**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/02907/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 31st October 2014** | **On 6th November 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MISS HILDA AMA DUFIE NYAMEKYE**
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr P Armstrong, Home Office Presenting Officer
For the Respondent: Mr P Haywood, Counsel instructed by Rodman Pearce Solicitors

**DETERMINATION AND REASONS**

*Introduction*

1. The Secretary of State is the appellant in this matter but I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Ghana born on 24th April 1981. She came to the UK for the first time in December 2003 using a false identity. She left the UK in March 2011 but re-entered with leave as a business visitor in her correct identity on 1st September 2011, and was granted leave to enter until 24th February 2012. On 21st February 2012 the appellant made an application for an EEA residence card on the basis of a derivative right of residence. The appellant argues that she is the primary carer for her three children: Nasara Naanminbinme Iddi; Waninuo Salaam Iddi Abdulai and Barkah Gabriella Iddi Abdulai who are all British citizens and thus she is entitled to remain under regulation 15A (4A) of the Immigration (EEA) Regulations 2006. It is argued that the father, Mr Rufai Iddi Abdulai is not involved with the upbringing of the children and had committed acts of domestic violence on the appellant.

3. This application was rejected on 20th March 2012. She reapplied on 11th April 2012, but the application was rejected on 26th June 2012. She re-applied on 10th October 2012. The application was refused on 16th December 2013, and the appellant appealed. Her appeal against the decision was allowed by First-tier Tribunal Judge Shanahan in a determination promulgated on the 18th August 2014.

4. The Secretary of State appealed and permission to appeal was granted on 25th September 2014 by Judge of the First-tier Tribunal Pedro on the basis that it was arguable that the First-tier judge had erred in law in misdirecting herself legally and failing to give adequate reasons as to why the children could not remain in the UK if the appellant was required to leave the UK.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

*Submissions*

6. Mr Armstrong relied upon the grounds of appeal.

7. He argued that the children could remain in the UK if the appellant was required to leave because there was evidence that the father was willing to look after them. It was recorded at paragraph 7 of the determination that when the children's births were registered their father, Mr Abdulali, had attended so that he could obtain benefits (this would have been in 2004, 2008 and 2009), and that he had tried to obtain the children to make a benefits claim in 2011. It was therefore incorrect to find that there was no one who could take responsibility for them at paragraph 24 of the determination, and therefore Regulation 15A(4A)(c) of the Immigration (EEA) Regulations 2006 had been dealt with incorrectly. MA and SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 380 is authority that Article 20 of the TFEU would not been infringed if there was: "another ascendant relative who has the

right of residence in the UK, and who can and will in practice care for the child".

8. Orally Mr Armstrong added that it was an error for the First-tier Tribunal to have concluded that Mr Abdulai was not able to care for the children without any evidence directly from him in terms of a witness statement or other evidence. The school evidence and that from Milton Keynes Children and Families Team was all based on what the appellant had told them.

9. The Secretary of State also argued that the determination was flawed because there was a fourth child of the appellant, whose father was Mr Abdulai's cousin, who is not able to be cared for by his father according to the findings of the First-tier Tribunal. However there was no evidence that this father would not assume responsibility for that child if the appellant had to leave the UK.

10. Mr Haywood submitted that he relied upon his skeleton argument and that I should dismiss the appeal. In summary in this document he submits that the Secretary of State accepts that the First-tier Tribunal was entitled to find the appellant a credible witness. Further there is no dispute to the finding that the other documentary evidence supported the appellant's account that she is the primary carer for the three British citizen children. The challenge by the Secretary of State addressed only whether someone else could look after the children if the appellant was removed, not whether the appellant was the primary carer: the issue to be determine under Regulation 15A(4A) of the Immigration (EEA) Regulations 2006. It is therefore submitted that she could not demonstrate a material error of law.

11. Further it is contrary to the evidence before the Tribunal to find that the three children could be cared for by their father, Mr Abdulai. The evidence at paragraph 7 is of a man who only wanted to have the children to make a benefits claim and who had not been in contact with the children or the appellant since 2011. The appellant had described Mr Abdulai as a person who has sexually, physically and mentally abused her. She has sought advice from MK Act (a domestic violence intervention service in Milton Keynes) and Milton Keynes Social Services about his violence, and her fears that he would abuse the children; and provided letters from these organisations. This evidence was found to be plausible by the First-tier Tribunal at paragraph 20 of the determination. It would be inconsistent with the duty of the Secretary of State to act in the best interests of the children in safeguarding and promoting their welfare in accordance with s.55 of the Borders, Citizenship and Immigration Act 2009 to find that Mr Abdulai was a suitable carer for the children. It could not be right that the appellant was obliged to call evidence from Mr Abdulai, who would be a hostile witness and in the context of what he had done to her in terms of domestic violence. It would have been for the Secretary of State to call Mr Abdulai if they felt this was the right thing to do.

