



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

Appeal Number: IA/26340/2014

THE IMMIGRATION ACTS

Heard at Field House

On 13th August 2015

Decision and Reasons

Promulgated

On 26th August 2015

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS M O A

(Anonymity Direction made)

Respondent

Representation:

For the Appellant: Mr L Tarlow (Senior Home Office Presenting Officer)

For the Respondent: Ms B Asanovic (instructed by Jesuis Solicitors)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State with regard to a decision of the First-tier Tribunal (Judges Lamb and Easterman) promulgated on 19th January 2015 by which it allowed the Appellant's appeal against the Secretary of State's decision to refuse to grant her leave to remain in the UK.
2. For the sake of continuity and clarity I shall continue to refer to **Ms A** as the Appellant and the Secretary of State as the Respondent in this determination.

3. The Appellant is a Nigerian citizen born on 21st November 1972. She has two children, **P** born on 19th December 1996 who is also a Nigerian citizen and **I** born on 20th May 2003 in Ireland. As a result **I** is an Irish citizen.
4. The Appellant first came to the UK as a visitor in 2003 with both children. She returned to Nigeria in 2006 leaving **P** and **I** in the UK. It is her evidence that after 2006 she travelled to and from Nigeria for trading activities during which she left the children with her siblings who are resident in the UK.
5. The Appellant and her husband were estranged in 2003.
6. On 18th May 2009 the Appellant was apprehended at Heathrow and interviewed by an immigration officer. She was recorded as saying at that time that her children were living in Nigeria, a matter which she has subsequently acknowledged was a lie. Since 2009 she has made various attempts to remain in the United Kingdom.
7. She was not permitted to work. Her evidence was that she lived with her children only partially and intermittently. Latterly and for two months prior to the hearing before the First-tier Tribunal the Appellant had been living with both children in Aberdeen in premises rented by someone else. The Secretary of State made removal decisions in relation to the Appellant and both children. However, it is acknowledged that as an Irish citizen those are ineffective in relation to **I**.
8. The Appellant appealed on her own and her sons' behalf against the removal decision which is the appeal which came before the First-tier Tribunal. The appeal was argued on the basis that the Appellant was entitled to a derivative right of residence under Regulation 15A of the EEA Regulations, an argument which found favour with the Judges.
9. The Judges in the determination set out the history in relation to the children and where they had lived. So far as **I** is concerned he has an Irish passport. He commenced primary school in April 2009 where he remained until July 2012. The school recorded him as living with his mother in Tilbury in 2010 and then in Chafford Hundred in 2012 and 2013.
10. In September **I** began attending Bosland Green Primary school in Bristol but the school letter does not indicate his address at the time.
11. **I** was registered at a GP surgery in Chafford Hundred in May 2009 and remained with them until February 2013. His next of kin and carer was recorded by the GP surgery as his mother, the Appellant.
12. **P** was born in Nigeria and is of Nigerian nationality. He had various visit visas to enter the UK between 2003 and 2006 but has subsequently overstayed. **P** has been to school in the UK in 2006 at Tollgate Primary School in London. He then attended St Pauls' Church of England Primary School in Wolverhampton between September 2007 and June 2008 and between September 2008 and September 2009 he attended Rogby School

in London. From September 2009 to July 2013 he attended Gable Hall School in Essex. Whilst in Essex he was registered as a patient at the same GP practise as **I**.

13. In the First-tier Tribunal's discussion and conclusions the Judges pointed out that the refusal letter contained two flaws in its reasoning. One was that it did not accept that **I** was an Irish citizen; although by the time of the hearing it was conceded that he was. Consequently the Secretary of State in the refusal letter did not consider the legal consequences of the fact that he is Irish. Secondly, the First-tier Tribunal noted that in the refusal letter the Secretary of State considered whether the Appellant was the "sole carer" for **I** and set the standard of proof as proof beyond reasonable doubt. That meant that the Secretary of State had not considered the test under Regulation. 15 as to whether the Appellant was **I**'s "primary carer". On that basis the Tribunal thought the decision was not in accordance with the law and on that basis the Appellant would have been entitled to succeed. However, the Tribunal went on to consider the matter substantively. It noted that **I**, although having an order for his removal and his appeal not being before them as an EEA citizen he is in law entitled to stay in the UK. If the Appellant were to be returned to Nigeria with **P**, who is also Nigerian, that would leave **I** at the age of eleven in the UK without his mother and brother. No evidence had been provided as to the arrangements which would have been made to look after him if he was left on his own which was profoundly unsatisfactory and could not possibly be in his best interests or secure his welfare. It found (Paragraph 31) that he would be compelled to leave with his mother and brother because it would undoubtedly be in his best interests to live with them.
14. The Tribunal then considered whether that would breach **I**'s rights as an EEA citizen. It found that it could:-

