Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38210/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 26th April 2016	**On 19th May 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N S
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No representative

DETERMINATION AND REASONS

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant's children. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant or her children. Any

disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judges Whitcombe and Page) allowing NS's appeal against a decision of the Secretary of State taken on 10 September 2014 refusing to issue her with a derivative residence card under reg 15A of the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended) (hereafter "the EEA Regulations").

3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Japan who was born on [ ] 1972. She is married to a British citizen, "MP" who was born on [ ] 1958. They met in Japan in 2000 and married on 24 December 2004. They have two children, "A" born on [ ] 2007 and "F" born on [ ] 2010. Both children are British citizens.

5. The family lived in Japan until 29 January 2014 when they came to live in the UK. They live together with MP's parents in [ ] Devon. His mother has significant health problems and possible signs of dementia and his father, who is aged 79, is in good health. MP has siblings and extended family members in the UK but, as I understand it, the appellant has none. MP is in full-time employment working for the [ ] Council as a workshop technician or mechanic maintaining the council's fleet of vehicles. The appellant does not work but undertakes the majority of the childcare responsibilities and domestic responsibility for the family. Both children are now in school.

The Appellant's Application

6. On 25 June 2014, the appellant applied for a derivative residence card under the EEA Regulations. The basis of her claim was under regulation 15A(4A) as the "primary carer" of her British citizen children who are residing in the UK and that, if she were required to leave, her children "would be unable to reside in the UK or in another EEA State".

7. On 10 September 2014, the Secretary of State refused the appellant's application. The Secretary of State was not satisfied, first that the appellant was the "primary carer" of the two children; and secondly, that they would be unable to reside in the UK or another EEA State if the appellant left the UK because there was no reason that the appellant's husband could not continue to care for them in her absence.

The Appeal

8. The appellant appealed to the First-tier Tribunal. The First-tier Tribunal was satisfied on a balance of probabilities that the requirements of reg 15A(4A) were met. In particular, the Tribunal was satisfied that the appellant was the "primary carer of

her two children" as she was the person with "primary responsibility for their care". Further, the Tribunal was satisfied on a balance of probabilities that the children would not be able to reside in the UK (or another EEA State) if the appellant were required to leave the UK.

9. As a result, the First-tier Tribunal allowed the appellant's appeal under reg 15A of the EEA Regs.

10. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had been wrong in law first, to find that the appellant was the "primary carer" and secondly, to find that the children would be unable to reside in the UK if the appellant left; despite any difficulties for the appellant's husband and his working arrangements, he would be able to care for them.

11. On 2 July 2015, the First-tier Tribunal (Judge M Davies) granted the Secretary of State on both grounds.

The Submissions

12. The appellant was not represented at the hearing before me but her husband, MP, spoke on her behalf. The Secretary of State was represented by Mr Richards.

13. Mr Richards relied upon the Secretary of State's grounds.

14. First, he submitted that the First-tier Tribunal could not properly and lawfully find that the appellant had "primary responsibility" for the children and that therefore she was a "primary carer" for the purposes of reg 15A(4A) of the EEA Regulations. He submitted that on the evidence it was clear that responsibility was shared between the appellant and their father (her husband) as they lived together as a family.

15. Secondly, Mr Richards submitted that the First-tier Tribunal was wrong in law to find that the children would be unable to live in the UK if the appellant left. Mr Richards submitted that it was only if the children would be compelled to leave the UK (and the EU) that the requirements of reg 15A(4A) were met. It was not sufficient, he submitted, as the First-tier Tribunal had concluded to find that there were practical difficulties for their continued residence in the absence of the appellant, in particular concerning the ability of their father to work as he currently did in the absence of the appellant. Mr Richards accepted, as had the First-tier Tribunal, that it was not realistic that MP's parents could undertake any significant amount of childcare. Mr Richards relied upon the Court of Appeal's decision in Harrison v SSHD [2012] EWCA Civ 1736 to the effect that it was not sufficient for the appellant to demonstrate practical difficulties affecting the quality or standard of life which might be affected by her departure from the UK. In this regard he also relied upon the Upper Tribunal's decision in MA and SM (*Zambrano*: EU children outside EU) Iran [2013] UKUT 00380 (IAC)) set out in para 8 of the grounds for permission to appeal to the Upper Tribunal.

