Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40733/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On 12 November 2015	**On 13 November 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State
[No anonymity direction made]

Appellant

and

Mariam Omolara Adegbie

Claimant

Representation:
For the claimant: Not represented
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appealed against the decision of First-tier Tribunal Judge Davies promulgated 9.1.15, allowing the claimant's appeal against the decision of the Secretary of State to refuse to issue the claimant with an EEA Derivative Residence Card, pursuant to regulation 15A(4A)(c) of the Immigration (EEA) Regulations 2006. The Judge heard the appeal on 5.1.15.

2. There was no challenge to the judge's finding that the claimant was and is the primary carer for her child. The issue in the appeal was whether the child would, in

theory, be unable to reside in the UK or another EEA State if the claimant were required to leave, the burden being on the claimant to discharge. The judge concluded at §25 of the decision that if the appellant was removed from the United Kingdom her son a British national would be forced to leave with her. After finding at §24 that the appellant is the primary carer of her son, the judge went on at §25 to state, "It is also clear from the evidence that the appellant has cared for her son throughout his life up to the present and that no-one else within the United Kingdom could care for the appellant's son if the appellant could no longer remain."

3. First-tier Tribunal Judge Osborne granted permission to appeal on 26.2.15.

4. Thus the matter came before me on 28.5.15 as an appeal in the Upper Tribunal. For the reasons set out in my error of law decision, I found that there was such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Davies to be set aside and remade. In summary, I found insufficient reasoning for the finding that the claimant's child would be forced to leave the EU on the hypothetical basis of the removal of the claimant from the UK.

5. Although Judge Davis found that the claimant was the primary carer of her son, there was insufficient evidence to conclude that the claimant, whom the judge found lacked credibility, had discharged the burden of proof on her. At §22 the judge concluded, "I also find it more probable than not that the appellant has regular contact with her mother and her mother's family and in all probability has more regular contact with her son's father than she has been prepared to admit." It was noted at §19 that the father has supported the child's application for a British passport and that he was receiving child support. The claimant told me at the hearing that she had asked him to do this, and that he arranged for that to be transferred to her bank account, but maintained that he didn't want to see her or have anything to do with the child.

6. In the circumstances, it is difficult to see on what basis the judge found or could have concluded on the evidence before him that the claimant had discharged the burden of proving that if she were required to leave the UK, the hypothetical situation given that there is no removal decision and no article 8 application for leave to remain, her child would be unable to reside in the UK or another EEA state. The conclusion appears to be based on the unchallenged finding that she is the primary carer. However, even if no one else helps look after the child and she is and always has been the sole carer, that does not mean that the child would be unable to remain in the UK or another EEA State. Whilst adoption or Social Services care has been held to be insufficient, on the evidence before the Tribunal there are other family members, including the father and/or the child's grandmother, who may be able to look after the child. Neither is the alleged unwillingness of the father to look after the child, the determinative factor.

7. It should be recalled that the Zambrano principle does not cover anything short of a situation where the EU citizen is in theory forced to leave the territory of the EU, and is not an assessment whether it would be disproportionate to require the claimant to

leave the UK, leaving her child behind. As is clear from the Court of Appeal case of Maureen Hines v London Borough of Lambeth [2014] EWCA Civ 660, in applying the test under regulation 15A(4A)(c) is clear it is necessary to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child. For this purpose it was generally accepted that an available adoption or foster care placement would not be adequate because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. It was also said, however, that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would not normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK. Apart from anything else, he would, even if he did leave, still only have the care of one of his previously two joint carers.

8. Although less than desirable, the child might be able to be looked after – to the extent that his age and other circumstances made him dependent on the care of another person – by someone other than the current primary carer, such as the British citizen father. It would only be if no adequate arrangements (not including adoption or other state care facilities) could be made, that the child would effectively have to leave.

9. I found that these issues were not adequate addressed in the decision of the First-tier Tribunal such that it must be set aside and remade. However, to enable the claimant, who was at somewhat of a disadvantage at the hearing, to better prepare her case and consider obtaining legal representation, I considered that it would be fair to adjourn the remaking of the decision, reserved to myself in the Upper Tribunal.

10. Thus the matter was relisted before me in the Upper Tribunal on 12.11.15. However, there was no attendance by or on behalf of the claimant. An explanation for that absence probably lies in the fact that following the decision of the First-tier Tribunal, the claimant made a further application to the Secretary of State on 30.3.15 for leave to remain as a parent under Appendix FM of the Immigration Rules. That application was granted under D-LTRPT 1.2 of Appendix FM by the decision of 18.6.15, a copy of which is now with the case papers. The Secretary of State was satisfied that on the information provided by the claimant she met the relevant eligibility and suitability requirements and that she had a genuine parental relationship with a child and that it is not reasonable to expect that child to leave the UK.

11. I am satisfied that the claimant was notified of the hearing before me, by the notice issued by the Tribunal on 16.10.15 and that it is in the public interest to proceed with the remaking of the decision in the appeal immediately. It is likely that she has nothing further to add to the EEA Derivative Residence Card appeal. In the circumstances, I dismiss the appeal on the basis that the claimant failed to discharge

the burden on her to demonstrate that if she is removed from the UK her child would be forced to leave the territory of the EU.

Decision:

The appeal is dismissed.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The appeal has been dismissed.

Signed

Deputy Upper Tribunal Judge Pickup

Dated