Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03682/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st January 2022	**On 23rd March 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

ABIMBOLA OMOLARA JEGEDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Thompson, direct access (Ajasin Chambers)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 7 December 1982. She appeals against the decision of First-tier Tribunal J G Raymond, promulgated on 16 July 2021, dismissing her appeal against the refusal of a residence card as confirmation of a derivative right of residence under Regulation 16(5) of the Immigration (EEA) Regulations 2016 ['2016 Regulations'].

2. Permission was granted by First-tier Tribunal Judge Handler on 12 October 2021 for the following reasons:

> "The grounds assert that the Judge erred in failing to undertake the assessment mandated by paragraph 30 of the Supreme Court in Patel v SSHD [2019] UKSC 59. It is arguable that the Judge failed adequately to assess the best interests of the appellant's British citizen children and failed to make findings regarding whether those children would be compelled to leave the EU by reason of a relationship of dependency with the appellant."

The appellant's immigration history

3. The appellant entered to UK as a student in 2006 and was granted leave to remain under the international graduates scheme until April 2009. She was granted a further period of leave to remain as a student until 30 April 2010.

4. A certificate of approval to marry a British citizen was issued on 23 March 2010 and the appellant applied for leave to remain as the spouse of Mr Oni on 30 April 2010. The application was refused and her appeal dismissed. On 16 November 2011, the appellant applied for leave to remain on Article 8 grounds, on the basis of her marriage to Mr Oni. The appellant was granted discretionary leave from 4 April 2012 to 4 April 2015.

5. The appellant's daughter [KGA] was born in April 2012 and her son [EOA] was born in July 2013. On 2 April 2015, the appellant applied for leave to remain outside the immigration rules. Her application was refused and her appeal was dismissed on 5 December 2016 by First-tier Tribunal Judge Omotosho. On 7 October 2017, the appellant applied for leave to remain on Article 8 grounds. This application was refused as a fresh claim on 25 August 2018. The appellant was served with notice of liability to removal on 24 October 2019.

6. The appellant's children were recognised as British citizens on 23 December 2019. On 11 February 2020, the appellant applied for a derivative residence card under the 2016 Regulations, the subject of this appeal, and she made an application for settled status under the EU Settlement Scheme [EUSS] which remains outstanding. The respondent refused the appellant's application under the 2016 Regulations on 30 June 2020. It was not clear on what basis the children were issued with British passports because they were not the biological children of Mr Oni and the passports were issued before their biological father, Benson OA, was granted indefinite leave to remain [ILR] on 26 February 2020.

7. On 6 July 2020, the respondent issued an amended refusal letter in which she accepted the appellant's children have been British citizens since birth. Save for this point the decisions of 30 June and 6 July 2020 are substantially the same.

8. The respondent refused the application for a derivative residence card because, contrary to the appellant's claim that Benson OA played no role in the children's lives and had only emerged in 2018 to enter his name on the birth certificates, Home Office records showed that the appellant and Benson OA had lived at the same address since 2012. Since Benson OA had ILR, it was not accepted the children would be unable to continue to reside in UK if the appellant was required to leave.

9. In addition, the respondent stated a derivative right of residence only applies if a person has no other means to remain lawfully in the UK. The application was also refused because there had been a significant change in circumstances and it was open to the appellant to re-apply under UK domestic law.

The First-tier Tribunal decision of 5 December 2016

10. Judge Omotosho found the appellant's evidence of her relationship with Mr Oni was vague, as were the details of the breakdown of her marriage. The appellant failed to give a credible explanation for why she was unable to submit her divorce certificate. The appellant admitted she had left the matrimonial home before she made her application for leave to remain, in April 2015, on the basis of her relationship with Mr Oni in which she claimed her circumstances were the same as those pertaining to her previous grant of discretionary leave.

11. At the hearing on 4 July 2016, the appellant was unsure of the paternity of her children and admitted she was not living with Mr Oni. Judge Omotosho rejected her claim to have been living with Mr Oni 'on and off' until 2014 and found the appellant to be entirely lacking in credibility. Judge Omotosho found the appellant could not satisfy the immigration rules and dismissed her appeal on human rights grounds. The appellant admitted, through her representative, that her children were not British citizens and they did not have seven years' residence.

