Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03201/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2017	**On 23 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

[N I]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Vidal of Counsel, instructed by Haris Ali Solicitors
For the Respondent: Ms Willocks-Briscoe, a Home Office Presenting Officer

DECISION AND REASONS

Introduction and background

1. This is the appellant's appeal against a decision of the First-tier Tribunal to dismiss her appeal against the respondent's refusal to issue a derivative

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residence card under paragraph 15A of the Immigration (EEA) Regulations 2006 (the EEA Regulations).

2. The appellant is a citizen of Nigeria who was born on [ ] 1978. Her immigration history was fully set out by the respondent in her refusal letter dated 18 November 2015. The appellant has one child by her former husband or partner, [AN]. The child, [WN], was born in the UK on [ ] 2010. [WN] is a British citizen by virtue of his father's nationality. The birth certificate was issued and listed [AN] as the father and the appellant as the mother.

The appeal before the First-tier Tribunal

3. The hearing came before Judge of the First-tier Tribunal A.M. Black (the Immigration Judge) on 25 January 2017. The Immigration Judge gave her decision within five days of the hearing. She set out fully the requirements of the EEA Regulations and she indicated the parameters of the dispute between the parties, noting that it was accepted that the mother was the primary carer of [WN], who had been born in the UK and had lived here all his life. However, it had not been accepted by the respondent, and was ultimately found to be the incorrect by the Immigration Judge, that [WN]'s father, who had registered the child's birth, had severed all connections with the child. The child appeared to be an exempt person because he was British, and the appellant had failed to demonstrate to the civil standard that the child would be unable to reside in the UK if she were required to leave.

4. The Immigration Judge summarised the grounds of appeal, indicating that although there had been contact between father and child after the child's birth that contact had ceased, and the father had made no further contribution to the child's upbringing nor, indeed, did he have any involvement with the child's day-to-day life. The appellant lived with his sister and her niece and nephew, both of whom had special needs. She took an active role in their upbringing and care. The appellant satisfied the criteria for the EEA Regulations and it was unnecessary to pursue an Article 8 claim because there were no removal directions.

5. The appellant submitted a bundle of documents before the First-tier Tribunal. The same bundle of documents was replicated before this Tribunal. Unfortunately, there were some issues about the numbering of that bundle and it proved difficult to follow, but I have been assisted in that regard by Ms Vidal, who represents the appellant.

6. The Immigration Judge effectively rejected the appellant's account that the child's father wanted "nothing more to do with the child". She pointed out that the father had attended the child when he was born in hospital. Although that was perhaps not the most important issue, it was an issue that the Immigration Judge focused on. In addition, there had been irregular contact over the years between the child's father and the child

which appears to have ceased in August 2015 according to the appellant, when the father attended a New Year family celebration.

7. The Immigration Judge expressed concerns over the witnesses she had heard. She did not hear from the father, but she did hear from the appellant and noted the evidence that had been given about the father coming to the hospital to see his son. Her oral evidence that he was present at the time of the birth was obviously correct. She initially said that he was in the delivery room but later said he was outside the door. By contrast, the appellant's sister told the Tribunal that she was in the waiting room at the hospital during the birth and that the father did not arrive until after the birth.

8. The appellant was asked what kind of things the child and father had done together when he visited, and she replied he did not take the child out because he did not want to be seen around with the child and there appeared to be an issue about the child being born in the first place in that it appears to have been the appellant's evidence that the father wanted the child to be aborted.

9. The Immigration Judge found that the evidence did not sit well with the fact that the child's father attended the registry office to register the birth using his own surname, which is relatively uncommon. The child was by the date of the hearing attending a school and his name is in the public domain. The child has a British passport, which his father clearly applied for, and those were not the actions, in the Immigration Judge's views, of a man who seeks to avoid his relationship with his son becoming known to his family.

10. The appellant's sister told the First-tier Tribunal that the child's father had attended a family celebration in August 2015. On that occasion she had spoken to him about introducing the child to his step family. He had told her that this would never happen. The appellant and her sister claim they had not seen the child's father since the child's birth. When asked whether the appellant's sister had told the appellant about this conversation she said "no". The Immigration Judge observed in paragraph 17 of the decision: "…, if she is believed, as she told me, the conversation was the reason that he stayed away from the child, I would expect the appellant's sister mentioned it to the appellant".

11. The Immigration Judge was therefore not at all happy with this evidence, finding that it was inconceivable that the appellant and her sister had not discussed the potential reasons for the child's father stopping visits, irrespective of the nature of those visits. The child's sister's account of this conversation does not have a ring of truth about it, in the Immigration Judge's view.

12. The claimed last contact, being in August 2015, was a month before the application was signed by the appellant and it was anticipated that she

would have been told by that time that the application would only be successful if she could demonstrate the child would be unable to reside in the UK if she were required to leave pursuant to Regulation 15A(4A) (c) of the EEA Regulations.

13. Taking the evidence in the round, the Immigration Judge found that it was likely that the reason for the claimed absence of contact between father and child was to promote the prospects of a successful outcome for the appellant. The Immigration Judge was not satisfied that the appellant's father had the limited role in the child's upbringing, as had been claimed. She rejected the appellant's evidence, finding it incredible and unreliable. She pointed out that she was unable to accept that the appellant had demonstrated the child would be unable to reside in the UK if the first appellant were required to leave.

