



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

Appeal Number: IA/09236/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9 February 2015**

**Decision & Reasons Promulgated  
On 16 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MS BAMITALE REBECCA IKUYINMINU  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Ariyo, instructed by Apex Solicitors  
For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The appellant is a citizen of Nigeria born on 7 July 1987 and she entered the UK as a Tier 4 Student on 7 October 2010 and she sought on 7 December 2011 a residence card by virtue of the EEA Regulations which was rejected on 17 January 2012. A further application on 17 February was again rejected on 11 May 2012. On 6 March 2013 she sought a derivative residence card under the **Zambrano** ruling which was refused on 17 January 2014.

2. The appellant had a child on 24 August 2012, now aged 2, his father was stated to be Abayomi Temidayo Olatunji who had ILR in the UK.
3. The respondent noted that the father registered the child's birth with the appellant on 1 October 2012 which indicated he had some parental contact. It was accepted that the appellant had provided some limited evidence that the child lived with her and she made some decisions regarding her welfare but she had not provided evidence that she was responsible for the child.
4. The appellant's appeal came before First-tier Tribunal Judge Horvath on 1 October 2014 and he dismissed the appeal on all grounds on 10 October.
5. An application for permission to appeal was submitted on the basis that the judge had failed to deal with the point that the decision was not made in accordance with the law, in particular with reference to the Immigration Directorate Instruction Family Migration Appendix FM, guidance which stated that a case with respect to a British citizen child "must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer". The judge accepted that the appellant had a genuine and subsisting parental relationship (paragraph 42 of the determination) and should have allowed the appeal to the extent the respondent's decision was not in accordance with the law.
6. The judge further failed to deal with the assessment of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in assessing the appellant's family life, in particular –

**"117B Article 8: public interest considerations applicable in all cases**

- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
  - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom."
7. Bearing in mind the judge failed to consider the effect of **Sanade & Others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC)** which confirmed that it was not possible to require a citizen of the European Union to relocate outside the EU or submit that it would be reasonable for them to do so.
8. One of the issues which concerned the appellant's representatives was that the judge appeared to proceed on the basis that the previous marital relationship of the appellant with another man was undisclosed to the respondent and this was not in fact the case. The appellant had

previously made an application on the basis of her marriage but this was refused by the respondent. It was submitted that their father had abandoned any care for the child and was not in any way in contact with the appellant and the judge had misunderstood the material facts. A parental biological relationship was distinct from the assumption of care responsibility.

9. The judge concluded that the appellant was not the primary carer of the child and this was unsupported by the material evidence submitted. In fact the appellant had relied on letters from the GP, the child's school and documentary evidence showing that the child resided with her. The judge failed to give effect to **Omotunde (best interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247**. The nationality of a child as a British citizen was said to be a primary consideration in an assessment of the best interests of the child.
10. In the last sentence at paragraph 48 of the determination the judge in assessing the family life of the appellant's child stated on the facts as found, "I find there is no family life as such between Mr Olatunji and the appellant/the child since they do not live together in a single family unit".
11. Having made this finding the judge erred and was inconsistent in not finding that there was no family life. *SEN v Netherlands* (2003) 36 EHRR 81 was proposition that a biological parent/child relationship will always give rise to family life.
12. Permission to appeal was granted by First-tier Tribunal Judge Simpson who found that the independent evidence from the GP and from the Maryland Children's Centre indicated the appellant was her daughter's primary carer and in those circumstances it was not reasonable to assume the child's biological father would be able, willing or even suitable to take full responsibility for the child.
13. Submissions were made at length at the hearing by Mr Ariyo and Mr Nath responded in stating that it was a thorough determination and the judge had gone through the various areas required of him, in particular Section 55 and the derivative rights of residence as set out.

### **Conclusions**

14. Under The Immigration (European Economic Area) Regulations 2006 15A(4A) in order to be entitled to a derivative rights of residence the appellant (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.

15. Mr Nath submitted that there were issues in relation to the appellant's credibility and that the question over the paternity of the child should be taken into account in the credibility assessment.
16. It was not the production of the marriage certificate or the previous marital relationship as being a fresh disclosure which the judge recorded but the revelation in the appellant's oral evidence that she was having a sexual relationship with two men at once and hence the issue regarding paternity which the respondent raised as a fresh disclosure. That said the judge recorded at paragraph 18 that in relation to the child's British passport "unless and until the birth certificate and the British passport are revoked they have to be taken at face value. I therefore have to assume for the purposes of this determination that Mr Olatunji is the child's father". Thus the judge accepted the child as British for the purposes of the hearing. I do not accept that it can be a sustainable attack on the decision that this revelation influenced the judge's reasoning. He gave a detailed assessment of why he rejected the appellant's evidence.
17. The judge moved on to assess that the child was a British citizen, that her status had been derived from her biological father who had settlement status in the UK but the judge recorded that the information provided by the appellants was very limited [20]. The judge also recorded that there was inconsistency in the evidence and this was set out clearly within the determination [21] and [22].
18. In particular the judge did not find the appellant to be a credible and honest witness or that she had given full and frank disclosure about the father. The judge was criticised at the lack of questioning of the appellant but it is the responsibility of the appellant to put forward her case and in essence the judge was not satisfied that she had given full and frank disclosure about Mr Olatunji. In particular the judge found that the father had taken part in the registration of the birth certificate and obtaining the British passport and as Mr Olatunji's family traditionally forbids the rejection of their children the judge was not satisfied as to the required standard that Mr Olatunji had rejected or abandoned the child [21]. Indeed, at paragraph 22 the judge found that:

"There was no credible or cogent evidence from the appellant that Mr Olatunji has rejected the child. On the contrary it was stated on the appellant's behalf (in the representative's letter) that the father of the child is not in a position to permanently care for the child because of accommodation issues and the tender age of the child."
19. The judge was criticised for failing to take into account the Immigration Directorate Instruction Family Migration Appendix FM, guidance which stated that a case with respect to a British citizen child "must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer" but the judge found it "more probable than not that Mr Olatunji would be able to and could undertake care responsibilities for the child since his tradition

forbids rejection of their children". And further the judge cited that "as pointed out in the refusal letter any unwillingness to assume care responsibility is not by itself sufficient for the appellant to assert that another direct relative or guardian is unable to care for the child". As such the judge proceeded on the basis that the child would not **have** to leave the UK with a parent. Nor, therefore did the judge ignore **Sanade**.