The decision of Judge Raymond

12. Before Judge Raymond, it was the appellant's case she had a one night stand with Benson OA which led to the birth of KGA. She confessed this to Mr Oni and their relationship eventually broke up. Thereafter, the appellant entered into a relationship with Benson OA which led to the birth of EOA. Benson OA refused to leave his wife so the appellant decided to end the relationship and bring up the children alone. However, the appellant contacted Benson OA in 2015 because she needed somewhere to live. Benson OA was her landlord and used her address to receive correspondence. In 2018, Benson OA wanted to do things properly by registering his name on the children's birth certificates.

13. The appellant asserted she was the primary carer of the children and without her support they would not be able to continue living in the UK. Benson OA did not know anything about his children and would not be able to care for them if the appellant left the UK.

14. Judge Raymond concluded the GP records showed that the children used their mother's name before 2018 and their father's name thereafter. The appellant's bank statements showed regular and substantial payments from Benson OA. Judge Raymond noted the appellant was in receipt of child benefit although she had stated in her application form that she was not. In oral evidence, the appellant stated she had stopped living with Benson OA in 2014 and he played no role in their lives, although she spoke to him 'now and then'. Benson OA owned the house and gave her money for the children. She did not know if he was willing to take a paternity test.

15. Judge Raymond considered the decision of Judge Omotosho and applied Devaseelan. His starting point was that the appellant was totally lacking in credibility. He found that there was no credible evidence of the father of the appellant's children. Given Benson OA's financial support, Judge Raymond did not accept Benson OA was married or that he would not cooperate with a paternity test. At [30], Judge Raymond stated: "It still languishes in deep obscurity how the two children obtained British citizenship."

16. In the subsequent paragraphs, Judge Raymond found there was no documentary evidence to show that Benson OA was the landlord of the appellant's accommodation whilst not sharing it with the appellant and the two children. At [32], Judge Raymond noted the appellant's claim that she was not receiving child benefit was contradicted by her bank statements. He found there was no documentary evidence to show that the appellant was a single mother and no witnesses to support the appellant's claim. Judge Raymond concluded Benson OA's financial support of the appellant and the children gave credence to the respondent's position that Benson OA and the appellant are living together as a family unit.

17. Judge Raymond found the appellant completely lacking in credibility and concluded at [43]:

> "For all the reasons therefore, which turn upon an evidential void that has existed at the heart of what is known about the life of the appellant since at least December 2016, I find the appellant had not established that her circumstances, and those of her two children, engage the requirements for a derivative residence card."

Submissions

18. Mr Tufan accepted there was an error in referring to undisputed matters and failing to have regard to the amended refusal letter. However, he

submitted that following Akinsanya v SSHD [2022] EWCA Civ 37 at [54] and [55] the appellant had to exhaust domestic remedies.

19. Mr Thompson submitted the judge was aware of the decision of 6 July 2020 which was relied on at the hearing. Akinsanya was concerned with the EUSS, not the 2016 Regulations and did not apply. The court found that Zambrano rights were not engaged where a person had leave to remain under domestic law. The appellant's appeal could be distinguished in law and fact. The appellant applied under regulation 16(5) of the 2016 Regulations and she did not have leave to remain. She was threatened with removal and therefore she could apply for a derivative right of residence.

20. Mr Thompson submitted Judge Raymond erred in law in failing to apply [30] of Patel. He had failed to consider the best interests of the children, their age and the effect of separation from the appellant. Further, Judge Raymond had considered irrelevant matters. The appellant's credibility in her appeal in 2016 was not relevant to the Zambrano assessment. The 2016 appeal had failed on its facts not on credibility. Although this decision was a starting point, the respondent had since conceded the appellant's children were British citizens and Benson OA was their father. Judge Raymond took into account irrelevant matters which tainted the remainder of his credibility findings.

