
**Upper Tribunal (Immigration and Asylum Chamber)** Appeal Number: IA/45919/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
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| **20 June 2014** | **7 January 2015** |

**Before**

**Lord Matthews, sitting as an Upper Tribunal Judge**
**Deputy Upper Tribunal Judge Holmes**

**Between**

**MRS SANDRA KOME HUTTON**
**(Anonymity Direction not made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation

For the Appellant: Mr O Bare, of Gromyko Amedu Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Background**

1. The appellant is a national of Nigeria who was born on 30 September 1984. She entered the United Kingdom on 16 March 2013 on a visit visa valid until 16 September 2013. On 14 September 2013 decisions were made to refuse to vary her leave to enter the United Kingdom and to remove her under Section 47 of the Immigration Asylum and Nationality Act 2006. It was contended that she was unable to meet the requirements of paragraphs E-LTRPT.2.2-2.4 and E-LTRPT.3.1 and paragraph EX.1 applied. As she was in the UK on a visit visa she could not meet the requirements of E-LTRPT.3.1. Furthermore she did not meet the requirements for leave

to be granted on the basis of her private life under paragraph 276ADE and the Secretary of State's position was that there were no exception circumstances which required leave to be granted outside the Rules under Article 8 ECHR.

2. She appealed against these decisions but her appeal was refused in the First-tier Tribunal in a determination promulgated on 28 March 2014. The appeal was dismissed both under the Rules and under Article 8 and permission was sought to appeal to this Tribunal. Before dealing with the grounds it might be helpful to set out the factual background which was, in large measure, undisputed.

3. The appellant married Alan Milton Hutton, a British citizen, in Nigeria on 27 March 2010. He was then working in Qatar and she joined him there after she was granted a one-year visa which was extended for another year. Their daughter, Nikisha, was born in Qatar on 3 January 2013 and is a British citizen. Shortly after Nikisha's birth her husband's contract ended and they came to the UK while they awaited a renewal of it. The appellant entered the country as a visitor in March 2013. As the renewal took longer than expected her husband took temporary employment in Kazakhstan which became permanent. He works offshore and accommodation is for employees only. She cannot obtain a visa to join him. He claimed that she was stranded in the UK and that gave rise to her application for leave to remain. Her husband is a mechanical engineer. The appellant claims that she comes from the Niger Delta region which is not safe for her. Her parents live there, she has one brother in college and the other is on the Ivory Coast. She has a married sister. Nikisha is of mixed race and it is claimed that she is not safe in Nigeria. She claims that people are kidnapped in the region in order that the kidnappers might make money. The First-tier Tribunal made reference to a Country of Origin Information Report updated in February 2014 which recorded that there was violence in the area but there was no claim for asylum.

4. The grounds of appeal submitted that the FtT failed properly to take account of the child's best interests, that the Article 8 assessment was flawed, that it was perverse to acknowledge that there was violence in the Niger Delta area and yet suggest that the appellant and her daughter could not enjoy a private life there. Of more significance however, it was submitted in the grounds that the FtT failed to consider the appellant's European law right to reside in the UK and referred to Article 20 TFEU and the well-known case of Ruiz Zambrano.

5. A judge of the First-tier Tribunal granted permission to appeal noting that the appellant had been appealing under Section 84(1)(d) of the 2002 Act on the grounds that she was a member of the family of an EEA national and the decision breached under Community Treaties. It was noted that the application contended the FtT erred in not considering the appeal by reference to EU law. The judge was of the opinion that given the derivative rights of residence for primary carers of British citizen children contained in Regulation 15A(4A) of the EEA Regulations this ground was arguable.

