



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/50676/2013

THE IMMIGRATION ACTS

Heard at Field House

On 22nd July 2014

Determination

Promulgated

On 08th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS MAYADA ABDELRAHIM MOHAMED ALI HELAL

Respondent

Representation:

For the Appellant: Mr G Saunders, Home Office Presenting Officer

For the Respondent: Mr R De Mello, Counsel instructed by David Tang & Co

DETERMINATION AND REASONS

EX TEMPORE JUDGMENT

1. The Appellant in this appeal was the Respondent in the First-tier Tribunal and for ease of reference I refer to the parties as they were known there.
2. The Respondent appeals the decision of First-tier Tribunal Judge Nightingale promulgated on 2nd May 2014 in which she allowed the

Appellant's appeal against the refusal of the Respondent to issue her with a residence card under the 2006 Immigration (EEA Regulations) with specific reference to Regulation 15A, the derivative rights of residence.

3. The judge found, contrary to the Respondent's assertion, that the Appellant is the primary carer of two British citizen children, the eldest born on 14th September 2008, a young girl with some health problems, and a boy born on 2nd August 2011 so at the time of the hearing, 2 and 5 years old. No challenge to the finding in respect of the primary carer position is made in these grounds.
4. The crux of the case as it was argued before the First-tier Tribunal Judge was what the impact would be on the British children if the Appellant went to Egypt.
5. The Respondent's challenge is to the findings relevant to Regulation 15A(4A)(c): that in the event that the Appellant had to leave the UK, to go in this case to Egypt and make an application from there, the children would be unable to reside here and would necessarily have to go with her. The Respondent argues that the fact of the father being able to remain in the United Kingdom means that the impact would not meet the threshold of showing that the children would be unable to reside in the United Kingdom.
6. The judge accepted the credibility of the Appellant and her husband in making her assessment of the circumstances of the children and also the family in general. There is no challenge to that finding.
7. I find that the judge made sustainable findings of fact including a finding that there is a significant degree of dependence between the children and the Appellant, accepting that the children's father played a very small role in their daily care, not even having changed a nappy. The Father instead played a significant financial role supporting his family through his employment, which involved long hours with unsocial shifts.
8. The judge considered the arguments put forward in connection with the position of whether or not the Appellant's husband would be able to afford sufficient childcare to allow the children to enjoy their rights of residence in the United Kingdom, but found that in fact the Appellant's husband would not be able to do so, taking into account his particular employment and the particular needs of the children, as the earnings were insufficient to meet the anticipated childcare costs. The judge found that the Appellant's husband would not be able to maintain his employment and provide the daily care required by the children.
9. In any event, the judge reasoned the best interests of the children were to continue to receive the daily care that they need, and currently enjoy, from their mother, taking into account the older child's health issues which, whilst not significant in terms of being life threatening, do require

significant additional care, as well as the age of the children in particular the youngest, only two.

10. The judge found that as a matter of fact the children would not be able to remain in the United Kingdom.
11. Mr Saunders before me reiterates the ground that the Judge's finding that the children would be unable to reside here reflects a threshold which is lower than the word unable would ordinarily imply, so that the legal test is flawed. I disagree with that submission. It is plain in the context of the case of **Zambrano** that "unable" in the context of an ability to reside here is about the substantive enjoyment of the right of residence. Also in a case to which I have been referred to today, **O & Another v Maahanmuuttovirasto Maahanmuuttovirasto v L, (joined cases C-356/11 and C-357/11)** that European jurisprudence reflects the position of our own domestic jurisprudence to the point that any test must take account of the respect due to private and family life and hold the best interests of the children as a primary consideration. I am satisfied that the decision of the judge is entirely consistent with that jurisprudence, and reveals no material error of law.

Signed

Date

Deputy Upper Tribunal Judge Davidge