21. Mr Thompson submitted it was not appropriate for the appellant to have to prove a negative. It was for the respondent to show the appellant was in a relationship. She who asserts must prove. The appellant was in the same situation as Mr Shah in Patel. She was the primary carer making all the important decisions. Even if the appellant was in a relationship with Benson OA, there were other factors which Judge Raymond failed to consider. There was no evidence from Benson OA because he did not want to contribute to the appeal. He provided financial support when he was threatened with the child support agency. There would be no need to transfer money to the appellant if they were living together.

22. Mr Thompson submitted the appellant was a truthful witness and accepted she could not qualify under the immigration rules before the previous Tribunal where the issue was Article 8 and her credibility was not material. In this appeal, Judge Raymond took into account irrelevant matters. The only change is circumstances was that Benson OA put his name on the children's birth certificates. Nothing else had changed. There was no evidence the appellant was in a relationship and she candidly disclosed that Benson OA was providing financial support before 2018 because the appellant was unable to work on becoming appeal rights exhausted.

23. Mr Thompson submitted Judge Raymond's findings at [29] and [30] had tainted his view of the appellant's credibility. These points had been conceded by the respondent and were irrelevant. Judge Raymond had not considered the best interests of the children because in his view they were not entitled to British citizenship. This view pervaded the entire decision.

24. Judge Raymond's finding at [32] was not raised in cross-examination and was not relied on in the refusal letter. It was unfair to hold this against the appellant without giving her the opportunity to explain. Mr Thompson accepted this point was not raised in his grounds of appeal upon which permission was granted.

25. Mr Thompson submitted the presenting officer before the First-tier Tribunal conceded the appellant was the primary carer. The judge's finding on the family unit did not prevent the appellant from succeeding. The judge failed to consider Patel and whether the appellant's children would be compelled to leave the UK.

26. Mr Tufan submitted the first part of the judgment in Akinsanya was a free standing assessment of a Zambrano right of residence and applied in this case. The judge's credibility findings were open to him on the evidence before him, notwithstanding his reference to immaterial matters. The judge considered the level of financial support in detail. Benson OA was granted settlement under the EUSS.

27. In response, Mr Thompson submitted that Akinsanya could be distinguished. The appellant did not have to prove a negative and there was no reason to dispute her account. The findings at [29] and [30] demonstrated Judge Raymond had not considered the amended decision and therefore the appellant had been deprived of a fair hearing. The appeal should be remitted to the First-tier Tribunal and the appellant should be permitted to produce further evidence.

28. Mr Thompson took instructions from the appellant as to the nature of any further evidence. He then submitted the Tribunal could not be confident Judge Raymond had considered the correct decision letter and therefore the appellant had not received a fair hearing. The appeal should be remitted to hear evidence from others who financially supported the appellant. Compulsion was a practical test. If the Tribunal found dependency, then the children would be compelled to leave the UK.

Conclusions and reasons

29. Judge Raymond properly applied Devaseelan and his starting point was that the appellant was totally lacking in credibility. We are not persuaded by Mr Thompson's submission that the appellant's credibility was irrelevant because her previous appeal was dismissed on its facts. There was insufficient documentary evidence or other evidence to support the appellant's account. Her credibility was crucial to the outcome of the appeal.

30. We are not persuaded Judge Raymond took into account irrelevant matters at [29] and [30] or that these findings tainted his view of the appellant's credibility. The judge accepted the appellant's children were British

citizens and found that the appellant and her children lived as a family unit with Benson OA, notwithstanding the lack of a paternity test. The judge's remaining reasons for finding the appellant to be totally lacking in credibility were sufficient to justify this conclusion.

31. Judge Raymond's finding at [32] was not unreasonable or unfair. The appellant was represented by Mr Thompson and the judge was not obliged to put discrepancies, which were clear on the face of the papers, to the appellant in oral evidence. The presenting officer's record of proceedings shows that the appellant accepted in oral evidence that she applied for child benefit.

32. Judge Raymond assessed the entirety of the evidence and his conclusion that the appellant was totally lacking in credibility was open to him on the evidence before him. The documentary evidence produced did not support the appellant's account and there was a lack of evidence which the appellant ought to have been able to produce if her account was true.

