Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20000/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 December 2017	**On 24 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EJATU [J]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr E Akohene, instructed by Afrifa and Partners Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Omotosho who in a determination promulgated on 10 November 2014 allowed the appellant's appeal against a decision of the Secretary of State to refuse her a derivative residence card. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly, I will refer to Ejatu [J] as the appellant as she was the appellant in the First-tier.

2. The appellant's appeal was allowed by Judge Omotosho after a hearing on 5 December 2014. The Secretary of State appealed that decision but that decision was upheld by Deputy Judge of the Upper Tribunal Harris who in a determination promulgated on 3 September 2015 found that there was no error of law in the decision of Judge Omotosho. Further representations were then made by the Secretary of State by letter, effectively making an application for permission to appeal to the Court of Appeal. Upper Tribunal Judge Kebede considered the application made and decided that the appropriate course of action was to set aside the decision of Judge Harris. She directed that unless there was any objection to that course of action within 14 days she would set aside Judge Harris's decision. There being no objection she set aside his determination. In these circumstances the appeal comes before me as an appeal to the Upper Tribunal against the decision of Judge Omotosho.

3. The appellant is a citizen of Sierra Leone born on [ ] 1978. She applied for a derivative residence card on 31 December 2013 on the basis that she was the primary carer of her sons, [RJK] and [RAK] whom she had had with her partner, [JK]. Her sons are, like her partner, British citizens. The application for leave to remain was on the basis that she was a primary carer under Regulation 15A(7) of the Immigration (EEA) Regulations 2006. The Regulation read as follows:-

> "**15A. Derivative right of residence**
>
> (1) A person ("P") who is not an exempt person and who satisfies the criterion at paragraphs (2), (3), (4a) or (5) of this Regulation is entitled to a derivative right of residence in the United Kingdom for as long as P satisfied the relevant criteria.
>
> (2) P satisfies the criterion in this paragraph if –
>
> (a) P is the primary carer of an EEA national ("the relevant 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 child of an EEA national ("the EEA national parent");
> ...

(4A) P satisfies the criteria in this paragraph if –

(a) P is the primary carer of a British citizen ("the relevant British citizen");

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave.

...

(7) P is to be regarded as a "primary carer" of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P -

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person."

4. The following facts are accepted. The appellant's partner is an exempt person as he is a British citizen. The children are under the age of 18, the appellant does not work but looks after the children at home and they are supported by her partner who works.

5. The Secretary of State in the letter of refusal stated that the appellant had not provided evidence as to why the children's father was not in a position to care for them if she were forced to leave the United Kingdom and that there was insufficient evidence to show that the British citizen children "... would be unable to remain in the United Kingdom/EEA if you were forced to leave". It was pointed out that any unwillingness to assume care or responsibility was not by itself sufficient for the claimed primary carer to assert that another direct relative or guardian was unable to care for the British children. The letter went on to say:-

> "Furthermore to be considered the primary carer we would expect you to provide evidence to show that the children live with you or spend the majority of their time with you, that you make the day to day decisions in regard to the children's health, education etc and that you are financially responsible for the children."

6. It was noted that the appellant had provided a letter from her partner where it was stated that she was the main carer for the children as she only worked part-time and he worked full-time - sometimes between 48

and 60 hours a week - and sometimes worked nights. He also claimed to be a student. The letter stated that:-

> "Notwithstanding the information regarding [JK]'s employment and studying, it is his choice to undertake such employment and studying, it is his choice to undertake such employment and studying and it does not negate his responsibilities for the children or the fact that you share the responsibility for your children's care with an exempt person."

7. It was pointed out in the letter of refusal that the appellant might wish to make an Article 8 application but in any event her application was refused under the provisions of Regulation 15A(4A)(a) and (c), 15A(7)(b) and 18A of the Regulations.

8. Judge Omotosho, in determining the appeal referred to the decision in **Zambrano (European citizen) [2011] EUECJ-C-34/09** and noted that the right of residence was not a free movement right but was a derivative right. She heard evidence from the appellant who referred briefly to her family life and those of her children and who said that she disagreed with the fact that the children could remain in Britain to be cared for by their father. In paragraphs 23 onwards Judge Omotosho set out her findings. She placed weight on the fact that the appellant's partner was in full-time employment and went on to say:-

> "I have no reason to doubt the evidence that the appellant is essentially the primary carer for both [RJK] and [RAK]. The children are very young, ages 2 and 3 years and clearly dependent on their mother for care and support. At the time of the application, the youngest child was still breastfeeding."