16. Mr Richards submitted that on the evidence the First-tier Tribunal's decision could not stand as a matter of law and the correct decision was to dismiss the appeal on the basis that the appellant could not meet the requirements of reg 15A of the EEA Regulations.

17. MP, speaking for his wife, submitted that his wife was their children's "primary carer" on the basis that he was at work for a minimum of 37 hours a week. She dealt with the school and the children's needs generally. He accepted, however, that he helped with the children, including their homework and showers in the evening.

18. MP further submitted that if the appellant left the UK it would cost around £200 per week for childcare which he would be unable to afford on his basic salary of £17,714. He submitted that he and the children would not be able to remain in the UK if the appellant left. He submitted that he would not be able to look after them if she left.

Regulation 15A

19. The relevant regulation in the EEA Regulations dealing with the appellant's application for a derivative residence card based upon a derivative right of residence is reg 15A(4A).

20. Regulation 15A(1) provides as follows:

> "(1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria."

21. The relevant criteria are found in reg 15A(4A) as follows:

> "(4A) P satisfies the criteria in this paragraph if—
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> (a) P is the primary carer of a British citizen ("the relevant British citizen");
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> (b) the relevant British citizen is residing in the United Kingdom; and
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> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave."

22. The term "primary carer" is defined in reg 15A(7) as follows:

> "(7) P is to be regarded as a "primary carer" of another person if
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> (a) P is a direct relative or a legal guardian of that person; and
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> (b) P—
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> (i) is the person who has primary responsibility for that person's care; or
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> (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person."

23. Finally, relevant for these purposes is reg 15A(8) which provides as follows

> "(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care."

24. In this appeal, the appellant can only succeed in showing that she is a "primary carer" by virtue of reg 15A(7)(b)(i) as the person with "primary responsibility" for the care of the children. Regulation 15A(7)(b)(ii) cannot apply to the appellant – if she shares equally the responsibility for the children with her husband – because he is an "exempt person" as defined in reg 15A(6)(c) because he is a British citizen.

25. As will be clear from these provisions, the disputed issues arise under reg 15A(4A)(a) and (c); it not being in question that the children are British citizens residing in the UK.

Discussion

26. The first issue is whether the First-tier Tribunal were correct to conclude that the appellant was the "primary carer" of the children for the purposes of reg 15A(4A)(b). That in turn required by virtue of reg 15A(7)(b)(i) that she had "primary responsibility for [their] care".

27. The First-tier Tribunal found at para 24 of its determination that she was the "primary carer of her two children". The basis of that conclusion is derived from the Tribunal findings of fact at paras 15-22 of its determination based upon the evidence:

> "15. There was actually very little factual dispute at the hearing. Having heard the evidence and the parties' submissions we made the following findings of fact on the balance of probabilities.
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> 16. The Appellant first met the Sponsor in Japan in 2003 and shortly afterwards they entered into a relationship. They married in Japan on 24th December 2004. The dates of birth of their children are set out in the first paragraph of these Reasons. The children are both British citizens.
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> 17. The family continued to live in Japan until 29th January 2014 when they travelled to the UK. A factor in their decision to relocate was the aftermath of the Fukishima nuclear power plant accident. It was becoming increasingly difficult for them to buy fresh food that had not originated from areas contaminated by radiation from Fukishima. The family have lived in the UK since 29th January 2014 and wish to make the UK their permanent home.
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> 18. The Appellant, the Sponsor and their children currently live with the Sponsor's parents in [ ] Devon. The Sponsor's siblings and extended family members are also present and settled in the UK. The Sponsor is in full time employment with [ ] Council as a Workshop Technician or mechanic, maintaining the Council's fleet of vehicles. He works over 40 hours a week and the family finances are secure. As the Sponsor put it, "we do fine and manage to save a little". The Sponsor's witness statement put his *gross* annual earnings at £17,758.52 (based on 37 hours a week), but we also accept his oral evidence that he has recently been able to work extra hours which have resulted in an increase in *take home* pay of about £1,500 per annum. It therefore appears likely that the Sponsor's income now exceeds the £18,600 income threshold were the Appellant now to apply for entry clearance as the spouse of the Sponsor. The Appellant was formerly a dental nurse while in

