Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA 04700 2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2018	**On 05 February 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

OLUBANKE [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Childs, Counsel instructed by Mitchell Simmonds Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Nigeria against a decision of the First-tier Tribunal dismissing her appeal against a decision of the Secretary of State refusing her a residence card as the parent of an EEA national residing in the United Kingdom. The appellant is the mother of four children. The oldest is an Irish national and the others are citizens of the United Kingdom. The oldest child was born in November 2003 and so is now 15 years old. The next was born in September 2005 and so is now 13 years old, and the other two are twins born in February 2008 and so are now 10 years old. The children attend boarding schools in the United Kingdom.

2. The appellant is divorced from their father. It is her case that she is the parent in charge of the children pursuant to a court order. The First-tier Tribunal Judge found at paragraph 7 of its Decisions and Reasons that the appellant is the "primary carer of her daughter". That is sufficient for the appellant's purposes because her case depends on any of the children satisfying the necessary criteria. I take the judge's finding to mean that he accepted that the appellant is the primary carer of all of the children which is how the appellant put her case. This part of the appeal has not been challenged.

3. The judge said:

> "8. In my opinion the critical question is whether the EEA national would be unable to remain in the United Kingdom if the appellant left the United Kingdom for an indefinite period. On the evidence before me I cannot reach such a conclusion because the EEA national is in fact in a boarding school, meaning that the appellant would have access to her during the school vacation and other breaks during the term. The evidence before me shows that such access has been exercised by the appellant visiting the UK or the EEA national spending her vacation in Nigeria. The appellant has a multiple entry visa and there is no suggestion on her evidence that the circumstances are such that she intends to be absent from the United Kingdom for an indefinite period.
>
> 9. It is far from clear to me what precise circumstances would compel the EEA national to leave the United Kingdom if the appellant was not granted leave to remain. The EEA national would continue to be a boarder at school and would continue to receive visits from her mother during the school breaks and she would on occasions be able to spend her vacations in Nigeria".

4. This is plainly a material error of law. The judge was asking himself if the appellant would be unable to look after the children in the United Kingdom. That is not the test. The Regulations impose a hypothetical test and require the decision maker to determine if the EEA national (*Regulation 16(2)(b)(iii)*) or the British citizen (*Regulation 16(5)(c)*) would "be unable to reside in the United Kingdom or in [another EEA state] if the person left the United Kingdom for an indefinite period". It does not matter in the slightest whether there is any prospect whatsoever of the person leaving the United Kingdom for an indefinite period. What matters is what would happen in that event. The First-tier Tribunal has plainly failed to apply the correct test and the decision cannot be sustained.

5. I therefore set aside the decision of the First-tier Tribunal.

6. Further, on reflection, I am satisfied that the appeal can only be decided one way. The finding that the mother is the primary carer is undisputed. Similarly, it has never been challenged that the children reside in the United Kingdom as self-sufficient people. They have the advantages of coming from a very wealthy family and the financial obligations of the Rules are plainly met.

7. I cannot see any way in which the appellant could discharge her responsibilities as the primary carer from outside the United Kingdom in a way that did not require the children to leave the United Kingdom. For much of their time, maybe even most of it, they are in the day-to-day care of the various schools that they attend but that is not for all of the time. They have holidays and they have breaks from school. The appellant does not need to be in the United Kingdom for every minute the children are not at school but if she were not there for an indefinite period she could not be their primary carer. It is clear to me that the appeal has to be allowed.

8. Ms Childs further submitted that the First-tier Tribunal erred by not having regard to Section 55 of the Borders, Citizenship and Immigration Act 2009, the "welfare of children" provisions.

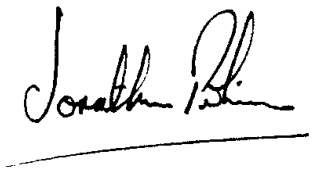
9. Mr Wilding initially submitted that this was not relevant and then modified that to the more insightful observation that it was not helpful. There is a statutory obligation to consider the welfare of children and there can be little doubt that the best interests of these children are that their mother has the right to be in the United Kingdom to support them. However, the Rules and EEA rights are not in any way discretionary. Knowing the best interests of the children is not going to assist. There is no material error in not making a finding about where those interests lie. What matters are the criteria recognised in the Rules and the criteria are satisfied in this case which is why I substitute a decision allowing the appeal.

10. In summary, the appellant's appeal against the decision of the First-tier Tribunal is allowed. The First-tier Tribunal erred in law by applying the wrong test and I set aside its decision and I substitute a decision allowing the appeal.

Notice of Decision

11. The First-tier Tribunal erred in law. I set aside its decision and substitute a decision allowing the Appellant's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 28 January 2019