Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04950/2019
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THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre (remote)	**Decision & Reasons Promulgated**
On: 5th March 2021	**On: 19 March 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Ladi Justina Ekundayo
Sinmiloluwa Oluwatamilore Ekundayo
(anonymity direction made)

Appellants

and

Secretary of State for the Home Department

Respondent

For the Appellant:	**Mr West, Counsel instructed by Blackfields Solicitors**
For the Respondent:	**Ms Pettersen, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants are both nationals of Nigeria. They are respectively a mother (date of birth 30th January 1972) and her daughter (9th January 2008). They seek permission to reside in the United Kingdom under Regulation 16 of the Immigration (European Economic Area) Regulations 2016. In particular Mrs Ekundayo asserts that she should not be required to leave the United Kingdom,

and thereby the European Union, because she is the primary carer for her son, Toluwalase Ekundayo (22nd April 2002), a national of the Republic of Ireland.

2. The Appellants made their applications for residence cards on the 27th March 2019. The decision to refuse was made on the 3rd September 2019. Appeals were lodged with the First-tier Tribunal on the 16th September 2019, and the appeals dismissed by First-tier Tribunal Judge Head on the 3rd February 2020. Permission was granted on the 21st December 2020 by Upper Tribunal Judge Hanson. Before me the parties agreed that notwithstanding the United Kingdom's withdrawal from the European Union the transitional provisions apply so as to preserve the right of appeal.

Background and Matters in Issue

3. The case for the Appellants before the First-tier Tribunal was that they both reside in Manchester with Toluwalase, who at the date of the First-tier Tribunal hearing was a minor. Applying Regulation 16(2) his mother was his 'primary carer' and thereby derived a right of residence in the United Kingdom; by extension his sister derives a right of residence under Regulation 16(6).

4. The First-tier Tribunal set out the background facts. All three members of this family had arrived in the United Kingdom from Nigeria on the 24th December 2018, with leave to enter as visitors. They had come to visit a Mrs Griselda Nwakaku Jiya, the mother of Mrs Ekundayo and grandmother to the two children. They are now living in her home. Toluwalase decided that he wanted to stay here with his grandmother, and so submitted an application for a self-sufficient EEA national child. After this was granted, the Appellants made their applications, Mrs Ekundayo for derivative residence, and Sinmiloluwa as her dependent. It is said that Mrs Jiya is unable to care for Toluwalase because she is the full-time carer for her other daughter, an adult with various disabilities and health issues, including Down's Syndrome.

5. Turning to the requirements of the Regulation the First-tier Tribunal accepted that Toluwalase was, at the date of hearing, a minor. It accepted that Mrs Ekundayo is his mother, and that he is an Irish national. There was not however any indication that he required any personal or physical care from his mother. He is studying, and working part time. He hoped to start university the following academic year. He is a healthy and competent young man. There were no reasons given as to why he could not simply live with his grandmother. Having regard to those matters the Tribunal was not satisfied that Mrs Ekundayo is her son's "primary carer". He does not need a carer. If he becomes a burden to his grandmother, he could move to independent accommodation. As to whether he would return to Nigeria if the Appellants did, the Tribunal found that he would elect not to do so. He is not unable to live

in the United Kingdom without his mother and sister, and would not be compelled to leave with them. The appeal was accordingly dismissed.

6. The Appellants submit that the First-tier Tribunal decision is flawed for the following material errors:

    i) Misdirection in respect of Regulation 16(8), in particular the definition of 'primary carer';

    ii) Failure to give adequate reasons/misdirection in respect of Regulation 16(2), in particular whether Toluwalase would be *unable* to remain in the United Kingdom if his mother left. It is submitted that the test is one of *compulsion*, not election;

    iii) Procedural unfairness, in particular a failure to give Mrs Ekundayo/Toluwalase an opportunity to respond to an adverse point in the decision, in particular the finding that Toluwalase could live independently of his mother which failed to take into account the fact that at the date of the appeal, he did not do so.

Discussion and Findings

7. Insofar as is material Regulation 16 provides as follows:

> **Derivative right to reside**
>
> **16.**—(1) A person has a derivative right to reside during any period in which the person—
>
> (a) is not an exempt person; and
>
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
>
> (2) The criteria in this paragraph are that—
>
> (a) **the person is the primary carer of an EEA national; and**
>
> **(b) the EEA national—**
>
> **(i) is under the age of 18;**
>
> **(ii) resides in the United Kingdom as a self-sufficient person; and**
>
> **(iii) would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period.**
>
> (3)…

(4)…

(5) ….

(6) **The criteria in this paragraph are that—**

(a) the person is under the age of 18;

(b) the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act;

(c) the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and

(d) the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.

(7)…

(8) **A person is the "primary carer" of another person ("AP") if—**

(a) the person is a direct relative or a legal guardian of AP; and

(b) either—

(i) the person has primary responsibility for AP's care; or

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

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words "the person" are to be read as "both primary carers".

(10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person's assumption of equal care responsibility.

(11) A person is not be regarded as having responsibility for another person's care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person's care.

(12) …

8. The Appellants lost their appeal on two issues, and they have permission to challenge the findings in respect of both matters.

