IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13000/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2015	**On 6 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FATMATA UNIS KAMARA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms L Kenny, Specialist Appeals Team
For the Respondent/Claimant: Mr E Akohene, Solicitor, Afrifa and Partners

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to issue her with a derivative residence card pursuant to Regulation 15A of the Immigration (European Economic Area) Regulations 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Sierra Leone. On 3 March 2014 the Secretary of State gave her reasons for refusing the claimant's application for a derivative residence card. In order for her to qualify for a right to reside on **Zambrano** grounds she had to demonstrate that:

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

   (b) the relevant British citizen was residing in the United Kingdom; and

   (c) the relevant British citizen would be unable to reside in the UK or in another EEA state if she was required to leave.

3. To be regarded as the primary carer, Regulation 15A(7) stated that a person P was to be regarded as a primary carer of another person if:

   (a) P is a direct relative or a legal guardian of that person; and either

   (i) is the person who has primary responsibility for that person's care; or

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

4. Exempt persons included a person who has ILR in the United Kingdom.

5. In support of her application, she had provided birth certificates for her son and daughter, and a passport for her son. The birth certificates confirmed the parentage of her son and daughter. But to be considered as the primary carer they would expect her to provide evidence to show the child in question lived with her or spent the majority of time with her, that she made the day to day decisions in regard to the child's health, education etc. and that she was financially responsible for the child. From the evidence provided, it had not been possible to conclude definitively that she was the children's primary carer. She had also failed to provide evidence as to whether or why her son's father, Unisa Sesay, was not in a position to care for her son.

The Hearing before, and the Decision of, the First-tier Tribunal

6. The claimant's appeal came before Judge L K Gibbs sitting at Hatton Cross in the First-tier Tribunal on 14 October 2014. The claimant was represented by Mr Akohene, and the Secretary of State was represented by a Presenting Officer. The judge received oral evidence from the claimant and Mr Sesay.

7. In her subsequent decision, Judge Gibbs set out the relevant provisions of Regulation 15A(4A) as follows:

   4A. P satisfies the criteria in this paragraph if –

   (a) P is the primary carer of a British citizen (the relevant British citizen);

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave.

8. The judge found that Mr Sesay worked hard to support his family working from 7pm to 3am five nights a week, and additionally attending college from 9.30 to 12.30pm. Although he was at home between around 1pm to 6pm Monday to Fridays, because he was a night shift worker, and also attended college in the morning, he was usually asleep in this time. As a result, other than at weekends, he hardly saw his children. So the judge was satisfied that the claimant was the primary carer of their two children.

9. On the question of whether the children would be able to remain in the UK if the claimant was removed, she said the critical question was whether the child is dependent on the parent being removed for the exercise of his union right of residence and whether removal of the parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the union. In answering this question, she said she had taken into account that the interests of the children were a primary factor, citing **ZH Tanzania v SSHD [2011] UKSC 4**. The children were very young (aged 5 and 1 respectively) and it was not contentious to conclude that their best interests were served by remaining in the family unit into which they were born. The 1 year old remained at home with her mother whilst her sibling was at school, and the children were wholly dependent on their mother for their care during the working week (Monday to Friday).

10. Although the Secretary of State might point to the fact that the children's father had indefinite leave to remain in the UK and could care for them if the claimant was required to leave, she found that the practical impact of this could not be said to be in the best interest of the children, or indeed of society.

The Grant of Permission to Appeal

11. On 9 December 2014 First-tier Tribunal Judge Shimmin granted the Secretary of State permission to appeal as the judge did not appear to have made detailed reference to, and consideration of, the relevant Regulations. As argued in the grounds of appeal, it was arguable that the judge had applied an incorrect definition of primary carer; had omitted to consider the issue of whether the claimant and her husband shared responsibility for their children and whether her husband was an exempt person; and that the judge had applied the incorrect test as established in Regulation 15A(4A)(c) in finding that the children would not be able to reside in the UK if their mother was removed.

