



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/52170/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 31 July 2014

Determination Promulgated
On 11 August 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HILDA CHIDIEBERE ONYEMEGBULEM

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Ahmed, A1 Immigration Services

DETERMINATION AND REASONS

1. The respondent, Hilda Chidiebere Onyemegbulem, was born on 21 March 1976 and is a female citizen of Nigeria. I shall hereafter refer to the respondent as the appellant and to the appellant as the respondent (as they were respectively before the First-tier Tribunal). The appellant had applied for a derivative residence card as

confirmation of her right to reside as a third-country national upon whom a British citizen is dependent in the United Kingdom. Her application was considered under Regulation 15A (derivative right of residence) of the Immigration (European Economic Area) Regulations 2006:

15A. Derivative right of residence

(1) A person ("P") who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who satisfies the criteria in paragraph (2), (3), (4) 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 18;

(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.

(3) P satisfies the criteria in this paragraph if –

(a) P is the child of an EEA national ("the EEA national parent");

(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and

(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if –

(a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and

(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(5) P satisfies the criteria in this paragraph if –

(a) P is under the age of 18;

(b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation –

(a) “education” excludes nursery education; and

(b) “worker” does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2).

(7) P is to be regarded as a “primary carer” of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P –

(i) is the person who has primary responsibility for that person’s care; or

(ii) shares equally the responsibility for that person’s care with one other person who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who does not have leave to enter or remain.

(8) P will not be regarded as having responsibility for a person’s care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person’s care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1)

2. The appellant’s application was refused by a decision of the respondent made on 25 January 2013. The appellant appealed to the First-tier Tribunal (Judge Henderson) which, in a determination which is dated 16 April 2014, allowed the appeal. The respondent now appeals, with permission, to the Upper Tribunal.
3. The appeal turns on a single issue. The respondent asserts in the grounds of appeal that the judge had “failed properly to consider the requirements of Regulation 15A. An unwillingness by a child’s father to assume responsibility is not, by itself, sufficient”. The respondent asserts that the appellant had not demonstrated that the child (a British citizen) would be unable to remain in the United Kingdom with her father if the appellant was required to leave.
4. I find that the appeal should be dismissed. I have reached that conclusion for the following reasons. Judge Henderson has carefully considered the evidence which was before her. I reject the submission of the respondent that she found only that the father of the child was unable to look after the child should the appellant leave because he had expressed an unwillingness to do so. The judge’s findings went beyond that, in particular at [27]:

I accept on the evidence before me that the appellant is the primary carer of a British citizen. She has a young child who is totally dependent on her mother for all her immediate needs. I do not accept that the child’s father is in a position to assume care

and responsibility for the child. I would also be deeply concerned about the child being forced into the care of a parent with whom she has not lived. I note that the child's father does have a separate married life in this country. He is also working. I accept that he is not in a position to provide daily care for his child and that in any event it is not in her best interests given her age to be deprived of the daily care of her mother. I conclude that the child lives with her mother and spends the majority of time with her mother and makes all the day-to-day decisions regarding her health and care. I know that she is also financially responsible for the child although I can see no reason why the child's father should not contribute in providing for her in the future.

5. The child in question was born on 12 November 2012. The father of the child is married to a British citizen and has very limited contact with the child (two hours on a Sunday morning). I find that Judge Henderson was fully aware of the provisions of Regulation 15A. The judge noted that the child's parents share parental responsibility [26], but as Mr Diwnycz for the respondent acknowledged at the hearing, the very limited contact which the father has with the child does not come close to providing for a sharing of primary responsibility for the child's care. This was clearly a case in which, in addition to being unwilling to assume any care responsibility for the child, the judge considered that leaving the child in the care of the father would be wholly impractical and contrary to the child's best interests. The Regulation (applying the ECJ judgment in *Zambrano* (C-34/09)) does not exclude the circumstances of the appellant as found by the judge in this instance. It was certainly open to the judge to find that, should the appellant be required to leave the United Kingdom, the child would for all practical reasons even if not in law, be compelled to go with her. The determination is legally sound and cogently reasoned.
6. In the circumstances, I dismiss the appeal.

DECISION

7. This appeal is dismissed.

Signed

Date 8 August 2014

Upper Tribunal Judge Clive Lane