The appeal to the Upper Tribunal

14. First-tier Tribunal Judge Robertson gave permission to appeal on 17 August 2017 because he considered there to be some arguable merit in the grounds which state that the First-Tier Tribunal failed to attach sufficient weight to the documents that had been produced in addition to the oral evidence, including those emanating from the church and the school which the child attended. Judge Robertson also gave permission to appeal on the other grounds including the ground which alleged that the First-tier Tribunal had failed to consider adequately the appellant's sisters evidence.

15. Oral submissions were made by both representatives before Upper Tribunal. Ms Vidal referred me to those parts of the evidence that, in her submission, had not been fully considered by the Immigration Judge. It was pointed out by reference to page A89, in the second bundle of documents lodged, that there was a document from [ ] Primary School which apparently confirmed that it was [NI], the mother, who brought the child to school and collected him every day and as far as the school was aware she was the primary carer.

16. Later in submissions, I was referred to a psychological assessment of the child, which suggested that the child had regular contact with his father, but it has been pointed out this post-dates the decision. There is no application before the Tribunal for fresh evidence to be adduced.

17. I was also referred to informal documents from the local church, which suggested that the mother was the person that the church had contact with and as far as they were concerned she was the person that they regarded as "the (main) person in the child's life" (see C1 and C2). She attended regularly the [ ] Church on Hatton Road, which is situated in [ ] Middlesex. During the four-year period of her active participation in the church as a regular attender she came with her son on Sundays and for major programmes. She was primarily responsible. There was no reference to the father in the documents at C 1 and C2, which are both

marked "To Whom It May Concern". The documents are essentially informal in character and do not have the status of witness statements. It will be necessary later to what weight should attach to them.

18. Unfortunately, there are two page A94s in both the bundles which have been produced. I was referred to A94 in the most recent bundle. The A94 in question was a document registering the child at the [ ] Primary School, listing the parent as being the appellant and not naming the father. Indeed, there is no reference to the father. I was invited to conclude that the child was primarily cared for by the mother. The Immigration Judge had been remiss not consider this evidence, it was argued. The evidence was material to the outcome. The decision was unsound, and I was invited to set it aside. I was invited to remit the matter to the First-tier Tribunal, rather than re-make the decision in the Upper Tribunal, as key evidence had been omitted and not to adopt the more usual option of remaking the decision within the Upper Tribunal in accordance with section 12 (2) (b) of the Tribunals, Courts and Enforcement Act 2007.

19. The respondent, however, did not accept any of these submissions, pointing out that the decision was a sound one, reached having carefully analysed the documentation produced, albeit that not all the documents were referred to. It was accepted by the respondent that the appellant was the primary carer for the child. However, after hearing all the evidence, the Immigration Judge had rejected the appellant's evidence, as she was entitled to. The Immigration Judge concluded that the child's father continued to be a person who would care for the child in the United Kingdom and therefore the child did not fall within the terms of the Regulations and specifically regulation 15 A (4A). The appellant was not able to rely on a derivative right of residence under 15A of the EEA Regulations.

20. Ms Vidal had a right of reply and she exercised that right. She pointed out that this was a case of the upmost importance for those involved, a sentiment with which I entirely agree. The evidence relating to the sister, she said, primarily went to the issue of contact, the father was not a figure in the child's life and she reiterated that the decision was not one that the Immigration Judge was entitled to come to based on the evidence. At the end of the hearing, I rose to consider my decision which I will later give.

Conclusion

21. Unlike the FTT, the Upper Tribunal has not had the opportunity to hear the witnesses give evidence, let alone make a balanced judgment as to the weight to be given to that evidence set against the documents to which I have been taken. It it is incumbent upon the Upper Tribunal to accord proper respect to the decision of the Tribunal below.

22. Although it is regrettable that the Immigration Judge did not consider all the documentation with as much care as she might have done, having

regard to the concession that the respondent made that the appellant was the primary carer for the child, I find that this does not amount to a material error of law. The documents which the Immigration Judge overlooked appear tangential to the main issue: the extent to which the child would be unable to reside in the UK if the appellant were required to leave the UK (see regulation 15A(2)(b)). The documents produced go primarily to indicate who other people thought the primary carer of the child was. Of course, there has been no evidence from the child's father or indeed the child himself. The test is not whether or not the appellant is the primary carer. That is accepted by the respondent. It is the third limb of the test that is in issue: whether the child would be unable to remain in the UK if the appellant were required to leave the UK.

23. The Immigration Judge fully considered that issue in her decision. She reached a decision that she was entitled to come to based on the evidence, having appraised the material parts of that evidence.

24. In addition, the Immigration Judge fully considered the welfare of the child in reaching her decision. However, the need to put the welfare of the child of the heart of the decision was essentially incorporated within the 2006 Regulations. I consider the Immigration Judge fully considered the provisions of regulation 15A(2)(b)(iii), in her decision.

25. Accordingly, the First-tier Tribunal was entitled to dismiss the appeal against the respondent's refusal to issue a derivative residence card in her case.

26. The Immigration Judge made an anonymity direction. There is no appeal against that decision.

Notice of Decision

The appeal under the 2006 Regulations is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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 7 November 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 7 November 2017

Deputy Upper Tribunal Judge Hanbury