33. The burden is on the appellant to show she satisfies regulation 16(5) of the 2016 Regulations, namely:

    (a) she is the primary carer of a British citizen;

    (b) the British citizen is residing in the UK; and

    (c) the British citizen would be unable to reside in the UK if the appellant left for an indefinite period.

34. Contrary to Mr Thompson's submission it was not for the respondent to show the appellant was in a relationship with Benson OA. It was for the appellant to establish the factual circumstances so that an assessment could be made of whether her children would be compelled to leave the UK. Judge Raymond was unable to make this assessment because the appellant failed to establish the facts she relied on.

35. Further, the record of proceedings from the presenting officer does not indicate that she conceded the appellant was a primary carer, as submitted by Mr Thompson. There was no indication of this concession in Judge Raymond's decision. In any event, this point was not material to the decision to dismiss the appeal.

36. At [30] of Patel the Supreme Court held:

> "The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, "in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium" (*Chavez-Vilchez*,

> para 71). The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts."

37. It is for the appellant to establish her British citizen children are dependant on her presence in the UK such that they would be compelled to leave if she returned to Nigeria. On the evidence before the First-tier Tribunal she failed to do so. Judge Raymond did not find the appellant to be a truthful witness and therefore could place no reliance on her evidence. There was no other evidence to support her claim. The letters from the school and GP did not assist the appellant in establishing a relationship of dependency of such nature that it would lead to the children being compelled to accompany the appellant to Nigeria.

38. There was insufficient evidence before Judge Raymond to establish dependency. Any failure to refer to the best interests of the children was not material in the circumstances. Even if it was in the best interests of the children to remain in the UK, the appellant had failed to show they would be compelled to leave upon her removal.

39. The appellant's case was not similar to Mr Shah's case in Patel. It is apparent from the evidence before Judge Raymond that he was unable to make factual findings because of the lack of credible evidence. Judge Raymond did not accept the appellant's account. She had failed to show the children would be unable to reside in the UK without her. In this case, Judge Raymond was entitled to find there was insufficient evidence to find in the appellant's favour.

40. The appellant was not deprived of a fair hearing. Mr Thompson accepted Judge Raymond was aware of the amended decision. Judge Raymond's failure to specifically refer to this decision was not material. The appellant had the opportunity to put forward evidence to show that her British citizen children would be compelled to leave the UK. At the hearing before Judge Raymond, she failed to submit sufficient evidence to do so. The judge's findings at [43] were sufficient to demonstrate his conclusion that the appellant could not satisfy the requirements of regulation 16(5).

41. We are not persuaded by Mr Thompson's submission that Akinsanya can be distinguished on its facts. The Supreme Court's consideration of the Zambrano principle was not limited to the EUSS and the conclusions at [54] and [55] of Akinsanya were of general application. The Supreme Court found that the wording of regulation 16(7)(c)(iv) was too clear to allow it to be construed to cover those with limited leave to remain as well as indefinite leave to remain. The fact the appellant has neither does not mean the principles at [54] to [58] of Akinsanya do not apply.

42. It is apparent from [54] and [55] of Akinsanya that the right of third country nationals to reside in a member state is a matter for the state and Zambrano rights are exceptional. They only arise indirectly and contingently in order to prevent a situation where EU citizen dependants

are compelled to leave the EU. They arise only where the carer has no domestic (or other EU) right to reside.

43. The applicant has the right to make an application under the immigration rules as a parent of British citizen children. She is not precluded from doing do by virtue of her appeal which was dismissed in 2016 because at that time it was conceded the appellant could not satisfy the immigration rules. The situation has now changed. The respondent accepts the appellant's children are British citizens.

44. Zambrano rights of residence do not arise as long as domestic law accords to Zambrano carers the necessary right to reside: Akinsanya at [54]. The appellant cannot succeed under the 2016 Regulations and her appeal was properly dismissed by the First-tier Tribunal.

45. Accordingly, we find there was no material error of law in the decision of First-tier Tribunal Judge Raymond dated 16 July 2021 and we dismiss the appellant's appeal.

J Frances

Signed Date: 16 February 2022
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal, we make no fee award.

J Frances

Signed Date: 16 February 2022
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.