9. She said that an appellant must satisfy the provisions of Regulation 15A(7). In paragraph 29 she stated:

> "29. Whilst I have concluded above that because [JK] is named as the children's father he can be regarded as sharing parental responsibility, however, I am satisfied that the appellant has primary responsibility for the care of their two children. The parties are not married and although they live in the same household, I am satisfied that [JK] works full time and study part-time; I have no reason to doubt the evidence that he is not available nor has he been personally responsible for the care of the children. When [JK] goes to work or attend his studies, it is the appellant who cares for the children on a day to day basis.
>
> 30. I note that there is no family court order in favour of [JK] in respect of the children and there is nothing preventing him from simply walking away from the relationship and from the children. I find that the appellant as the mother of these British citizen

children is their primary carer and as such she has primary responsibility for the care of her children as required under Regulation 15A(7)(b)(i).

31. In light of my findings, I do not need to consider the alternative proposition under Regulation 15A(7)(b)(ii), i.e. where responsibility is shared or the fact that [JK] is an exempt person under the Regulations."

10. In the following paragraphs Judge Omotosho said she took into account the family circumstances noting that she had found that the appellant was primarily responsible for the care of her children while their father went to work and studied. She said that the appellant's partner "has not taken care of the children and would find it difficult to do so if the appellant is asked to leave". She added:-

"32. ... Whilst I acknowledge that their father could stop his studies or work to concentrate on the care of his children or seek services to help him with their care, however in my view this would not necessarily be desirable and could be very expensive bearing in mind [JK]'s limited income. In addition, I note the concern of the appellant and [JK] about the Ebola crisis in Sierra Leone and the concern for the children if they were to go with their mother. The respondent in the decision letter had not properly considered the best interest of the children and had simply inferred shared parental responsibility and equated this with primary responsibility without considering the impact of removal of a mother from the care of very young children.

33. I find that although the children are not required to leave the UK with their mother, I however conclude in light of all the evidence and in this particular circumstance that in reality these British Citizen children would be unable to reside or remain in the United Kingdom with their father if their mother was required to leave. I am satisfied that it would not be in the children's best interest for there to be a family split involving either the mother or the father."

She therefore allowed the appeal.

11. The Secretary of State appealed, arguing that the judge had placed weight on there being no family court order in favour of [JK] and there was nothing preventing him from simply walking away from the relationship and from the children. It was stated that the fact that there was no family court order and there was nothing to prevent [JK] walking away from the relationship was not a sound reason to find the appellant to be the primary carer as any unwillingness to assume care and responsibility was not by itself sufficient for the claimed primary carer to assert that another direct relative, in this case the father, was unable to care for the children. It was

pointed out that one of the conditions associated being regarded as primary carer is financial responsibility and in this case the father had responsibility for the children. Moreover, the father was an exempt person. It was not relevant that the father might find it difficult to look after the children as it was acknowledged that the father could stop his studies or work to concentrate on the care of his children or seek services to help him with care. It was stated that it was a matter of choice and agreement between parents when it came to the care of, and provision for their children, in this case the father might initially find it difficult to adapt to the change, but both physical and financial support would be available to him. It was stated that the latter was in the form of tax credits if he were to apply and qualify and it was submitted that whilst it would not necessarily be desirable as the judge states in paragraph 32 of the determination, the children would still be able to reside in the United Kingdom if the appellant were required to leave. It was on that basis that permission was granted. Judge Harris however, when considering the appeal in the Upper Tribunal, found that Judge Omotosho had made no error of law. He appeared to consider that the appellant had primary responsibility for the children's care and that therefore the requirements of Regulation 7 were met.

12. His decision to dismiss the appeal in the Upper Tribunal was challenged by the respondent in the letter dated 15 September 2015 which stood as an application to the Court of Appeal. It was argued that Judge Harris had misdirected himself in law in his application of the principles of **Zambrano** and reference was made to the Tribunal decision in **MA & SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 380** in which the Upper Tribunal had written in paragraph 41(ii) that:-

> "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 letter also referred to paragraph 56 of **MA & SM** where it was stated:-

> "The mere fact that the sponsor cannot be as economically active as he would wish, because of his care responsibilities to JM and FM, is not sufficient to support a conclusion that JM and FM would be denied the genuine enjoyment of their EU citizenship rights, nor would this be the case even if the sponsor were required to stop working altogether."

