



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/03503/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 January 2015

Determination Promulgated  
On 10 February 2015

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MRS S N S  
(Anonymity Direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Chipperfield of counsel instructed by Visa Legal Ltd  
For the Respondent: Mr T Melvin a Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Jamaica who was born on 2 November 1978. Following a hearing on 13 November 2014 where I sat with Mrs Justice Andrews we found that there were errors of law in the determination of First-Tier Tribunal Judge Kaler (“the FTTJ”) who had dismissed the appellant’s appeal against the respondent’s decision of 19 December 2013 to refuse to grant her a derivative residence card as the primary carer of a British child under the provisions of Regulation 15A of the Immigration

(European Economic Area) Regulations 2006 (“the 2006 Regulations”). We set aside her decision and directed that the appeal be reheard in the Upper Tribunal with oral evidence. The findings of fact made by the FTTJ were not preserved. Our reasons and conclusion are set out in a Decision and Directions dated 14 November 2014 which is set out in the Appendix to this Determination.

2. It is in these circumstances that the appeal comes before me for rehearing. The appellant has changed her solicitors. She attended the hearing together with her two daughters and her son although he stayed outside the hearing room. I have all the documents which were before the FTTJ together with a supplementary bundle from the appellant submitted with a letter of 23 December 2014, a request from the appellant’s solicitors to extend the grounds of appeal to encompass Article 8 grounds, a skeleton argument prepared by Mr Chipperfield, JM v SSHD [2006] EWCA Civ 1402 and Ahmed (Amos; Zambrano; reg 15A (3) (c) 2006 EEA Regs) [2013] UKUT 00089 (IAC). Mr Melvin put in written submissions accompanied by a copy of a standard form of “Statutory Declaration of Acknowledgement of Parentage” and an extract from the Home Office computer records relating to the appellant. During the course of the hearing I was handed a small bundle of copy photographs showing members of the appellant’s family, a printout of Home Office records relating to the appellant and the appellant’s son’s British passport. Copies of the identity page in the passport were taken and the original returned. Neither representative objected to the production of these documents.
3. Mr Chipperfield informed me that the witness statements from the appellant and her two daughters in the latest appellant’s bundle were intended to replace earlier witness statements. It was considered that these contained errors made by former solicitors which needed to be corrected. He asked whether the respondent was challenging the fact that the appellant’s son was a British citizen. Mr Melvin accepted that for the purpose of the proceedings before the Tribunal he should be treated as a British citizen.
4. Both representatives agreed that the issue at the core of this appeal was whether, if the appellant had to return to Jamaica, his natural father could look after his son. Initially, Mr Chipperfield accepted that the conclusion would be the same whether it was reached under Regulation 15A or on Article 8 human rights grounds. However, during the course of his submissions he withdrew this and instead submitted that Article 8 grounds should be considered if the appeal failed under Regulation 15A.
5. I heard oral evidence from the appellant and both her daughters. Their evidence is set out in my record of proceedings. They were examined in chief, cross examined and, except for one of the daughters, re-examined. I asked some questions for the purpose of clarification. Mr Melvin’s cross examination of all three witnesses was lengthy and detailed.
6. Mr Melvin relied on his skeleton argument and the refusal letter. The appeal turned on Regulation 15A and the question of whether if the appellant went back to Jamaica

there was anyone else who could look after her son. His main submission was that his father could look after him. The only other possibility was his grandmother but Mr Melvin submitted that the evidence about her was unclear and unreliable. It was not apparent whether she lived in the UK or the USA and whether she saw him on a regular basis.

