IAC-AH-LEM-VP-V2

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/03633/2014

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Determination Promulgated** |
|---|---|
| **On 19th November 2014** | **On 23rd December 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**EMILY HOBWANA**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr C Timpson, Counsel
For the Respondent: Mrs R Petterson, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of Zimbabwe born on 11th August 1986. The Appellant had applied for a derivative residence card as the primary carer of a British citizen who is resident in the United Kingdom. The Appellant's application was considered in accordance with Regulation 15A and 18A of the Immigration (EEA) Regulations 2006. By Notice of Refusal dated 20th December 2013 the Secretary of State held that the Appellant had failed to demonstrate that she met the relevant conditions of the Regulations.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal De Haney sitting at Manchester on 15th May 2014. In a determination promulgated on 2nd June 2014 the Appellant's appeal was allowed under the EEA Regulations.

3. On 10th June 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 4th August 2014 First-tier Tribunal Judge Fisher granted permission to appeal. Judge Fisher noted that the grounds seeking permission asserted that the judge had erred in law by concluding that the Appellant was the primary carer of the child on the basis that her husband worked full-time and was sometimes required to work at short notice or overnight. Judge Fisher found that it was for the First-tier Tribunal Judge to determine as a question of fact whether the EU citizen would be compelled to leave the EU to follow the Appellant. However nothing less than compulsion would suffice and EU law was not engaged where the quality or standard of life of the EU citizen would simply be diminished. Judge Fisher concluded that it was arguable in his relatively short paragraph 14 that the judge had failed to fully engage with the requirements and that there was therefore an arguable error of law in the judge's reasoning which was capable of affecting the decision made.

4. On 20th August 2014 the Appellant's instructed solicitors provided a response pursuant to Rule 24. That response contended that the First-tier Tribunal Judge had engaged with the requirements and that the Appellant was the primary carer of the child and that the child would be compelled to leave the EU if her mother was not granted a residence card. Further it was contended that the Respondent had failed to consider Article 8 of the European Convention of Human Rights and that it was not a defence to state that because the Appellant did not make an application under the Immigration Rules that the Respondent was precluded from considering Article 8 ECHR.

5. It is on that basis that the appeal comes before me. This is an appeal by the Secretary of State. For the purpose of continuity within the proceedings the Secretary of State is referred to hereinafter as the Respondent and Mrs Hobwana as the Appellant. The Appellant appears by her instructed Counsel Mr Timpson. Mr Timpson is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mrs Petterson.

## Submissions and Discussions

6. Mr Timpson submits that the issue centres on the very discrete point as to whether or not the Appellant is or is not the primary carer of her British citizen daughter born on 28th January 2012. The Secretary of State's submission is that the Appellant cannot be described as being the primary carer simply because her husband, the child's father, works full-time and that that interpretation fails to appreciate the case law upon which the Secretary of State drew up the derivative right provisions of the EEA

Regulations. Mr Timpson submits it is difficult to know how that argument can be sustained.

7. Mrs Petterson relies on the Grounds of Appeal and submits that the Appellant's husband can be the primary carer here. Mr Timpson retorts by saying that in fact that is not the law and refers me to the principles to be found in the authorities of *Ahmad (Amos; Zambrano; Regulation 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC)* and *Sanneh v the Secretary of State for Works and Pensions and the Commissioners for Her Majesty's Revenue and Customs [2013] EWHC 793 (Admin)*. Mr Timpson specifically refers me to the proposition that can be derived from those authorities that even where a non-EU ascendant relative is compelled to leave an EU territory the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU and who can and will in practice care for the child.

8. He submits that such a premise which is recited in the Grounds of Appeal by the Secretary of State actually favours the Appellant.

9. Mr Timpson points out that the findings of fact at first instance have not been challenged and that the Immigration Judge found the Appellant to be the primary carer. He submits that the father's evidence was heard before the judge and that the judge has made findings that the father is not in a position to care for the child. He submits that this position is not challenged by the Secretary of State and therefore the Secretary of State cannot possibly succeed on this appeal. He asks me to dismiss the appeal. Mrs Petterson indicates that she does no more than rely on the Grounds of Appeal.

**The Law**

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider

every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## Findings on Error of Law

12. I acknowledge that the findings of fact of the First-tier Tribunal Judge are relatively short but that in itself does not constitute error. The First-tier Tribunal Judge has set out in some considerable detail the relevant law and paragraphs of the EEA Regulations and I take them on board and it is not necessary nor appropriate to fully recite them here. Further the First-tier Tribunal Judge has set out in very considerable detail the documentary evidence that he has considered and the evidence that he has considered. He heard both from the Appellant and from her husband and he found both witnesses to be credible. The findings of fact that he made are not challenged by the Secretary of State.

13. At paragraph 14 of his determination the judge found that the overwhelming evidence before him showed that Mr Cherera (the child's father) worked over 37 hours a week and that his job meant that he could be called in at short notice and to work overnight. The judge concluded that it was abundantly clear (his words) that the Appellant was the primary carer of their daughter who was a British citizen. I find that that is a conclusion applying the law and the facts to this case that the First-tier Tribunal Judge was perfectly entitled to reach and to draw the conclusion from the factual matrix of this case that if the Appellant was be required to leave the UK that it would be practically impossible for the child's father to assume duties as carer. I am only determining whether or not there is a material error of law. On the facts as presented however I would agree with him and certainly on the evidence before him and the way he has dealt with it there is nothing to show that he has not followed a proper analysis of the law and made findings that he is perfectly entitled to. In such circumstances the decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

## Decision

The decision of the First-tier Tribunal discloses no material error of law. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal is maintained.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed Date **19th November 2014**

Deputy Upper Tribunal Judge D N Harris