9. The first arises under Regulation 16(2) and (8): is Mrs Okundayo, as a matter of law, her son's "primary carer". At the date of the appeal Toluwalase was 17

years and 9 months old. As Judge Head found, he was studying independently and working part time. He hoped to go to university. As is apparent from the decision, the Tribunal evidently thought these matters relevant to whether his mother provides him with "care": it did not find that he required her "personal or physical care" and so found the requirements at Regulation 16(8) not met.

10. The written grounds, drafted on the 17th February 2020, take issue with this approach, and submit that in fact all that the Tribunal was required to do in the case of a *Zambrano* minor child was satisfy itself, according to Regulation 16(8)(i), that the carer had "primary responsibility" for the child's care. As a parent it could be presumed that she did – indeed this was the effect of Home Office guidance on the point set out in the grounds.

11. Unfortunately the grounds do not appear to have taken into account the guidance issued by the Supreme Court on this matter in Patel (FC) v Secretary of State for the Home Department [2019] UKSC 59, handed down some two months before they were drafted. As the Court there makes clear there should be no automatic assumption that a *Zambrano* dependency exists between parent and child. There the Court cites with approval the CJEU's analysis at §76 of KA and Others (Regroupement familial en Belgique) [2018] 3 CMLR 28

> "It follows from paras 64 to 75 of this judgment that article 20 TFEU must be interpreted as meaning that:
>
> – where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third-country national concerned of a derived right of residence under article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible;
>
> – **where the Union citizen is a minor, the assessment of the existence of such a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium. The existence of a family link with that third-country national, whether natural or legal, is not sufficient, and cohabitation with that third-country national is not necessary, in order to establish such a relationship of dependency**."

12. Here the undisputed facts were that Toluwalase had applied for residency as a self-sufficient child who was going to be living with his grandmother. The Tribunal took into account the fact the he was already moving towards independence, and in fact was planning to go to university in a matter of months. In those circumstances it is not easy to see what risks there might have been to his "equilibrium" should his mother and sister return to Nigeria as had originally been planned when they made their applications to enter the United Kingdom as visitors, a procedure that they could no doubt go through again if they wanted to see him in the United Kingdom outside of term time. It seems to me that the Tribunal's reasoning was in material part in line with the Supreme Court's decision in Patel. Whilst the grounds are correct in submitting that there was no need, for instance, to look for a need for personal care, ground 1 is not made out.

13. Ground 2 takes issue with the Tribunal's finding that Toluwalase would not "elect" to return to Nigeria. Mr West submits that the correct test was whether he would be unable to remain in the United Kingdom. Again, it is difficult to see where material error can be found. True, the question of what Toluwalase *chose* to do was not really relevant: the focus should have been on what the *inevitable* consequence of his mother's departure might be. As is apparent from my findings on ground 1, this too is misconceived. On the findings of fact made, reasonably open to the Tribunal, there is no question that Toluwalase was quite able to live in the United Kingdom without his mother. He could stay with his grandmother, or in due course move into university halls of residence if he so wished. In his own statement he mentions his hopes in that regard, as well as the fact that he had, at the date of the appeal, three part time jobs, had joined a gym, had made many friends and was doing brilliantly at college, having gained a Distinction in his BTEC extended diploma. He was, at the date of the hearing, technically a child, but one on the cusp of adulthood, whose affection for his mother notwithstanding, was evidently able to embark on the next phase in his education without her: indeed that was his very plan. I do not think, reading the holistic approach advocated in KA and approved in Patel, that the First-tier Tribunal can be criticized for placing weight on those matters.

14. Mr West further submits, in something of a departure from the grounds, that the Judge's reasoning on the test at Regulation 16(2) was flawed for a failure to take material evidence into account, namely the fact that Toluwalase was very close to his mother because she had been a single parent for a long time, and they had together faced adversity. I accept that the Tribunal did not specifically address that element of the evidence, but I am not satisfied that if it had done so, its decision could have been any different. The totality of the decision is that Toluwalase has from his grandmother, in his own words, love, kindness and

financial support. The First-tier Tribunal found that he needed no more than that. That was, in the circumstances, a finding open to the Judge.

15. The final ground raises issues of procedural fairness. It is submitted that the Tribunal acted unfairly in not giving the witnesses the chance to address its concerns about the ability of Toluwalase to live independently of his mother. Mr West points out that at the date of the appeal he did not as a matter of fact do so, and the Tribunal impermissibly speculated/ acted unfairly when it dismissed the appeal on the basis that at some point in the future he would cease to do so. The grounds pray in aid the decision in O'Reilly v Mackman [1983] UKHL 1 to submit that it is a fundamental right of natural justice that a party is afforded a reasonable opportunity of learning what is alleged against him. And so it is. But here neither the Appellants nor their representatives can possibly have been unaware of this particular concern, since it was squarely the basis upon which the Secretary of State put her case, as long ago as 3rd September 2019. At the hearing I invited Mr West to identify what particular aspect of the Tribunal's findings fell foul of this principle of natural justice. He was unable to do so.

16. None of the grounds are made out and the appeal is dismissed. For the avoidance of any doubt if I am at all wrong about any of the foregoing I should note that it matters not, since Toluwalase is now an adult, and in the absence of any particular dependency upon his mother, the appeal would therefore fail on *Zambrano* grounds if remade today.

Decisions

17. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

18. There is no order for anonymity.

Upper Tribunal Judge Bruce
5th March 2021