IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08162/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2015	**On 13 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS MOJISOLA ENIGBOKAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Sreeraman (Home Office Presenting Officer)
For the Respondent: No Appearance

DECISION AND REASONS

1. The appellant in this matter is the Secretary of State. The respondent is Ms Mojisola Enigbokan who was the appellant in the proceedings before the First-tier Tribunal. The respondent is a citizen of Nigeria and her date of birth is 14 January 1981. She appealed a decision made by the Secretary of State dated 23 January 2014 refusing to issue a derivative residence card under the Immigration (EEA) Regulations 2006 pursuant to the **Zambrano** principle.

2. In a determination promulgated on 21 August 2014 the First –tier Tribunal (Judge Cohen) allowed the appeal under the EEA Regulations and in the alternative outside of the Rules under Article 8 ECHR.

3. **Grounds for Permission**

The Tribunal erred by failing to correctly apply Regulation 15A(4A)(c) of the Immigration (EEA) Regulations 2006 (as amended). The appellant must satisfy sub-paragraph (c) that the relative British citizen would be unable to reside in the UK or in another EEA state if the appellant were required to leave. The Tribunal failed to address this issue in the decision and there was insufficient evidence to show that the British citizen child would be unable to remain in the UK if the appellant (her mother) were required to leave the UK. A disinclination or reluctance on the father's part did not indicate inability to care for the child.

4. **Permission to Appeal**

Permission was granted by First-tier Tribunal Judge T R P Hollingworth on 1 October 2014. The permitting judge stated:

> "The judge found the appellant a credible witness and accepted everything that was said by her. Paragraphs 13 and 14 of the determination are capable of review however. They fail to attach sufficient weight to the fact that the father is named on the child's birth certificate. Moreover, he was apparently involved in making a benefits claim for the child after the birth. Giving these to the appellant albeit only for a short period. Creating the impression that he was involved as a carer. Neither of these aspects are referred to in the evaluation of the appeal. They tend to suggest the natural father does have more involvement (with the child) than the appellant contends. The documents supporting the application are in fact limited in evidential terms. The child initially attended playschool. This is not a school as such. It is fee paying and therefore not independent. Neither, are the supporting letters from family members. It is difficult to see how a GP could be in a sufficiently informed position to identify the appellant as sole carer when the consultation was for a minor ailment only and in isolation. Furthermore, the judge may have attached insufficient weight to the obstacle regarding the tenancy agreement referred to in the reasons letter. This would have some bearing on the appellant's credibility. All the respondent's grounds are arguable."

Error of law hearing

5. The respondent failed to appear at the hearing before me on 21 December 2015. I was satisfied that notice of the date and time of the hearing had been sent to the respondent at her home address in Essex and to her solicitors TW Solicitors. There was no communication either from the respondent or from her solicitors giving any explanation for failure to attend and there was no request for any adjournment made. Having regard to the overriding interest and pursuant to the Procedural Rules I decided to proceed to hear the appeal in the absence of the respondent and/or representative.

6. Ms Sreeraman relied on the grounds of appeal arguing that the First-tier Tribunal failed to consider Regulation 15A(4)(c) adequately or at all. It was clear that the child's father was in the UK and the Tribunal failed to consider the issue holistically. Rather it relied on the evidence given by the appellant which the Tribunal found to be credible, in particular as regards the unwillingness of the father to look after the child. There was no attempt by the Tribunal to reconcile those findings with the apparent involvement that the father had had post birth including his name on the birth certificate, an application made for child benefit and further in obtaining a passport for the child some two years following the birth. The Tribunal ought to have considered the test in **AM and SM** such that there must be factors rendering the relatives to be unable to look after the child.

Discussion and Decision

7. In support of her submissions Miss Sreeraman relied on **Ayinde and Thinjom (Carers – Regulation 15A Zambrano) [2015] UKUT 560 (IAC)** and **MA and SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 00380 (IAC)**.