The Hearing in the Upper Tribunal

12. At the hearing in the Upper Tribunal Miss Kenny invited me to find a material error of law for the reasons identified as arguable in the grant of permission to appeal. In support of the argument that the judge had

applied the incorrect test under Regulation 15A(4A)(c) she relied on **Harrison and Another v the Secretary of State for the Home Department [2012] EWCA Civ 1736**, and in particular the following passage at paragraph [63]:

> I agree with Mr Beal QC, Counsel for the Secretary of State, that there really is no basis for asserting that it is arguable in the light of the authorities that the **Zambrano** principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into picture to protect family life as the court recognised in **Dereci**, but that is an entirely distinct area of protection.

13. Giving the leading judgment of the court, Elias LJ further observed at paragraph [66] as follows:

> Moreover, as the Upper Tribunal noted, the actual results in **Mcarthy** and **Dereci** do not sit happily with the submissions now advanced by the appellants. In both those cases the removal of the husband or partner, who in **Dereci** was also the father, would inevitably mar the enjoyment of the right of residence of wife and children. Even if the non-EU national is not relied upon to provide financial support, typically there will be strong emotional and psychological ties within the family and separation will be likely significantly to rupture those ties, thereby diminishing the enjoyment of life with the family members who remain. Yet it is plainly not the case, as **Dereci** makes clear and Mr Drabble accepts, that this consequence would be sufficient to engage EU law. Furthermore, if Mr Drabble's submission were correct, it would jar with the description of the **Zambrano** principle as applying only in exceptional situations, as the court in **Dereci** observed. The principle would regularly be engaged.

14. On behalf of the claimant, Mr Akohene submitted there was no error of law in the judge's decision. It was accepted that the claimant's partner was an exempt person. This did not matter, as the claimant met the alternative criteria of being the children's primary carer.

Discussion

15. Neither party produced any authority on the definition of primary carer in Regulation 15A(4A)(a). Mr Akohene submitted that as there was no authoritative definition of the term, it was open to the judge to find that the claimant met this criterion on the facts as found by her.

16. However I consider that the meaning of primary carer in Regulation 15A(4A) to be determined by reference to Regulation 15A(7). The primary carer is a direct relative or legal guardian of a child who is either the person who has primary responsibility for that child's care, or shares equally responsibility for that child's care with one other person who is not an exempt person. The key dichotomy in the definition is between an

applicant who shares the responsibility for the child's care with one other person (who is not an exempt person), and an applicant who has the primary responsibility for that child's care.

17. On the facts, the claimant clearly shares responsibility for the children's care with her partner, who is an exempt person. Although she is entrusted with the vast majority of the children's day-to-day care, as her partner works long hours, she does not have *primary responsibility* for the children's care. Both legally and factually the responsibility for the care of the children is shared between them. Where a third country national resides under the same roof in a genuine and subsisting relationship with an exempt person and the child of their union, it is very difficult to see how that third country national could ever be characterised as having primary responsibility for the child's care. At all events, on the facts found by Judge Gibbs there was only one possible answer: which is that the claimant did not, and does not, meet the definition of a primary carer in Regulation 15A(7). She does not have primary responsibility for the children's care; and although she shares responsibility for their care, she does not share it with a non-exempt person.

18. As the claimant does not meet the definition of a primary carer, the judge erred in law in not dismissing her appeal under the Regulations 2006.

19. Since the claimant does not satisfy the requirements of sub-paragraph (a) of Regulation 15A(4A), it is not strictly necessary to decide whether the judge also erred in law in finding that the criteria in sub-Section (c) of Regulation 15A(4A) were satisfied. So I will deal with the point succinctly. It is apparent from the passages in **Harrison** which I have cited earlier in this decision that the judge was wrong to answer this question by reference to considerations of best interests and proportionality. While such considerations are highly relevant to an alternative claim under Article 8, they do not properly form part of a discussion as to whether the requirements of sub-paragraph (c) of Regulation 15A(4A) are met.

20. Article 8 was not raised in the alternative before the First-tier Tribunal, and Mr Akohene confirmed that he was content with the position taken by the Secretary of State in the refusal decision. The Secretary of State is not proposing to remove the claimant, and she invites the claimant to make a separate application on family or private life grounds.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the decision by the Secretary of State to refuse to issue her with a derivative residence card is dismissed under the Regulations 2006.

No anonymity direction is made.

Signed Date **6 February 2015**

Deputy Upper Tribunal Judge Monson