Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02976/2019 (V)**

THE IMMIGRATION ACTS

Heard at: Field House
On: 22 February 2021

Decision & Reasons Promulgated
On 03 March 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SHUMAILA KHALID

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection by the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

2. The appellant, a national of Pakistan born on 2 October 1985, 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 an EEA Family Permit under the Immigration (European Economic Area) Regulations

2016 (“the EEA Regulations”), as the parent of her British sons in accordance with the Zambrano principles.

3. The appellant stated in her application that she intended to accompany her son Najeeb, a British citizen, to the UK. She had another son, Ahmed, who was also a British citizen. She claimed that she was the primary carer of her sons and provided a letter from their father stating that the only role he had in their lives was to provide financial support.

4. The respondent refused the application on 8 June 2019. The respondent noted that in November 2018 the appellant had applied for a visit visa for 16 days and had stated at that time that they would be staying with her children’s father. The respondent also noted that the appellant had previously stated that she resided on agricultural land owned by her children’s father, which she maintained as his second wife. The respondent considered that that suggested that the children’s father therefore had a more active role in the children’s lives than claimed. The respondent considered that, contrary to the requirements of regulation 16(5), the appellant and her sons currently resided in Pakistan and had not provided any evidence of ever residing in the UK and that, as the children’s father was residing in the UK and had a settled family life there, there was no evidence to suggest that the children would be unable to reside in the UK if the appellant were to leave for an indefinite period. Accordingly the respondent considered that the requirements of regulation 16(5) were not met and the application was refused.

5. The appellant’s appeal against that decision was heard by First-tier Tribunal Judge Monaghan on 14 January 2020. It was argued before the judge that the decision denied the children their rights under Article 20 TFEU and stopped them enjoying their rights as EU citizens, as the appellant was their primary carer and they had lived with her since birth and could not come to the UK without her. They could not live in the UK with their father as he would not accommodate them. They would be staying with the children’s paternal uncle initially before obtaining their own residence in the UK. The judge noted that the evidence was that the children’s father had a partner in the UK with whom he had been living for 12 years, that the appellant was his other partner in Pakistan with whom his children lived, that he had no active role in the children’s lives aside from financial support and that his partner in the UK was not willing to take responsibility for the children and he had to keep the appellant and their children away from her.

6. The judge found that the appellant could not meet the requirements of regulation 16(5) because the children did not reside in the UK and had always lived in Pakistan and the appeal failed on that basis. The judge also found there to be insufficient evidence to enable her to reach a finding that the appellant was the primary carer of the children, noting that the evidence of both the appellant and the children’s father in the visa application was unreliable, as it had been stated then that they would all be staying with the children’s father if the application was successful. The judge agreed with the respondent that the evidence pointed to a far greater involvement of the children’s father in the

lives of the appellant and the children than claimed. The judge accordingly dismissed the appeal.

7. Permission to appeal that decision was initially refused by the First-tier Tribunal. A renewed application was made to the Upper Tribunal on the grounds that the respondent and the judge had failed to consider regulation 11(5)(e), according to which the appellant should have been granted admission to the UK.

8. Permission was granted by the Upper Tribunal on 9 August 2019 as follows:

> "…There is arguable merit in the assertion in the original grounds that the judge erred by finding that the appellant was not the primary carer of her two children for the purposes of regulation 16(5)(a). It is also arguable, in light of regulation 11(5)(e), that the judge erred by finding that the appellant could not meet the requirements of regulation 16(5) because the children were not already residing in the UK. Arguably neither of these would be material if the judge had given proper reasons for finding that the requirements in regulation 16(5)(c) were not met. However it is arguable that the reason given at [22] was not a proper reason and that, despite the findings at [26] to [28], the judge arguably failed to make any finding as to whether the children would be able to reside in the UK with their father if the appellant was not able to reside here and thus whether or not they would be deprived of their rights as British citizens if the appellant was denied entry to the UK…"

9. The respondent filed a Rule 24 response on 2 October 2020, accepting that the judge had erred in law in finding that the appellant was unable to satisfy the requirements of the EEA Regulations 2016 by reason of her and her children not being in the UK. However the respondent considered that the error was only material if the judge had found that the requirement of being a primary carer under the EEA Regulations was satisfied, which she had not. There had been no challenge to the judge's adverse credibility findings in that respect. The judge's decision should therefore be upheld.

10. The matter then came before me.

The EEA Regulations 2016

11. The relevant regulations state as follows:

> **"Right of admission to the United Kingdom**
>
> **11.-** (5) The criteria in this paragraph are that a person ("P")—
>
> … (e) is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and P would be entitled to reside in the United Kingdom under regulation 16(5) were P and the British citizen both in the United Kingdom."
>
> **"Derivative right to reside**

> **16**.- (1) A person has a derivative right to reside during any period in which the person—
>
> (a) is not an exempt person; and
>
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
>
> (5) The criteria in this paragraph are that—
>
> (a) the person is the primary carer of a British citizen ("BC");
>
> (b) BC is residing in the United Kingdom; and
>
> (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period."

12. At the hearing, there was no (remote) appearance by or on behalf of the appellant. I noted that her representatives, Lincoln Law Chambers, had been sent a Notice of Hearing with relevant join-in details for a Skype hearing and also noted that their registered office appeared to be the "Punjab Bar Council", with no telephone number provided for a UK office. In the circumstances there seemed to me no reason not to proceed in the appellant's absence.

13. Ms Everett accepted that there was an error of law in the judge's decision, as found in the Rule 24 response. The only issue, therefore, was whether or not the appellant was the primary carer of the two children. I put it to Ms Everett that, although the judge had raised credibility concerns which had not been challenged, on the basis of her findings, I could not see how the appellant could not be considered to be the primary carer of the children, and how the children could remain in the UK without the appellant, given her findings at [19] and [20], that there was no evidence to suggest that the children were residing in the UK or had ever done so and that the children lived with the appellant in Pakistan. It seemed to me that, whether or not the children's father had a far greater involvement in the lives of the appellant and their children than was being claimed, the evidence still demonstrated that the appellant was the primary carer, on the facts which were accepted by the judge. As such, when regulation 16(5) was considered together with regulation 11(5)(e), the requirements of regulation 16(5) were met.

14. Ms Everett agreed with that understanding and agreed that the decision should be re-made by allowing the appeal. She had no objection to the matter being determined on that basis, without the need for a further hearing. Accordingly I set aside Judge Monaghan's decision and re-made the decision by allowing the appellant's appeal on the basis that the requirements of the EEA Regulations had been met and that the appellant had a derivative right of residence in the UK under regulation 16(5).

DECISION

15. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and is re-made by allowing the appellant's appeal under the EEA Regulations 2016.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 22 January 2021