13. It was stated that that finding had been affirmed by the Court of Appeal in **Sanneh & Others [2015] EWCA Civ 49** where it was found that the **Zambrano** principle did not preclude the removal of the primary carer even if that would "necessarily diminish the quality of their lives".

14. It was submitted that if the children were left in the care of their father they would not be left without the resources necessary for them to live within the European Union.

15. As I have said Judge Kebede set aside the decision of Judge Harris. At the hearing before me Mr Bramble referred to the terms of Regulation 15A and stated that it was clear from relevant case law that the appellant did not meet the requirements of Regulation 15A. It was clear that Judge Omotosho ignored the fact that [JK] was an exempt person and therefore could care for the children – it was not in dispute that he was their father. He took me through the terms of paragraph 15A arguing that clearly the appellant did not meet the requirements therein. In reply Mr Akohene argued that it was accepted that the appellant was the primary carer as opposed to sharing responsibility and that the judge had been correct to focus on the facts as they actually were. The application of the Regulations should not be so rigid as to mean that the appellant was not entitled to remain. He emphasised that the reality was that the children had been brought up by their mother and had an emotional attachment to her and that to sever that would lead to emotional damage. He stated that the cases in **MA and SM** and **Sanneh** were fact-specific and that Judge Omotosho had been correct to state that there was no alternative other than that the appellant should look after the children and therefore she should not be required to leave.

Discussion

16. Regulation 15A is clear. At (4) it states that "P is the primary carer of a person meeting the criteria" that is that the child is an EEA national and under the age of 18 and at 4(a) it stated that P would satisfy the criteria if she was the primary carer of the British citizen, was residing in the United Kingdom and the relevant citizen would be unable to reside in another EEA state. The reality is that at (7) the term primary carer is defined as a direct relative or legal guardian of the person for whom care is being provided and is the person's primary responsibility for that person's care or shares equally the responsibility for that person's care with one other person who is not an exempt person. At (7)(a) it states:-

> "7(a) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(ii), (4)(b) and (4)(a) and (c) shall be considered on the basis that both P and the person with whom care responsibility is shared be required to leave the United Kingdom."

17. That is clearly not the case here. Indeed the reality is there is simply nothing to show that the appellant is the primary carer in terms of the law. While it may be that daily care while [JK] is working is the responsibility of the appellant the reality is that there is nothing to indicate that [JK] does not play a full role in making decisions for the children or indeed spends time with them when he is not working and of course the reality is that he has financial responsibility for children. It is hypothetical to suggest that he could merely walk away. That is not the fact as it stands. This is a couple who live together and bring up their children together. Moreover, although clearly there is shared responsibility for the children, [JK] is an exempt person under the provisions of Regulation 7(b)(ii). The fact that

they share responsibility means that the appellant cannot be considered as the primary carer of the children.

18. I take note of the case law set out in **MA & SM** and in **Salleh & Others**. The conclusions of Judge Omotosho are clearly wrong and are not made in consideration of the exact terms of the Regulations. For that reason I set aside her decision.

19. Having set aside the decision of Judge Omotosho for the reasons which I have given above I find that the appellant has not discharged the burden of proof upon her and that she does not qualify for a derivative right of residence under Regulation 15(a) and I therefore dismiss his appeal.

20. I would point out that the Secretary of State, in the letter of refusal made it clear to the appellant that she would be able to make a human rights application. Such an application would of course be strengthened by the terms of Section 117(b)(6) of the 2002 Act. I consider that that would be the appropriate course of action – there has not been a decision to remove the application but she should take steps to regularise her position before such a decision is made.

Notice of Decision

21. The determination of the First-tier Tribunal Judge is set aside.

22. I remake the decision and dismiss her appeal under the Immigration (EEA) Regulations 2006. No rights under Article 8 of the ECHR were raised in the appeal.

No anonymity direction is made.

Signed  Date: 19 January 2018

Deputy Upper Tribunal Judge McGeachy