Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03390/2015

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Decision Promulgated**
On : 30 June 2016	**On: 12 July 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AOO
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse to issue her with a derivative residence card as the primary carer of a British

citizen resident in the UK, under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The appellant is a citizen of Nigeria born on [ ] 1977. It is not clear when she arrived in the UK, but on 3 October 2012 she was served with illegal entry papers and then sought asylum. Her asylum claim was refused on 28 August 2013. On 23 January 2014 she sought a derivative residence card as the primary carer of a British citizen resident in the UK. Her application was refused on 21 February 2014. She made another application for a derivate residence card on 24 April 2014 which was refused on 28 July 2014. She then made the current application on 1 November 2014, which was refused on 6 January 2015.

3. In refusing the application, the respondent noted that the appellant was applying on the basis of being the primary carer of AOOA, a British citizen, who was also her son. The respondent considered that there was insufficient evidence to show that the child would be unable to remain in the UK if she were forced to leave. There was no evidence why the child's father was not in a position to care for him if she had to leave the UK. The respondent did not, therefore, consider that the appellant met the requirements of the criteria for a derivative right of residence. The application was refused with reference to Regulation 15A(4A)(a)(c) and 18A of the EEA Regulations.

4. The appellant appealed against that decision and her appeal was heard on 8 May 2015 by First-tier Tribunal Judge Heatherington. At the hearing the judge heard from the appellant. The father of her child was not in attendance but an email from him was handed in. The Home Office presenting officer produced a copy of the decision in the appellant's earlier application for a derivative residence card, dated 21 February 2014, in which doubts were expressed by the respondent as to whether the appellant was the mother of the child AOOA and whether AA was his father. Judge Heatherington found as a fact that the appellant was the mother of the child, and that his father was AA. The appellant lived in Birmingham whilst AOOA's father lived in London. The judge found that the evidence was of regular, but infrequent, meetings of AOOA with his father and that they had gone to a park in Birmingham two to three months ago and had met two months prior to that in London. He summarised AOOA's medical conditions. The judge found that this was a last ditch attempt by the appellant to remain in the UK and he did not believe her evidence as to the level of contact between father and son. He was not satisfied that AA was not in a position to look after his son and he did not accept that he had the mental problems claimed. He did not accept that AOOA would have to leave the UK if the appellant were forced to leave. Accordingly he dismissed the appeal.

5. The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused, but was subsequently granted on 16 September 2015, on the grounds that the judge had failed to take into account other evidence which indicated that the child's father had no shared responsibility, provided no financial support for the child and had no regular contact with him, and had provided insufficient reasoning for concluding that

the child’s father was in a position or willing to care for him in the absence of the appellant.

Appeal hearing and submissions

6. At the hearing the appellant attended with a lay representative who assisted her. She did not have a legal representative and I therefore permitted the lay representative to sit next to her and assist her, albeit without directly addressing the Tribunal.

7. Ms Aboni made submissions first and asked that the judge's decision be upheld as the findings made were open to him on the evidence and there were no errors of law. In response the appellant said that her son could not live with his father as he did not have the same character as his father and she did not want him to follow his character. She referred to the best interests of her child.

Consideration and findings.

8. Permission was granted to the appellant to appeal to the Upper Tribunal on grounds that were not, in fact, raised by her, but which raised arguable grounds of a failure by the judge to consider certain evidence that was before him. However it seems to me that the judge did consider all of the evidence, albeit not referring specifically to every document. At [11] to [13] he referred to the email from AOOA's father and to the medical evidence relating to AOOA's various conditions. At [10] the judge said that "the evidence is of regular but infrequent meetings of AA with AOOA", which suggests an overview of all the evidence. In any event, having regard to the evidence referred to in the grant of permission, which appears at D1 to E3 of the respondent's appeal bundle and near the end of the bundle (including a letter from [ ] Day Nursery), it is clear that that goes no further than stating what is already known and accepted, namely that AOOA lives with his mother, that his father lives separately, and that there is contact between them.

9. It is claimed by the appellant that AOOA's father cannot look after him because of his mental health problems, but there was no evidence before the judge, other than an email from AA, to confirm that. The judge did not accept that AA had mental health problems as alleged and gave reasons for not accepting that he had been given a credible account of the level of contact between AOOA and his father. He did not accept that AOOA's father could not care for him in the absence of the appellant and, on the very limited evidence he had before him, he was perfectly entitled to reach such a conclusion.

10. In any event, the relevant question to be asked, for the purposes of Regulation 15A(4A)(c), was whether AOOA would be unable to reside in the UK if his mother, the appellant, had to leave, and the judge found that he would not. It is relevant to note that AA, in his email, stated that he did not want to be separated from his son. Clearly, therefore, if the appellant had to leave the UK, there was an alternative for AOOA, namely to live with his father. He would not be forced to leave the UK himself. That was the conclusion reached by the judge and was one that was clearly open to him on the evidence before him.

11. In a response to the respondent's Rule 24 response, it was submitted on behalf of the appellant that the respondent had failed to have regard to the best interests of the child. That was not a matter before the judge, but in any event it is clear that the respondent had considered the best interests of the child, as referred to the decision of 6 January 2015. What the appellant appears to ignore is that there is nothing stopping AOOA from accompanying her back to Nigeria and there is no question of her being forcibly separated from her child. The relevant EEA Regulations recognise that a British national cannot be forced to leave the UK and therefore the question the appellant had to answer was whether AOOA would be forced to leave if she did. For the reasons properly given by the judge, he would not.

12. Accordingly I find that there are no errors of law in the judge's decision. He was entitled to conclude as he did.

DECISION

13. The appellant's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. I do not set aside the decision. The decision to dismiss the appellant's appeal therefore stands.

Anonymity
The First-tier Tribunal made an anonymity order. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2014.

Signed: Date: 12 July 2016

Upper Tribunal Judge Kebede