Japan but is not currently working in the UK. She hopes to return to dental nursing in the future if possible.

19. The Sponsor's parents are of advanced years and the Sponsor's mother has recently suffered significant health problems necessitating a 3 week stay in intensive care and a further 3 weeks in a different hospital. Possible signs of dementia are under investigation at the moment. The Sponsor's father is in good health and is aged 79. We accept that the Sponsor's parents are not realistically in a position to undertake any significant amount of childcare.

20. The Sponsor generally works from 8am to 5pm from Mondays to Fridays. He also works some Saturdays. We do not accept the Respondent's submission that this more or less equates to school hours. Even if no allowance is made for the journey time from the Sponsor's workplace to his childrens' school (a matter on which we heard no evidence), it is clear that there would be several hours each day during which childcare would be required. While the Sponsor is clearly a concerned and committed father, his working pattern means that he is unable to provide a great deal of the necessary childcare. For that the children rely on their mother, the Appellant. The Appellant undertakes the vast majority of the childcare responsibilities, by which we mean not only cooking, cleaning, clothing and washing, but also the general provision of emotional and physical support to the children. The Appellant also undertakes about 75% of the housework in the family home.

21. The children are now at school. Their English is improving and there is a corresponding deterioration in their Japanese. They feel settled in their current home and school. We did not hear any evidence to suggest that the school has, for example, a "breakfast club" or "after school club", effectively providing childcare at either end of the school day in order to assist working parents.

22. The Sponsor has considered the cost and availability of professional childcare. He has concluded that it is more than he could reasonably afford. We accept his estimate of the costs, which he put at £20-25 per child per day with meals. That estimate was not challenged by the Respondent and the Respondent called no evidence of its own regarding childcare costs in North Devon. We also proceed on the basis that the cost is almost certain to be higher if childcare is required during the school holidays. When those figures are set against the current level of family income it is clear that professional childcare would be totally unaffordable. Miss Davies did not suggest otherwise."

28. The EEA Regulations offer no definition of "primary responsibility" for the care of a child in reg 15A(7)(b)(i) albeit that reg 15A(8) makes plain that financial contribution alone will not amount to an individual taking "responsibility" for the child's care.

29. Clearly where there is one parent who has both the legal responsibility and practical day-to-day responsibility for the care of a child, that individual will have "primary responsibility" for that child's care and will as a consequence be the child's "primary carer". Where, however, there are two parents who have legal responsibility for the child's care and both, in practice, care for the child albeit at different times of the day or week according to their family arrangements, it is in my judgment impossible to say that either parent has "primary responsibility" for that child's care. The responsibility is, in fact, 'shared' albeit that the responsibility is discharged at different times. Here, there is no doubt that both the appellant and MP have joint

legal responsibility for their children. They retain that responsibility at all times – jointly. They share day-to-day care according to the arrangements of their lives. The fact that MP works during the week (and even on Saturdays) whilst the appellant does not have employment and looks after the children during the day or when MP is at work does not mean that she has "primary responsibility" for their care.

30. As the EEA Regulations make clear in reg 15A(7)(b)(ii) where responsibility is "shared" then despite the fact that neither person has "primary responsibility" for the child's care, they will nevertheless only be a "primary carer" if the person with whom responsibility is shared is themselves not an "exempt person", i.e. not someone who has a right to reside in the UK as set out in reg 15A(6)(c).

