



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28913/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10 April 2014

Determination Promulgated  
On 11 July 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

I C

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Presenting Officer  
For the Respondent: Mr Collins, Counsel, instructed by Howe & Co, Solicitors

**DETERMINATION AND REASONS**

**Immigration History**

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 23 January 2014. However, for ease of reference, the Appellant and Respondent are

hereafter referred to as they were before the First-tier Tribunal. Therefore Ms IC is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. By way of background, the Appellant is a citizen of Zimbabwe, born on 22 April 1979, who applied for a derivative residence card on the basis of her role in the care of her son, T-G, who was born on 21 November 2006 and is a British Citizen. She lives with her son and husband, K-G, who is a bus-driver. Both she and her husband were diagnosed with, and are being treated for, HIV. Before the First-tier Tribunal it was submitted that the Appellant satisfied the requirements of paragraph 15A of the Immigration (European Economic Area) Regulations, 2006 (as amended) and that the decision was in breach of the rights of the Appellant and her family under Article 8 ECHR.
3. First-tier Tribunal Judge Flynn allowed the Appellant's appeal under Reg 15A, under Appendix FM of the Immigration Rules (on the basis of her private and family life in the UK) and under Article 8 ECHR.
4. In the grounds of application, the Respondent asserts that the Judge erred because:
  - a. He failed to give adequate reasons for findings on a material matter in that it was stated in the RL that care of T-G was shared by both parents equally and, as K-G was an 'exempt person' as defined in Regulation 15A (6) (c), the Appellant did not meet the definition of primary carer. The Judge accepted that the father's role in the care of T-G was 'not solely financial' and that he 'plays some part in looking after his son,' but despite this found that the Appellant was the primary carer.
  - b. He materially misdirected himself in law because:
    - i. He failed to appreciate that even if the Appellant was the primary carer, Reg 15A (2) (b) (iii) requires the Appellant to establish that TG 'would be unable to remain in the United Kingdom' if the Appellant was required to leave the UK. TG's father had flexible working hours; he stated during the hearing that if the Appellant was required to leave the UK, he would not go with her and he would not let their son go either. There was no documentary evidence to suggest that the father was unable to care for his son either due to his work or due to his medical condition;
    - ii. The Judge considered the provisions of Appendix FM-EX.1 as a standalone provision, contrary to the guidance in **Sabir (Appendix FM-EX.1 not free standing)** [2014] UKUT 00063 (IAC), and had therefore failed to consider the requirements of Appendix FM paragraphs R-LTRPT and E-LTRPT.
5. In granting permission, First-tier Tribunal Judge Deans stated that 'the Judge made very careful findings under Article 8. The issues raised under Reg 15A, are however, arguable. Having regard to paragraphs 38-39 of the determination, the point raised in respect of paragraph EX.1 may also be arguable but would not seem to affect the

outcome. Overall the application for permission to appeal does not appear to be directed at the outcome of the appeal but only to the issue of whether it should be allowed under Reg 15A as well as under Article 8’.