"... not see how any child could satisfy the requirement to be financially self-supporting, yet the provision cannot be read as applying in a way which avoids that requirement. It therefore seems to restrict the Zambrano rights as set out in the case law which we have cited. Our obligation in those circumstances is to apply full EU rights namely the TFEU rather than Article 15A wording. Applying those rights as explained by Elias LJ in Harrison, the Appellant is a third country national who upon whom **I**, a minor child, is dependent. He is an EU citizen and the refusal of a right of residence to his mother would deprive him of the genuine enjoyment of the substance of the rights attaching to his status of European Union citizen".
15. For those reasons the First-tier Tribunal allowed the appeal.
16. The Secretary of State's grounds from which permission to appeal was granted are on the basis that the Tribunal erred in its finding that the regulation restricted the Zambrano [\[2011\] EUECJ C-34/09](#) rights as set out in case law but failed to taken into account judgements in Zu and Chen v SSHD [2004] ECR 1-9925 which makes clear that the rights of citizens of the union to reside in another member state are subject to the limitations

and conditions imposed by the Treaty and by measures adopted to give it effect. The grounds argue that the Secretary of State is entitled to impose a requirement under Regulation 15A(2)(b)(ii) that the EEA national child is residing in the United Kingdom as a self-sufficient person. As such it is argued that the Tribunal erred in allowing the appeal.

17. Secondly, it is asserted that the Tribunal erred by failing to provide adequate reasons for its finding that the Appellant is the primary carer of the child I despite the fact that on the basis of its own findings the Appellant had only lived with her children partially and intermittently.
18. Before me Mr Tarlow relied on the grounds. Counsel for the Appellant defended the decision and reasons pointing out that the Appellant had relied on directly affected rights. It was argued that I has a right to reside under the Regulations and the Directive and it is clear from the case of Amos that the rights referred to in Zambrano does not just apply to British children and in this case the decision would deprive I of the genuine enjoyment of his rights as an EU citizen.
19. I agree with the Secretary of State that the First-tier Tribunal has misdirected itself as to the law and the EEA Regulations. I disagree with the argument that no EEA national child in the UK could conceivably be self-sufficient and thus meet the requirements of that part of Regulation 15A.
20. An EU citizen is only entitled to remain in the UK if he is exercising Treaty rights (with a very few exceptions provided for in the Regulations).
21. The relevant part of Regulation 15A provides:
 - (1) A person (“P”) who is not an exempt person and who satisfies the criteria in Paragraph (2), (3), (4A) or (5) of this Regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
 - (2) P satisfies the criteria in this paragraph if -
 - (a) P is the primary carer of an EEA national (“The relevant EEA national”); and
 - (b) The relevant EEA national -
 - (i) Is under the age of eighteen;
 - (ii) Is residing in the United Kingdom as a self-sufficient person; and
 - (iii) Would be unable to remain in the United Kingdom if P were required to leave.
22. The point about the derivative rights of residence is that certain persons are entitled to be in the United Kingdom in order to exercise Treaty Rights and if they are under the age of eighteen and are unable to do so alone then their parent may be entitled to a derivative right in order to provide

their care. Regulation 15A provides as above. It also provides for a child who is in the United Kingdom and at school at a time an EEA national parent was in the United Kingdom as a worker for him to remain to complete his education with a non EEA parent who will then have a derivative right.

23. Derivative rights are temporary and do not lead to a permanent right of residence. They last only while the EEA national has the right to reside.
24. There is also provision for the primary carer of a British citizen who would be unable to reside in the UK without the person's presence with them.
25. It can thus be seen that the provisions of Regulation 15A are there to safeguard a British or EEA national's right to exercise rights in the United Kingdom. For an EEA national the rights are defined in the EEA Regulations. An EEA national is entitled to exercise Treaty Rights in the United Kingdom, for a short period as a job seeker and thereafter as a worker, a self-employed person, a self-sufficient person or a student.
26. Unless an EEA national is exercising Treaty rights in the United Kingdom, they have no right to remain. They do not have a right to be in the United Kingdom otherwise. In the situation of this family I is an EEA national and the only Treaty right he could be said to be exercising is that as a student because he is in education. Regulation 4(1)(d) defines student as a person who -
 - (i) is enrolled, for the principal purpose of following a course of study (including vocational training) at a public or private establishment which is -
 - (aa) financed from public funds; or
 - (bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of proving such courses or training within the law or administrative practise of the part of the United Kingdom in which the establishment is located;
 - (ii) there is comprehensive sickness insurance cover in the United Kingdom;
 - (iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social system of the United Kingdom during his period of residence.
27. It is clear therefore that the requirement in Regulation 15A for the EEA national child in education to be self-sufficient ensures that he complies with the definition of a student contained in Regulation 4. If he does not meet the definition of student he is not exercising Treaty rights and thus falls outwith Regulation 15A and his parent cannot have a derivative right to reside.

28. Neither the EEA Directive nor the Regulations provide for an EEA national child to enter the United Kingdom and be educated at the UK's expense and to receive medical treatment at the UK's expense.
29. In this case I has neither medical insurance nor is he self-sufficient. He is thus not a "student" as defined by the Regulations and so cannot be said to be exercising Treaty rights in the UK and thus the Appellant is not entitled to a derivative right of residence under Regulations 15A and her appeal fails.
30. It also follows that as the child, I is not exercising Treaty rights, the Secretary of State's decision is not wrong in law for failing to address Regulation 15A.
31. Having found the First-tier Tribunal erred in allowing the appeal and having set its decision aside, In re-deciding the appeal I dismiss the Appellant's original appeal against the decision of the Secretary of State.

Signed

Date 24th August 2015

Upper Tribunal Judge Martin

Direction regarding anonymity

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings

Signed

Date 24th August 2015

Upper Tribunal Judge Martin