6. Before us Mr Deller conceded that the First-tier Tribunal had made an error of law in not considering the question of any rights the appellant might have under EU law but did not go so far as to concede that the appellant had a derivative right. At the root of his submissions was an argument that if the appellant had to leave the country it was not inevitable that her child would also have to do so. At the very least there was no evidence to that effect. While the FtT had, at paragraph 15, found that due to her age it followed that Nikisha would leave with her mother if she was removed, that was not a finding made in the context of the EEA Regulations. We are not entirely sure that that matters. A finding in fact is a finding in fact whatever the context and is based on the evidence rather than in the context of the legal consequences which may flow. Nonetheless we agreed with Mr Deller that an error of law had been made and we proceeded to re-make the decision ourselves.

7. We heard evidence from the appellant. Her position was that if she left the country then her daughter would have to come with her. She had no relatives in the UK and her husband's only relative was a 29-year old son who lived in Scotland with his partner and child. Her husband could not come back to look after the child because of his work. Certain payslips were produced which showed that he earned 750 euros per day.

8. Mr Deller did not challenge any of her evidence.

## Submissions

9. Mr Deller again made the point that it was not inevitable that the child would have to leave the UK if the mother left. He accepted that there were currently relatives available but the appellant's husband could come back to look after the child. The fact that he was living and working abroad was a matter of personal choice. Under questioning from the bench we understood him to concede that he could see no particular reason why an application from abroad by the appellant for leave to enter within the Rules would not be successful. He submitted that the Zambrano route, now reflected in the EEA Regulations, was one which was jealously guarded and we should be slow to find that it was inevitable that the child would have to leave with her mother. He then made detailed submissions on Article 8 considerations but in view of the decision to which we have come we do not consider it necessary to go into those in any detail.

10. For his part Mr Bare submitted that the Regulations had been met and that in any event we should allow the appeal under Article 8.

## Discussion

11. The particular Regulation in contention is, as we have said, Regulation 15A(4A) and is in the following terms:

> "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".

12. There is no doubt that the appellant is the primary carer of a British citizen, her daughter. Equally there is no doubt that her daughter is residing in the United Kingdom. The question, so far as the Regulations are concerned, is whether the child "would be unable" to reside in the UK or in another EEA state if the appellant were required to leave.

13. There was no issue as to whether or not the appellant could live in another EEA state, the argument being related to her position in the UK. As we have indicated, Mr Deller focused on the inevitability of the child having to leave if her mother were removed. He conceded however that inevitability could not be taken to its strictest limits. For example the child could be adopted but he would not argue that that was a reasonable approach to the meaning of "unable to reside" in the UK if her mother left. One could imagine a number of fanciful scenarios but he quite properly refrained from relying on a construction which brought them into play.

14. In our view the question is ultimately one of fact. As we have indicated, the First-tier Tribunal found as a fact that due to her age Nikisha would leave with her mother if she was removed. It seems to us that her age is a most material consideration. At the date of the hearing before us she was 17 months old. The evidence disclosed, and we accepted it, that her father spent most of the year working in Kazakhstan and visited from time to time. It is plain that the primary bond in the family is between Nikisha and her mother. We cannot conceive of circumstance in which Nikisha could reasonably be able to live in the UK without her mother. We take on board what Mr Deller had to say about the husband's working arrangements being voluntary and we agree with him that people cannot circumvent the Rules by virtue of their own actions and thereby deprive the United Kingdom of its ability to control immigration. All that having been said, however, we are of the opinion that if the appellant were to leave the country her child would inevitably have to go with her given her age, her state of development and the bond to which we have referred. We do not think that the child's inability to live in the UK without her mother could in any sense be said to be voluntary.

15. In these very special circumstances we hold that the Regulation is met. That being so we do not find it necessary to discuss the permissions which were made on Article 8. We pause to note, however, that one feature which would have weighed with us is that it would appear, at least on the information before us, that there would be nothing to stop the appellant making an out-of-country application under the Immigration Rules, if she were so minded, and we see no reason to think it would be unsuccessful, given what we know about the family's financial circumstances. What we

have said in that regard, should be treated with caution since there may be other circumstances of which we are unaware.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)
Date: 9 April 2015