12. As the three older children are British citizens and the appellant has been found to be their primary carer the position of the fourth child (who did not form part of the original application) is irrelevant. Any error in relation to this child cannot be material.

13. At the end of the hearing I told the parties that I found that the First-tier Tribunal had not erred in law but that I would set out my full reasons in writing.

*Conclusions*

14. I find that Judge Shanahan directed herself correctly as to the legal requirements of Regulation 15A of the Immigration (EEA) Regulations 2006. She specifically sets out Regulation 15A(7) which defines primary carer as a person who has "primary responsibility for that person's care" and then looks at the evidence before her and concludes in the final paragraph of her determination, paragraph 24, that this appellant is the primary carer for her children.

15. The case of MA and SM (Zambrano: EU children outside the EU) Iran does, in a review of previous authorities, look at a case which states that the rights of an EU child under Article 20 of the Treaty on the Functioning of the European Union (TFEU) will not be infringed if another ascendant relative with the right of residence in the EU "can and will in practice care for the child". The Tribunal did not consider Regulation 15A of the Immigration (EEA) Regulations 2006 as it was agreed by the parties that it did not apply to the appellants in that appeal as they and their British children were not at that time in the UK. However in determining the appeal of MA the Tribunal found that the father in that case was not be able to care for the EU child without "more than an insignificant risk" to the child's essential well-being due to his mental health issues, and thus that the appellant was entitled to come to the UK in accordance with Article 20 of the TFEU to ensure that her British child had the benefit of his British and EU citizenship.

16. In this appeal Judge Shanahan finds the appellant to be a credible witness. The appellant has given evidence that the British citizen father of the children had subjected her to verbal, physical, sexual and emotional abuse. She had provided documentary evidence that she had sought advice about him from relevant agencies including a domestic violence charity, MK ACT, and Milton Keynes Children and Families Team (Social Services) and the dangers she felt he posed to her and the children. The fact that the appellant gave evidence that up to 2011 that the children's father had had an interest in the children on the basis that he could obtain extra state benefits using their existence (as recorded at paragraph 7 of her determination) does not alter the fact that the evidence put to Judge Shanahan was that this father was one who would pose "more than an insignificant risk" to the essential well-being of his children.

17. Judge Shanahan was therefore entitled to find that the appellant was the primary carer for her three oldest British citizen children as the evidence before her was sufficient to conclude that the children's father was not someone who could or would in practice care for the children, particularly given his history of violence to their mother and the fact that he had not actually had contact with them since 2011.

18. There is no requirement in the Immigration (EEA) Regulations 2006 that specific evidence (such as from the other parent) of "primary responsibility" be adduced and Judge Shanahan made her decision in a lawful way based on relevant evidence before her which she very carefully considered to be credible, looking at the reasons why the respondent alleged it was not at paragraph 18 to 20 of her determination. In this case there were strong reasons (his history of violence and lack of contact over the past three years) why it would not have been at all reasonable to expect the appellant to call the children's father as a witness.

19. The appellant has a younger fourth child with another man (a cousin of the father of her three older children) and her evidence is that he could not care for this child because he had returned to his wife and could no longer help her (see paragraph 7 of the determination). I note that this child did not form part of the original application by the appellant. It is clear that the appellant is in practice this child's primary carer from the totality of evidence before Judge Shanahan.

20. However if this evidence was not sufficient for Judge Shanahan to make her findings in relation to him (that the appellant was also his primary carer at paragraph 23) as she did not have enough evidence that his father could not and would not in practice care for him if the appellant had to leave, this could not be a material error of law in allowing the appeal as the appellant had clearly properly satisfied the test at paragraph 15A of the Immigration (EEA) Regulations 2006 (for the reasons set out above) in relation to her three older British citizen children.

Decision

21. The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

22. The decision of the First-tier Tribunal allowing the appeal under the Immigration (EEA) Regulations 2006 is upheld.

Deputy Upper Tribunal Judge Lindsley
4th November 2014