20. Further the judge cited at paragraph 23 that an extract from the child's red book showed that Mr Olatunji had been involved in the BCG administered to the child and in effect the judge found:

"I am not satisfied that the appellant is the sole primary carer of the child. I find that Mr Olatunji can and probably does undertake care responsibilities for the child including making day-to-day decisions on her upbringing, even if there is no subsisting relationship between the appellant and Mr Olatunji as claimed by the application".

21. The judge found further inconsistencies in the appellant's evidence in relation to the accommodation and her financial support. Indeed the judge rejected the appellant's evidence given the appellant's lack of veracity.
22. That said, I find there are two issues in the decision which need to be addressed. The judge, despite the copious evidence produced rejected the concept that the appellant was the primary carer of the child. Bearing in mind the evidence from the Lime Tree Surgery and the Maryland Children's Centre that the appellant was known to them and that she participated in all activities provided to support her and the child, I find that the conclusion that at [27] that the appellant was not the child's primary carer is not necessarily accurate in relation to Regulation 15A(4A) (a). The question, however, is further, whether under 15A(c) the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave. The appellant must also satisfy this limb of the regulations. The judge did not consider that she could.
23. Although the judge found at paragraph 48 that "on the facts as found I find that there is no family life as such between Mr Olatunji and the appellant/the child since they do not live together in a single family unit" , Mr Olatunji has in fact a biological relationship with the child and thus family life. This was an error but I do not, however, find this material. The judge clearly accepted that Mr Olatunji did have a continuing relationship with the child. At paragraphs 22 and 23 the judge found Mr Olatunji would be able to and could undertake care responsibilities for the child. Indeed paragraphs 27 and 28 would appear to contradict each other.
24. At paragraph 33 the judge clearly states "I find it more probable than not that the child has contact with Mr Olatunji... I have found that the British citizen child could stay in the UK with Mr Olatunji should this be the appellant's and Mr Olatunji's choice".

25. Having stated that and found that the child has contact with Mr Olatunji the judge clearly has addressed the issue of whether the child would be required to leave.
26. I find therefore that the judge has in effect taken into account whether it would be unreasonable to expect a British citizen child to leave the European Union with the parent or primary carer and has applied Regulation 15A(4A)(c). The judge confirmed that she was satisfied that the child's proper place is with ***either*** of her parents and that the child's overall wellbeing and best interests would be served if she was to continue in the care of either parent.
27. Alternatively the judge found on the basis of the child's age that the child's activities may be different in another country but her private life would continue in respect of all its essential elements and that the child would be able to adapt to new environment in Nigeria should she be removed there. Indeed the judge had regard to **ZH (Tanzania) [2011] UKSC 4** and stated that she found it would not be unreasonable to expect the child to leave the UK with the appellant should this be the parent's ***wish***. Thus the judge was alive to the fact that it was not a requirement that the child should leave.
28. Once again the judge found at paragraph 43 that Mr Olatunji was in the UK. He was stated as having ILR and there was no persuasive evidence that the child did not have a subsisting relationship with him. Indeed, the judge earlier in the determination found that there was evidence pointing to the fact that she did.
29. The judge then proceeded to consider the facts on Article 8 outside the Immigration Rules and it is at this point that she moves on to a consideration of proportionality in terms of Article 8 and makes reference to Section 117B. The judge factors in the consideration that the appellant has temporary leave to remain in the UK and it was a condition of her entry that she should return home upon expiry of her student visa. The judge also finds that her parents and siblings should be able to assist her whilst she finds suitable employment in Nigeria [51]. Further to Section 117B(6) the judge is not finding it reasonable to expect the child to leave the United Kingdom for the reasons given in the decision.
30. The judge clearly found that the decision was justified and proportionate. The judge was clearly apprised of the fact that the child was a British citizen but noted that it "is reasonable for the child to leave the UK with the appellant should this be her ***wish***". **Sanade & Others (British children - Zambrano - Dereci) [2012] UKUT 00048**, at paragraph 95 confirmed:

"This means that where a child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. Their case serves to emphasise the importance of nationality already identified in the decision of the Supreme

Court in **ZH (Tanzania)**. If interference with family life is to be justified it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation”.

31. This is the point. The judge found that it was reasonable for the child to live with either parent and that Mr Olatunji continued to have contact with the child and therefore it was the choice of the parent whether to relocate with the child or leave the child in the UK with the other parent.
32. I find that the evidence overall the appellant was not believed regarding the claimed distant relationship between herself and Mr Olatunji. The judge clearly found Mr Olatunji was involved in the child’s upbringing. The judge gave reasoning for this and separate from the mere absence of Mr Olatunji from the court hearing [21]. As such, should the mother wish to return to Nigeria without the child it was a matter for her. In sum the child was not being required to leave the European Union.

**Notice of Decision**

33. I find that there was no error which would materially affect the outcome of the decision and the decision shall stand.

No anonymity direction is made.

Signed

Date 14<sup>th</sup> March 2015

Deputy Upper Tribunal Judge Rimington