Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: EA/13661/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th October 2018	**On 22nd October 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

OLUBUKOLA [A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Chakmakjian of counsel instructed by Mondair Solicitors

For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Nigeria and on 14 November 2016 the Respondent refused to issue her with a derivative residence card as the primary carer of an EEA national who is currently in education in the United Kingdom. The EEA national in question is her daughter, who was born in 2010, and who was issued with a derivative residence card on the basis that

she was attending St Matthew's Church of England Primary School during the time that her father was exercising his Treaty rights to take up employment in the United Kingdom.

2.. The Appellant appealed on 28 November 2017 but First-tier Tribunal Judge Lodge dismissed her appeal in a decision promulgated on 17 July 2018. She appealed against this decision and on 20 August 2018 First-tier Tribunal Judge Kelly granted her permission to appeal.

ERROR OF LAW HEARING

3. Counsel for the Appellant made his oral submissions and the Home Office Presenting Officer simply stated that he would not be opposing the appeal.

ERROR OF LAW DECISION

4. Regulation 15A of the Immigration (European Economic Area) Regulations 2006 states that:

"(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.

(2) P satisfies the criteria in this paragraph if-

(a) P is the primary carer of an EEA national…; and

(b) the relevant EEA national-

(i) is under the age of 18;

(ii) is residing in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if-

(a) P is the chid of an EEA national

(b) P resided in the United Kingdom at a time when the EEA national parents was residing in the United Kingdom as a worker;

(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if-

(a) P is the primary carer of a person meeting the criteria in paragraph (3) … and

(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave".

5. It is not disputed that the Appellant's daughter meets the criteria of Regulation 15A (3). Her birth certificate confirms her paternity and the Respondent's own records state that her father is an EEA national. Her birth certificate also confirms that she is under 18. In addition, the evidence confirms that she was attending St Matthew's Church of England Primary School during the time that her father was exercising his Treaty rights to take up employment in the United Kingdom.

6. In relation to whether the Appellant is her primary carer. Regulation 15A (7) states that:

"P is to be regarded as a 'primary carer' of another person if

(a) P is a direct relative … and

(b) P is

(i) the person who has the primary responsibility for that person's care"

7. It is accepted that the Appellant's daughter lives with her and in paragraph 22 of the Appellant's daughter's father's statement, dated 19 December 2017, he confirmed that the Appellant is her primary carer. In paragraph 6 of his statement, dated 11 October 2015, he also stated that his daughter had "always been living with her mother since birth and her mother always been the one meeting her needs in terms of care (personal) … Because I have 4 other children and my wife I cannot take care [of my daughter] and my wife will not allow this to happen. The only support I give my only daughter is financial and emotional supports". On the basis of this evidence, I find that the Appellant is her daughter's primary carer.

8. For the purposes of Regulation 15A(40(b) the Appellant also had to show that her daughter would be unable to remain in education in the United Kingdom if she had to leave the United Kingdom.

9. In paragraph 32 of her statement, dated 19 February 2018, the Appellant stated that:

"Unfortunately, although [T] is understanding and agrees that [A] and the boys spend time with [O] and see her, she is not prepared to let [O] live with her and [A], so if I am

> required to leave the UK I will have to take [O] with me, which would be devastating for everyone and most certainly would not be in my daughter's best interests".

10. Nevertheless, in paragraph 20 of his decision, First-tier Tribunal Judge Lodge found that:

> "Looking at the evidence I am satisfied that if the appellant had to leave the European Economic Area the child would be able to remain in the UK with the sponsor. The sponsor's protestations that D could not live with him because his wife objects are, in my opinion, half-hearted as demonstrated by the appellant's equivocation in paragraph 44 of her witness statement".

11. In paragraph 44 of the Appellant stated:

> "If, for example, I was to leave the UK alone and somehow persuade [T] to allow [my daughter] to move in with [her father] and her, I still know that [my daughter] will suffer a lot from this, as she has never lived with anyone else apart from me and I was always responsible for her day in, day out".