8. The First-tier Tribunal heard evidence from the respondent Ms Enigbokan who the Tribunal found to be an entirely credible witness. The Tribunal found that she was the primary carer of a British citizen child and that Regulation 15A was met in all respects. In making findings and considering the circumstances the Tribunal had in mind the respondent's consistent evidence concerning her relationship with the father of the child and found that she had effectively been "warned off" from contact with him by his wife. The Tribunal accepted that other than on a handful of occasions when she met with the child's father following the child's birth, he had not had any contact with the child since. [13]

9. At [14] the Tribunal considered the Secretary of State's concern that there was insufficient evidence to show that there were no other relatives in the UK who could assist in the upbringing of the child. The Tribunal found:

> "I am therefore entirely satisfied that the appellant's former lover is not willing to look after M in the UK and that his wife is certainly opposed to doing so. I therefore find that M's father plays no active part in his life and would be unwilling to act as his carer in the UK."

Reliance was placed on a letter from the school and GP in support of the fact that the respondent is primary carer.

10. There was no challenge by the Secretary of State to the finding that the respondent was the primary carer for the British citizen child. The grounds argue that the Tribunal although concluding that the requirements of Regulation 15A were met, did not give adequate consideration of Regulation 15A(4)(c) and/or the Upper Tribunal decision of **MA and SM** (cited above). In that decision the Tribunal had regard to the High Court decision of **J Sanneh v SSWP and the HMRC [2013] EWHC 793 (Admin)**:

> "The rights of an EU child will not be infringed if he is not compelled to leave. Therefore even where a non-EU ascendant relative is compelled to leave EU territory, the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child."

11. The applicable principles where, as here, there is another relative who may be able to care for the child, were further elaborated in **Hines v Lambeth [2014] EWCA Civ 660** where Vos LJ held [24]

> "I do not however think that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK. Apart from anything else he would even if he did leave, still only have the care of one of his previously two joint carers. This is a highly fact sensitive matter which involves consideration of the welfare of the child and requires an assessment of the child's individual physical and emotional needs and circumstances including the impact of separation from a primary carer, however this is not an assessment of the child's best interests."

12. In this instance it is clear that the only other possible suitable carer for the British citizen child would be his father. In the decision made by the First-tier I acknowledge that the Tribunal has not specifically referred to Regulation 15(4A)(c) and that the Tribunal has focused on the issue of primary carer without detailed consideration of the adequacy or otherwise of any potential arrangements that could have been made for the father to care for the child. That said I am satisfied that the Tribunal considered all the evidence that was available to it including the oral evidence from the respondent which it found to be extremely credible. It may be that insufficient attention was given to a more detailed exploration of the factual background and circumstances in relation to the child's father. However it is of note that the Secretary of State was represented at the hearing and it was therefore open to the Secretary of State to subject the evidence to scrutiny in order to assist the Tribunal. In light of the fact that the Tribunal can only make a decision based on the evidence before it, I am satisfied that there was sufficient consideration of all relevant issues and that the Tribunal was entitled to place weight on the oral evidence of the respondent in reaching a conclusion that the child's father was unwilling to assume care and responsibility. Indeed the Tribunal went further in finding that the child's father had no contact or involvement with the child and his own personal circumstances were such that he would not be able to provide adequate arrangements for the child's care. The end result therefore is that the child would effectively have to leave the UK with his mother.

13. The question of weight to be attached to oral and documentary evidence is a matter within the remit of the Tribunal and it is my view that the Tribunal considered all of the evidence before it. There was no evidence of shared responsibility beyond the father's name being on the birth certificate and an application for child benefit but such matters were considered by the Tribunal and sustainable findings made. The Tribunal

had in mind that it was the respondent's burden to address the issue under 15A(4A)(c). I am satisfied that the Tribunal effectively took the view that in the absence of his mother looking after him there would be no one else who could in practice provide proper care arrangements for the child who would be forced to leave the UK.

14. Accordingly I am satisfied that the decision and reason does not disclose any material error of law.

Decision

There is no error of law in the decision and reasons which shall stand. The Secretary of State's appeal is dismissed.

No anonymity direction is made.

Signed Date 10.1.2016

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 10.1.2016

Deputy Upper Tribunal Judge G A Black