31. As I have already indicated, MP is an "exempt person" as he is a British citizen and therefore has a right of abode in the UK. Whilst the term "primary responsibility" should not be seen in a narrow legal sense, it remains relevant whether more than one person has responsibility to care for the British citizen child through whom the derived right of residence is claimed. A joint legal responsibility linked to a shared practical discharge of that responsibility by two parents who live together with the child is, in my judgment, inconsistent with either parent being said to have "primary responsibility" and therefore to be the "primary carer".

32. For these reasons, the First-tier Tribunal erred in law in concluding that the appellant was the children's "primary carer" and so met the requirement in reg 15A(4A)(a).

33. Further, in any event, the Tribunal's finding that the children "would be unable to reside in the UK" if the appellant were required to leave and so she met the requirement in reg 15A(4A)(c) is also legally flawed.

34. The First-tier Tribunal's reasoning is at paras 25-29 of its determination as follows:

> "25. We therefore turn to the test in regulation 15A(4A)(c), and the question whether the Appellant's children would be unable to reside in the UK or another EEA State if the Appellant were required to leave.
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> 26. We have concluded that the Appellant has also proved on the balance of probabilities that her children would not be able to reside in the UK (still less another EEA State) if she were required to leave.
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> 27. The Sponsor's working pattern means that he will be unable to provide effective childcare without either reducing his hours or engaging professional childcare. We have not heard any evidence regarding the willingness of the Sponsor's current employers to contemplate a reduction in his basic hours, but on the assumption that they would, the financial consequences for the Sponsor and the remaining family would clearly be grave. The family finances are currently sound but it seems unlikely that they would remain secure if there were to be a significant reduction in the Sponsor's hours. It is equally clear that the cost of professional childcare would be prohibitive given the current level of family income. The Sponsor's parents are not realistically in a position to supply any significant amount of free childcare.

28. In submissions, Miss Davies did not suggest either that professional childcare was affordable for this family or that the Sponsor's parents would be able to provide some or all of it. Miss Davies' submission was confined to the suggestion that the Sponsor would be able to provide the necessary childcare in the evenings and at weekends. We are unable to accept that submission. It does not sufficiently recognise the need for childcare at each end of the school day (when the Sponsor would be at work) or the impact of school holidays.

29. While it would be possible *in theory* for the Sponsor to combine the roles of sole earner and sole career we do not think that would be at all realistic in practice. Realistically, if the Appellant were to leave the UK then her children would have to leave too. It would deprive them of an effective right of residence. The family arrangements function well at the moment because the Appellant is able to contribute significant amounts of free childcare. There is simply no alternative source of affordable, let alone free, childcare."

35. The approach of the First-tier Tribunal is, in my judgment, contrary to the approach of the Court of Appeal in Harrison and as stated by Hickinbottom J in R (Sanneh) v Secretary of State for Work and Pensions [2013] EWHC 793 (Admin) at [19]. It amounts, in effect, to a finding that the position of the children in the UK without their mother would be untenable because MP would be unable to look after and support them.

36. In Sanneh, Hickinbottom J summarised the position as follows at [19]:

"i) All nationals of all member states are EU citizens. It is for each member state to determine how nationality of that state may be acquired, but, once it is acquired by an individual, that individual has the right to enjoy the substance of the rights that attach to the status of EU citizen, including the right to reside in the territory of the EU. That applies equally to minors, irrespective of the nationality of their parents, and irrespective of whether one or both parents have EU citizenship.

ii) An EU citizen must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For a minor, that freedom may be jeopardised if, although legally entitled to reside in the EU, he is compelled to leave EU territory because an ascendant relative upon whom he is dependent is compelled to leave. That relative may be compelled to leave by dint of direct state action (e.g. he is the subject of an order for removal) or by virtue of being driven to leave and reside in a non-EU country by force of economic necessity (e.g. by having insufficient resources to provide for his EU child/ren) because the state refuses him a work permit). 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.