7. Mr Melvin said that the respondent did not accept that Mr M was the natural father of the appellant's son. However, for ease of reference I will refer to the child as the son of his father (Mr M) until such time as I determine this issue. I asked Mr Melvin why it was suggested that the father would be the person to look after the son if he was not in fact his natural father. Mr Melvin said that the respondent's position was that, whatever their biological status, the father could look after him.
8. Mr Melvin submitted that I had not been told the correct and truthful position by the appellant or her daughters. There was a lack of documentary evidence to corroborate their claims. There was little evidence to show that there was any lengthy relationship between the father and the son. When the appellant first registered the birth of her son his father was not named. It was only approximately 2 ½ years later that the application was made to add the name of the father. The appellant had failed to give any persuasive reason for her claim that after she and the father had lived apart without any contact for such a long time he would contact her and name her as his next of kin when he was seriously ill in hospital. It was not credible that he would suddenly wish to give his name to his son or to obtain a British passport for him. The father had not provided a statement or given evidence for the appellant.
9. Mr Melvin argued that if the father had made the passport application for his son he would have had to state that he was accepting parental responsibility for him. It was not likely that if the appellant was so determined to establish her status in the UK she would not have made an application during the period she was the spouse of an EEA national. Mr Melvin accepted that the appellant had not attended the appeal hearing in 2008 and that the appeal was determined on the papers.
10. His contention was that the daughters had been primed as to what to say by their mother. He asked me to find that none of the witnesses were credible in relation to their evidence as to the relationship and contact with the father. There was no evidence to support the contention that Social Services had not made any effort to obtain payment from the father to support his son or that he was incapable of providing such support. The appeal stood or fell on the basis of my findings in relation to Regulation 15A and Article 8 did not apply. I was asked to dismiss the appeal.
11. Mr Chipperfield submitted that the issues were narrow and clear. The appeal turned on the credibility of the appellant and her daughters. JM was still good law and the appeal should be considered on Article 8 human rights grounds as well as under Regulation 15A if the latter failed. The individual referred to as the daughters'

grandmother was not the son's grandmother. I was asked to find that all three witnesses were credible and to allow the appeal.

12. I reserved my determination.
13. I find that this appeal turns on the credibility of the appellant and her daughters. One of the main factors advanced by Mr Melvin in support of his contention that they were not credible was the lack of documentary evidence to support what they said. The appellant relies on her latest bundle and it is true to say that this contains little supporting documentary evidence. The letter from Lambeth Council confirms the financial support being provided for the appellant and her children but says nothing relevant to the relationship between the son and his father. Only one of the letters of support from friends says anything about the father. It states that he plays no father role in his son's life.
14. The Home Office records make reference to a reported domestic incident with a man whose name is not the same as the father in which it is said that the appellant was then pregnant and that the named individual was the father of her child. The appellant says that this was a mistake and that the individual was neither her partner nor the father of her son. I note that the Home Office records also state that checks were made with Lambeth Registry Office and confirmation obtained that re-registration of birth did take place to add the name of the father to the original birth certificate. Mr Melvin has conceded for the purpose of proceedings before the Tribunal that the son is a British Citizen. His mother, the appellant, is not a British citizen and the son could not have been registered as a British citizen unless his father was a British citizen.
15. The appellant has provided a detailed explanation as to why the father's name was not added to the son's birth certificate until approximately 2 ½ years after his birth. She has also explained why she did not make an application for leave to remain as the spouse of an EEA national during the period when she was married to a Frenchman. She said that she did not believe that she could do so because he was not employed. These explanations are not inherently implausible and must stand or fall with my assessment of her credibility as a whole. There is no DNA evidence to show paternity although the appellant's evidence was that she had not been in contact with the father for some time and that he had health and alcohol-related problems.
16. I found the appellant and her daughters to be clear and on the whole consistent witnesses. Mr Melvin conducted searching cross examinations. The elder daughter was an impressive witness particularly in her ability to remember precise dates. The younger daughter was vaguer. All three witnesses gave broadly consistent evidence in answer to questions about family relationships including some about more distant relatives in whom the daughters had little interest. Overall I find that their evidence about important matters was consistent and that inconsistencies were minor. I detected no evidence of the daughters having been coached in any way. On the

contrary, I gained the strong impression that they were speaking from their own recollections.

17. It is on the face of it strange that the appellant would have parted from the father before the birth of their son because of the consequences of his drinking, had no contact with him for a considerable time and then, when he was seriously ill and in hospital for a kidney transplant, that he would name her as his next of kin and she would go to see him taking with her the son he had never seen. Her explanation was that nobody else had been to see him and she felt, after the lapse of time, that he should see his son and have an opportunity to build a relationship with him. The fact that these hopes did not bear fruit does not make it any less plausible that the appellant would have tried or that they would have cooperated to add the father to the birth certificate and that he would have applied for his son's passport.
18. Looking at all the evidence in the round and accepting that there are factors which militate both for and against the credibility of the appellant and her daughters I have come to the conclusion that they are credible witnesses. I accept their evidence in all material respects.
19. Paragraph 15A of the 2006 Regulations provides;

“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)."