## Submissions

6. At the outset of the hearing, Mr Collins, in a bid to narrow the issues, stated that it was accepted by the Appellant that the Judge did not, under Reg 15A (2)(b)(iii), consider whether TG would be unable to reside in the UK if the Appellant was required to leave, but that this error was not material because he had made sufficient findings of fact on which to conclude that TG would be unable to reside in the UK. The father’s desire to keep his son in the UK did not affect the findings of fact made by the Judge. As to Article 8, there appeared to be no challenge to the Judge’s findings in respect of Article 8 ECHR, only under Appendix FM, and therefore the only challenge was to the route taken by the Judge to arrive at her decision.
7. Ms Isherwood stated that she did not entirely agree with Mr Collins’ analysis because the challenge was that there was a contradiction between the Judge’s findings and the RL, when the Appellant’s application was made on the basis that both parents shared responsibility for the care of TG. She therefore relied on the grounds of application, submitting the following:
  - a. In the RL, at p 2 of 5, the issue of primary responsibility was clearly raised, and the Judge failed to deal with it. At [32], the Judge found that the Appellant was TG’s primary carer; this contradicted the evidence provided at the date of application. At [33] the Judge then quoted from the RL stating that the Appellant provided “more domesticated care” whereas K-G provided “more of a financial contribution towards primary care” but the Judge went on to find that “K-G does not share the care of his son equally with the appellant and that she is the primary carer” [35]. He used the same evidence to reach the conclusion that the Appellant is the primary carer (that being the letters from T-G’s school and nursery referred to at [32]) to confirm that K-G had some responsibility for T-G’s day to day care [35].
  - b. The Judge’s account of the presenting officer’s submissions at [39] did not accurately reflect the submissions made on behalf of the Respondent recorded at [24]. The presenting officer actually submitted that ‘there was no evidence that the son would be unable to reside in the UK without his mother’ not that ‘it would be reasonable to expect T-G to live in Zimbabwe’ and therefore the way the Judge viewed the evidence affected his findings of fact which affected his Article 8 assessment.
  - c. The finding at [54] was not sufficient to allow the appeal under the Regulations or sufficient for the Appellant not to comply with the provisions of the Immigration Rules. In his findings at [56] the Judge was simply relying on the evidence in [54] and not ‘looking at the whole picture’.
  - d. At [58] the Judge misinterpreted the Respondent’s position; the Judge had quoted from the RL at [33], which confirmed that the Respondent did not

accept that the Appellant was the primary carer of T-G. The Judge focused on the financial contribution, which was not the whole of the picture.

8. Mr Collins submitted as follows:

- a. The Judge's determination was meticulous and careful; the references to the RL by the Judge were just that and Ms Isherwood's submissions ignored the findings of the Judge. At [2], he summarised the evidence, and at [3] the Respondent's case. At [7 - 15] the Appellant's evidence was given and at [16 - 23], K-G's evidence was provided. The Judge's findings of fact started at [28]; he made firm findings at [32] and he considered the evidence as to care and made a balanced decision at [35]. The assertion in the grounds that the reasoning in relation to the primary care point was inadequate was not made out. The reference to the findings of the Judge on which his decision as to primary care rested in paragraph 5 of the grounds of application was selective. At [54] the Judge made clear that childcare would be difficult to organise in the absence of the Appellant.
- b. Mr Collins accepted that the Judge had not specifically considered the requirements of Reg 15A(2)(b)(iii) but submitted that the only rational inference that could be drawn from the findings of fact was that T-G would be unable to live in the UK if his mother was required to leave the UK. Therefore, the error was not material.
- c. As to the provisions of Appendix FM, the route for the parent of a child was couched in terms of sole responsibility. As recognised by Judge Deans in granting permission, even if Judge Flynn was wrong in relation to the provisions of Appendix FM (and how much Sabir impacts where the route under consideration is the child route rather than the parent route is a matter for discussion), still the Appellant must succeed under the provisions of Article 8 ECHR, to which there had been no challenge.
- d. He submitted that the Appellant would therefore succeed under Reg 15A but if I was not with them on that, she must succeed under Article 8 ECHR as there was no challenge to allowing the appeal under this ground in the grounds of appeal.

9. Ms Isherwood had no additional submissions in reply.

10. I reserved my decision, which I now give below, together with my reasons. In the event that I found a material error of law in the determination, both Ms Isherwood and Mr Collins agreed that new evidence would need to be called as the Respondent would wish to question K-G further with regard to his medical condition.

