Officer Mr McVeety.

The Facts

7. The Appellant and her husband, Mr Peter Smith, are separated. Mr Peter Smith has been working in Nigeria since 1992 as a procurement manager. Mr Smith and the Appellant married in 2005 and they lived together between 2005 and 2012. The Appellant was the primary carer of the children who were in her care every day given that Mr Smith spent much of his time working away at different locations. They have two children,

Miss Hannah Abeni Smith, a British citizen born in Nigeria on 4th March 2005, and Master Bradley Obinne Smith, a British citizen born in the UK on 13th June 2010. Mr Smith continues to reside in Nigeria where he works as a procurement manager for Fiddil Limited and his contract requires him to be present at his workplace for four weeks, with the following four weeks away from his workplace, although he is still required to undertake duties – principally outside the UK – during those weeks away from his workplace.

8. The Appellant and the two children have a property in the UK jointly owned by the Appellant and Mr Smith. The separation between Mr Smith and the Appellant is amicable to the extent that Mr Smith retains a bedroom within the property for his overnight use on occasions when he is able to visit the home and to see his children.

Submissions/Discussions

9. Mr McVeety on behalf of the Secretary of State accepts that Mr Smith's job takes him away from the country a lot, noting that he has employment in the oil industry in Nigeria. He however relies on the Grounds of Appeal, in particular the Secretary of State's contention that the existence of a British citizen parent who would be able to assume caring responsibility for the children excludes the Appellant from qualifying for a derivative right under Regulation 15A.

10. Mr McIndoe submits that there might be some force in the Secretary of State's argument with regard to the assumption of caring responsibility in the event of Mr Smith living, to use his words, "down the road" from the Appellant. However he submits that the reality is that Mr Smith works in Nigeria and that this is accepted by the Secretary of State. He further submits that that was the approach adopted by Immigration Judge Lever and that the judge took the correct approach at paragraph 24 in finding that it is not a helpful, conclusive or constructive approach to look at hypothetical circumstances at the edge of a spectrum of reasonableness in order to conclude as to whether or not a child could theoretically be able to remain within the United Kingdom. He submits that the judge's findings were sustainable and do not disclose a material error of law.

11. He further emphasises that the fact that the Appellant is the children's primary carer is not a recent development but one that existed previously when the parties resided in Nigeria and that she has in fact always been the children's primary carer and therefore it could not be contended that these circumstances had been manufactured purely for the purpose of obtaining a derivative residence card.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational

conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Material Error of Law

14. The Appellant has sought a derivative right of residence under paragraph 15A of the Immigration (European Economic Area) Regulations 2006. Judge Lever has identified the basis of the Appellant's application and appeal from the Notice of Refusal and that the application is on the basis that the Appellant is the primary carer of two British citizen children under the age of 18 residing in the UK, in education and on whose behalf it is said they would not be in a position to remain in the United Kingdom if the Appellant were to be returned to Nigeria.

15. The determination is well thought out and constructed. At paragraph 23 the judge has made findings of fact concluding from the evidence that he has heard and having had the benefit of seeing the children at the hearing he has concluded that they are well adjusted children with the benefit of the upbringing and security provided by their parents. He thereafter at paragraph 24 and subsequent goes on to consider who has the primary responsibility for the children and whether the children would be able to remain in the United Kingdom if the Appellant were forced to leave. He has considered the most recent authority of *Hines [2014] EWCA Civ 60* and having studied the case law and analysed it sensibly and carefully, he has made findings that the Appellant is the primary carer and that the children aged 9 and 4 at date of hearing would be unable to remain in the UK to the extent that there would be a serious impairment of their quality of life if the mother was forced to return to Nigeria. Those were findings that the judge was entitled to make and he was also entitled to make findings regarding the inability in these circumstances of the children's father to act as their primary carer due to his employment. Having heard

the submissions and having considered this matter, I wholeheartedly agree with the conclusions reached by the First-tier Tribunal Judge.

16. Further thereinafter for the avoidance of doubt and to provide a complete picture, he has gone on to consider the position of Article 8 outside the Immigration Rules and made findings that he would have allowed the appeal under Article 8. He has thus carried out a very thorough and detailed analysis of the facts and law and made findings which are completely sustainable. In such circumstances the determination discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The determination of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed Date **2nd February 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed. No application is made for a fee award and none is made.

Signed Date **2nd February 2015**

Deputy Upper Tribunal Judge D N Harris