20. I find that the father is the natural father of his son who was born on 31 December 2008. He has always lived with the appellant. He has never lived with his father. The appellant and the father separated when she was three months pregnant. They separated because of difficulties within the family caused by the father's drinking. The father did not see or support the son between December 2008 and April 2011. In April 2011 the father was seriously ill and had a kidney transplant. At his request the appellant was contacted and she took her son to see his father in hospital. The two of them agreed that the father should be added to the birth certificate. An application was made for this to be done and the birth certificate was amended. The father applied for and his son was issued with a British passport. This was sent direct to the appellant. Subsequently there was occasional contact between the father and his son always in the presence of the appellant. The appellant was concerned because the father started drinking again soon after the kidney transplant. The father was invited to his son's birthday party at the end of 2011 and put in a brief appearance. He has not seen the appellant or his son since then. The appellant asked him to assist with the appeal hearing but did not hear anything further from him. The appellant has heard and believes that the father is not working and is suffering repeated ill-health after years of heavy drinking. The appellant's daughter saw him although not to speak to and her evidence was that he appeared to be in very poor health and having difficulties walking.

21. I find that the appellant is the primary carer for her son. His father has never had any responsibility for his care. I find that his lack of contact, lack of interest, drinking habits, long-term ill-health and unemployment means that he would be neither willing nor able to look after his son if the appellant was removed from the UK. I accept that the elder daughter would, as she said in her evidence, be unable to look after him. The younger 17-year-old daughter was not even asked whether she could do so and I find that she could not. The only other possible candidate, suggested by Mr Melvin, is the daughter's grandmother who is not a blood relative of the son. She spends part of her time in this country in part in the USA. The evidence falls far short

of establishing that there is any possibility of her being either willing or able to look after him. I find that the son is a British citizen and an EEA national. He is under 18 years of age.

22. I find that to the standard of the balance of probabilities the appellant has established that she meets the requirements of Regulation 15A of the 2006 Regulations.
23. I find that in the light of JM and Ahmed Article 8 human rights grounds can be considered, as Mr Chipperfield submits. However, as I have allowed the appeal under the 2006 Regulations I do not consider it necessary to do so.
24. Whilst I have not been asked to make an anonymity direction I consider that such a direction is appropriate and necessary to protect the interests of the son and the appellant's daughters. I make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or any member of her family.
25. The decision of the FTTJ having been set aside I remake the decision and allow the appellant's appeal under the 2006 Regulations.

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Signed

Date 7 January 2015

Upper Tribunal Judge Moulden



## Appendix A

1. The appellant is a citizen of Jamaica born on 2 November 1978. She has been given permission to appeal the determination of First-Tier Tribunal Judge Kaler (“the FTTJ”) who dismissed her appeal against the respondent’s decision of 19 December 2013 to refuse to grant her a derivative residence card as the primary carer of a British child under the provisions of Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”). The application was considered on the basis of the appellant’s claim that she was a third country national upon whom a British citizen was dependent in the United Kingdom in line with the ECJ judgment in **Ruiz Zambrano** (C34/09).
2. The respondent took the view that the appellant had not established that her son, K, who was born on 31 December 2008, would be unable to remain in the UK if she was forced to leave. She had not provided evidence as to why his father would not be in a position to care for him.
3. The appellant appealed and the FTTJ heard her appeal on 14 August 2014. Both parties were represented. The appellant gave evidence, as did one of her daughters. The FTTJ dismissed the appeal both under the 2006 Regulations and on Article 8 human rights grounds. She found that; “I am not satisfied on the evidence before me that the father is an unsuitable person to look after K and so K could therefore live with the father in the UK. K would not be required to leave the country if the appellant were removed.” The appellant was not entitled to derivative right of residence under the 2006 Regulations as there was another parent who could look after K.
4. The appellant applied for and was granted permission to appeal to the Upper Tribunal. It was submitted that the FTTJ made an error of fact which either was so important that it amounted to an error of law, or else gave rise to an error of law in that the misunderstanding of the appellant’s evidence was taken into account by the FTTJ in reaching the conclusion that there were inconsistencies between the appellant’s oral and written evidence as to whether she had lived with K’s father and whether they were living together when he was born. The first, second and third grounds address differing aspects of this alleged error. The grounds also argue that the FTTJ erred in the conclusion that the appellant’s circumstances were not exceptional so as to merit Article 8 consideration outside the Immigration Rules and failed to take into account the interests of the appellant’s two daughters.
5. Mr Osadebe relied on and developed the grounds of appeal by reference to the appellant’s bundle of documents which was before the FTTJ.
6. Ms Kenny submitted that there was no error of law. If there was, it was not material. She argued that the fact that K’s birth was originally registered with no father named, but subsequently re-registered by both parents specifically in order to

include the father's name on the birth certificate, indicated that the father was more involved in his son's life than the appellant had suggested.