### **Decision and reasons**

11. I deal firstly with Ms Isherwood's submissions that the Judge, in his findings, contradicted the Respondent's assertions in the RL and/or misquoted or

misinterpreted the RL and/or the submissions made by the presenting officer on behalf of the Respondent at the First-tier Tribunal hearing as follows:

12. There is no merit in Ms Isherwood's submission that the Judge's findings contradicted the RL. The purpose of an appeal is to enable each party to present the evidence and for a judge to make findings of fact based on the evidence and to make a decision on the balance of probabilities. His function is not to ensure that he does not contradict the assertions of the Respondent in the RL. Where the Judge has assessed the same or similar evidence to that which was provided to the Respondent, he is not bound to reach the same conclusions on that evidence as was reached by the Respondent in the RL, provided that he gives adequate reasons for his findings. This would be the case even where there is no additional oral evidence but applies particularly where, as here, there was oral evidence as well as documentary evidence.
13. There is also no merit in the submission that the Judge at [39] misquoted the submissions made on behalf of the Respondent (because the presenting officer did not submit that it would be reasonable for T-G to live in Zimbabwe; the presenting officer had submitted that there was no evidence that K-G would be unable to care for TG if his mother was required to leave the UK). This is because at [25] the Judge records that the presenting officer submitted that "it would be reasonable for the child to relocate to Zimbabwe". This submission is based on a failure to read the determination carefully.
14. Turning next to the first ground of application, i.e finding that the Judge's reasoning in relation to the primary care point was inadequate, I find that there is no merit in this. Again I find that the Judge did not misinterpret the Respondent's position at [58] where he stated "I accept, as did the Respondent, that the Appellant has been almost wholly responsible for the day to day care of her son..." This is not so different from his direct quote from the RL at [33], that is, that the Appellant provided "more domesticated care" whereas K-G provided "more of a financial contribution towards primary care". It is not wrong for a Judge to draw from this primary evidence the conclusion that this "domesticated" or "day to day" care has been provided by the Appellant to T-G since the day of his birth and to find "...that the Appellant has been almost wholly responsible for the day to day care of her son since he was born". It is a reasonable inference for the Judge to draw that TG therefore "...has a strong emotional dependency on his mother and that he relies on her for assistance with his daily needs, including medication." Furthermore, there is nothing inconsistent in the Judge's references to the school and nursery letters at [32] and [35]; at [32] he makes his findings of fact and at [35] he explains his findings.
15. Contrary to Ms Isherwood's submissions, I find that the Judge did not focus simply on one aspect of the care required by T-G (whether this was financial [35] or child care [54]); his findings are at [32 - 35, 39, 54 - 58], and he has considered the 'whole picture'.
16. On a reading of a determination as a whole, I find that there is no merit in the submission that the Judge's findings of fact on the issue of primary responsibility are inadequate.

17. As to ground 2, as accepted on behalf of the Appellant, having found that the Appellant was the primary carer of T-G for the purposes of Regulation 15 (2)(a) of the Immigration (European Economic Area) Regulations 2006, as amended (the Regulations), the Judge erred in failing to consider whether T-G would be unable to continue to live in the UK, pursuant to the provisions of Regulation 15 (2)(b)(iii) if the Appellant were removed. Contrary to the submissions on behalf of the Appellant, there were insufficient findings of fact to draw the inference that had the Judge directed his mind to this requirement the only logical inference was that T-G would be unable to remain in the UK. No medical evidence was supplied to establish that the only treatment regime that was effective for the father's condition was the regime he was currently on or whether adjustments could be made. There was also no evidence from his employer as to whether adjustments could be made to his hours of employment. However, this error of law is only material, and a further hearing will only be necessary, if the Appellant wishes to pursue her claim to a derivative residence card because she is, I find, entitled to a grant of leave to remain on the findings of the Judge under Article 8 directly applied as set out below.
18. As to ground three, the 'material misdirection in law' point, the challenge was under **Sabir**. The Respondent has not identified whether the provisions of Appendix FM in fact apply to the Appellant's application. Although the Judge dealt with the appeal under Appendix FM superficially (not following the approach in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)** and going straight to Appendix FM paragraph EX.1, contrary to **Sabir**), the Appellant's application was made on 11 November 2011. The decision was made in March 2012, well before the New Rules came into force. The Respondent did not deal with the Article 8 claim in the reasons for refusal letter and said that she would not do so until a charged application was made.
19. **Edgehill and Bhoyroo v SSHD [2014] EWCA Civ 402** applies. In **Edgehill**, it appears that the appellant's application was made before the new Rules came into effect, on the basis of the 14 year rule which she could not meet until after the Upper Tribunal had issued its decision in February 2013; and therefore she had also appealed on Article 8 grounds. In that case, before the Court of Appeal, on behalf of the Respondent, it was submitted that where an appeal was made on Article 8 grounds, applications made before 9 July 2012 fell to be decided under the New Rules because:
- a. Only applications under the Immigration Rules would be dealt with under the old Rules. However, all applications under Article 8 were outside the Rules and the provision that they would be dealt with under the old Rules did not apply to Article 8 claims; and
  - b. The new Rules applied because the Tribunal on an appeal under Article 8 was considering the state of affairs at the date of hearing, not at the date of the Secretary of State's decision.
20. Both Arguments were rejected by the CA. Lord Justice Laws said that if, in deciding an appeal under Article 8 there was reliance by the Tribunal on the New Rules in cases where applications were made before 9 July 2012, that would be a material error of law. Therefore, whilst it is an error of law not to follow the approach in