12. This did not provide any evidence that her daughter would be permitted to move in with her father and had to be viewed in the round with the Appellant and her daughter's father's statements which strongly indicated that his wife would not let her move in. In addition, this evidence had not been seriously challenged during the appeal hearing and no adverse credibility findings had been made against the Appellant and her daughter's father. At best the conclusion reached by First-tier Tribunal Judge Lodge was speculative.

13. For all of these reasons I find that it is arguable that there were errors of law in First-tier Tribunal Lodge's decision.

Decision on error of law

(1) The appeal is allowed.

(2) The decision of First-tier Tribunal Judge Lodge is set aside.

(3) The appeal is retained in the Upper Tribunal and is re-made below.

RE-MADE DECISION ON THE SUBSTANTIVE APPEAL

1. For all of the reasons given above, I find that the Appellant meets the criteria contained in Regulation 15A(4) of the Immigration (European Economic Area) Regulations 2006.

2. The Appellant is the primary carer of the child of an EEA national who is in education in the United Kingdom and the child would be unable to continue to be educated here, if the Appellant were required to leave the United Kingdom.

3. Taking the evidence in the round and applying the necessary balance of probabilities the child's father is not in a position to care for her on a full-time basis as his wife will not permit her to live with them. There is also no suggestion that there is any other adult who could care for her here.

4. In addition, the child has lived with her mother for all of her life and the evidence of the Appellant and the child's father is that she would suffer emotional harm if she had to remain here without her mother. For example, the Appellant said in paragraph 45 of her statement the child would not understand why her mother had abandoned her here and left for Nigeria.

5. I have noted that on page 4 of 6 of the Respondent's refusal letter, he stated that:

> "Section 55 of the Borders, Citizenship and Immigration Act 2009 places a duty on the Secretary of State to have regard to the need to safeguard and promote the welfare of children in the UK when carrying out immigration functions. In the context of your application for a Derivative Residence Card under the Immigration (European Economic Area) Regulations 2006, this duty requires the Secretary of State to deal with your application in a timely manner. Where an EEA documentation application is refused, section 55 also requires the Secretary of State to take special care to explain the reasons why the application has been rejected, and to make sure the consequences of the refusal decision are explained clearly…
>
> Section 55 does not affect the Secretary of State's consideration of whether the criteria in order to enjoy a derivative right to reside under the 2006 Regulations are met. The criteria contained in regulations 15A and 18A of the 2006 Regulations are objective and

do not depend upon an exercise of discretion by the Secretary of State. Section 55 does not require the Secretary of State to apply different criteria to those contained in the 2006 Regulations".

6. However, in paragraph 23 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 Lady Hale found that Article 3(1) of the United Nations Convention on the Rights of the Child is a binding obligation in international law, and the spirit, if not the precise language, had also been translated in to national law and that one of these pieces of national law was section 55 of the Borders, Citizenship and Immigration Act 2009.

7. Furthermore, the Home Office's own policy on *Free Movement Rights: derivative rights of residence* states that:

"The best interests of the child

- The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that consideration of the child's best interests is a primary consideration in immigration cases.
- You must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK when assessing whether a relevant child would be unable to remain, or to continue to be educated, in the UK, if the applicant left the UK for an indefinite period".

8. In addition, the Immigration (European Economic Area) Regulations transposed and implemented Council Directive 2004/38/EC *on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.*

9. Therefore, even if the EEA Regulations themselves do not refer directly to the concept of best interests, I must take into account the EU legislation applicable to the rights protected in the EEA Regulations. When taking into account any piece of EU legislation it is also necessary to take into account the provisions of the Charter of Fundamental Rights of the European Union 2000/C 364/01.

10. Article 24 of that Charter states that:

> "2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

11. Taking all of the evidence into account, it indicates that it would not be in the child's best interests to suggest that she could continue to be educated here in the absence of her mother, who is her primary carer.

Decision

(1) The Appellant's substantive appeal is allowed.

Nadine Finch

Signed Date 16 October 2018

Upper Tribunal Judge Finch