7. Mr Osadebe asked us to find that there was an error of law, set aside the decision and remake it without preserving any of the findings of fact. We reserved our determination.
8. We find that the FTTJ made an important error of fact amounting to, or at the very least giving rise to an error of law. In paragraph 9 she said; "The appellant stated at the hearing that she had never lived with K's father. However she said in her statement that they did live together for two years before they married (paragraph 17). It would therefore seem that they lived together when K was born. They probably parted shortly afterwards, as the parents' addresses on the birth certificate are different. I accept that they have not lived together for several years."
9. This conclusion arises from a misreading of the appellant's witness statement. In paragraph 17 the appellant said that whilst living in the UK she met a named French national (AM). They lived together for two years and then married in a church in Camberwell in 2010 (i.e. when K was around 2 years old). The marriage broke up and they separated. However, in paragraph 16 the appellant said that K's father was a British citizen and in paragraph 21 that K was also a British citizen. Throughout K is referred to with the family name M, which is the same as the name of his father given on his birth certificate. We accept that the birth certificate issued on re-registration raises issues which also need to be considered when compared with the original birth certificate.
10. Whilst the appellant's witness statement perhaps could have been clearer, we find that the appellant was not saying that AM, a French national, was K's father. In any event, as K was born in 2008, the FTTJ's findings that the couple parted shortly after his birth (having lived together previously) make no sense if she mistakenly believed the appellant to have been referring to AM as K's father in paragraph 17 - the appellant and AM lived together for two years after K's birth and before they were married. The FTTJ has somehow muddled up the evidence. The appellant's witness statement is not inconsistent with her oral evidence. The appellant was consistent in her evidence that M was the father of K and that they had never lived together.
11. We find that this is an important error of fact which impinges both on the central issue in the appeal and on the question of the appellant's credibility. The conclusion that the appellant had given inconsistent evidence is likely to have informed the FTTJ's conclusion that the appellant had failed to show that K's father could not look after him if she had to leave the country. We cannot assume that she would have reached the same conclusion if she had not fallen into error on this point. The finding that K's parents had lived together for some time before he was born, and parted shortly after the birth might indicate that the nature of the relationship was more durable than the appellant had suggested in her evidence, and an inference could be drawn from this that M would be more likely to take an interest in the child of the

relationship. Both that, and the supposed inconsistency in the appellant's evidence are likely to have had a significant bearing on the FTTJ's rejection of the appellant's claim that M had little to do with K and her finding that he has had "meaningful contact" with his father and continues to do so.

12. There is in terms no clear conclusion as to whether the appellant is or is not a credible witness. However the muddled findings in paragraph 9 may have influenced the FTTJ in finding inconsistencies elsewhere in her evidence that we find difficult to discern.
13. Whilst it is not raised in the grounds of appeal, we cannot see why the FTTJ reached the conclusion that she did in paragraph 10 of the determination that the appellant had been inconsistent about the amount of contact that K's father M had with K. It is not clear why the appellant's evidence that his father "hardly ever sees" K and certainly does not make any financial contribution towards his upkeep is alleged to be inconsistent with her evidence that he does "sometimes" telephone her (that is, the appellant), and that she and M may have met up and talked "on a few occasions" whilst K was present. Taken together with the evidence there was one recent birthday party for K at the father's house, and that the father made arrangements with the appellant to see K but then did not always turn up, it is not obvious to us that the appellant's evidence about the extent of M's contact with K is inconsistent. The FTTJ's reasoning is not assisted by the apparently self-contradictory conclusion in the paragraph 11 that there was "regular intermittent" contact between K and his father. One would not usually refer to intermittent (i.e. sporadic) contact as "regular", unless perhaps as an obscure way of describing contact once or twice every year but on regular occasions, say, Christmas and on the child's birthday. It does not appear that this is what the FTTJ had in mind, and in any event the evidence does not bear that interpretation.
14. We find that there is an error of fact which amounts to an error of law and that it is material. The FTTJ might well have reached a different conclusion but for the mistake.
15. The FTTJ did not make an anonymity direction. Whilst we have not been asked to do so we consider that it is appropriate and necessary to protect the interests of K and the appellant's other children. We make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellants or any member of her family.

## **Decision**

16. Having concluded that the FTTJ erred in law we set aside her decision. The findings of fact are not preserved. There was insufficient time for us to re-hear the appeal with oral evidence. We direct that the appeal be reheard in the Upper Tribunal.