Gulshan and Sabir in Article 8 cases where the application was made after 9 July 2012, they cannot apply to cases in which applications were made before that date.

21. The Judge considered the Appellant's application under the new Immigration Rules when the application was made before the new Immigration Rules were in force and therefore did not apply to the Appellant's application. It follows, therefore, that he should not have applied the approach in Sabir, which applies to the new Rules and the Judge therefore misdirected himself in law. However, this error would only be material if the Judge did not go on to consider the appeal under Article 8 ECHR directly applied.
22. The only challenge to the Judge's assessment of proportionality under Article 8 directly applied was that his findings of fact as to primary care were flawed for the reasons submitted during the hearing. These submissions were unsustainable. He directed himself properly, made careful findings, which are not perverse or irrational, he gave adequate reasons and his conclusions on proportionality were not challenged and were open to him on the evidence before him. There is no basis on which to set aside his decision to allow the Appellant's appeal on Article 8 ECHR grounds.
23. On the basis of the above, a resumed hearing will only be necessary if the Appellant, who on the basis of my conclusions is entitled to a grant of leave under Article 8 ECHR, wishes to pursue her application for a derivative residence permit, which will require additional evidence as agreed by the parties at the hearing, in the absence of which there is insufficient evidence before me to find that T-G would not be able to continue to live in the UK if his mother was required to leave. In view of this, the parties were sent directions setting out my conclusions and asking the Appellant to confirm whether she wishes to pursue her application for a derivative residence permit within 10 days of the directions being sent out. It was made clear that if no response was received, I will assume that a further hearing is unnecessary.
24. The Appellant has not indicated her intention to pursue her application for a derivative residence card within the stipulated period and therefore there will not be a resumed hearing.

## Decision

25. There are material errors of law in the determination of Judge Flynn as set out above. His decision in relation to:
  - a. Regulation 13 of the EEA Regulations is set aside. I remake the decision to dismiss the appeal under Regulation 15;
  - b. Article 8 under the new Immigration Rules is set aside. I remake the decision to dismiss the appeal under the Immigration Rules.
  - c. There are no material errors of law in relation to his decision under Article 8 directly applied and his determination on this ground therefore stands.

**Anonymity**

26. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue this order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the basis of the details relating to the Appellant's child and details relating to the medical conditions of the Appellant and her husband. Unless and until a tribunal or court directs otherwise, the Appellant and her husband and son are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

M Robertson  
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT  
FEE AWARD

No fee has been paid or is payable and therefore no fee award can be made

Signed

Dated

M Robertson  
Deputy Upper Tribunal Judge