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; although (a) diminution in the quality of life

> might engage EU law if (and only if) it is sufficient in practice to compel the a relevant ascendant relative, and hence the EU dependent citizen, to leave, and (b) such actions as removal or prevention or work may result in an interference with some other right, such as the right to respect for family life under article 8 of the European Convention on Human Rights.
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> v) Although such article 8 rights are similar in scope to the EU rights conferred by article 7 of the Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to member states only when they are implementing EU law. If EU law is not engaged, then the domestic courts have to undertake the examination of the right to family life under article 8; but that is an entirely distinct area of protection.
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> vi) The overriding of the general national right to refuse a non-EU national a right of residence, by reference to the effective enjoyment of the right to reside of a dependent EU citizen, is described in both *Dereci* (paragraph 67) and *Harrison* (paragraph 66) as "exceptional", meaning (as explained in the latter), as a principle, it will not be regularly engaged."

37. The derivative right is not established unless the individual would be forced or compelled to leave the UK. In Harrison, Elias LJ (giving the judgment of the court), and referring to the CJEU case law upon which reg 15A(4A) is based, said this at [63]:

> "… [There] is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it the child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged."

38. At [67], Elias LJ stated that:

> "The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national."

39. In my judgment, it was simply not open to the First-tier Tribunal to find that the appellant's children would be compelled to leave the EU because MP would, in effect, be compelled to leave the UK because he could not care for his children and work at the same time.

40. It is irrational to find that MP (in the absence of his wife) would be unwilling and unable to care for his children. Many people live their lives as single parents caring for and providing for their children through work or, possibly, supplemented by State support. Both MP's children are in school. They require "hands on" care only for non-school times. There was evidence before the First-tier Tribunal as to the cost of childcare which MP also told me was about £200 per week. It is not clear whether this was the cost of professional childcare on a more or less full-time basis or not. MP's evidence was only that he would be presented with difficulties in carrying on

his current employment if he had to look after his children full-time. The fact that he may not be able to be as economically active as he would wish, or work a pattern that he now does because of his care responsibilities to his children, is not sufficient to support a finding that A and F would be denied the genuine enjoyment of their EU citizenship rights (see, e.g. MA and SM at [56] also doubting whether that would be the case even if a father had to stop working altogether).

41. It may be MF's choice to leave the UK with A and F but, in my judgment, the First-tier Tribunal could not rationally come to the conclusion that he (and therefore A and F) would be forced or compelled to leave the UK. The evidence before the First-tier Tribunal was not such, in my judgment, that a finding could rationally be sustained that a single man in employment (whether his current employment or other employment) would be unable to care for his children who are in full-time education and who live with their father in his parents' home. Even if MP's parents were unable to undertake any significant amount of childcare, nothing in the evidence before the First-tier Tribunal suggested that his father (in particular) could not provide some support and there was no evidence before the First-tier Tribunal that MP would not be able to obtain State support if the family's circumstances required it.

42. In my judgment, the only rational conclusion on the evidence was that, whilst there may be a diminution in the quality of life of the children if their mother left the UK and possibly a lower standard of living if their father's income was reduced, the substance of their right to reside was not infringed in that their circumstances could not possibly, on the evidence, be such that their father would be unable to care for them in the UK.

43. For those reasons, the First-tier Tribunal erred in law in finding that the requirement in reg 15A(4A)(c), that the children would be unable to reside in the UK (or another EEA State) if the appellant were required to leave, was met. The only proper conclusion on the evidence was that the requirement was not met.

Decision

44. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under reg 15A(4A) involved the making of an error of law. That decision is set aside.

45. I remake the decision dismissing the appeal on the basis that the appellant has failed to establish that she meets the requirements of reg 15A(4A), in particular paras (a) and (c).

46. Accordingly, the appellant's appeal under the EEA Regulations is dismissed.

Signed

A Grubb
Judge of the Upper
Date 19th May 2016