Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05593/2014

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**
On 29 September 2014 **On 29 September 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Victoria Omobolanle Hussain
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr D Adams, instructed by TW Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Victoria Omobolanle Hussain, date of birth 30.12.82, is a citizen of Nigeria.

2. This is her appeal against the determination of First-tier Tribunal Judge Lal promulgated on 1.8.14, who dismissed her appeal against the decision of the respondent, dated 6.1.14, to refuse her application made on 16.10.12 for an EEA derivative residence card entry clearance pursuant to regulation 15A of the

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Immigration (EEA) Regulations 2006, as amended. The Judge heard the appeal on 30.7.14.

3. First-tier Tribunal Judge Page granted permission to appeal on 19.8.14.

4. Thus the matter came before me on 29.9.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Lal should be set aside.

6. The relevant background to the appeal is that the appellant lives with her three children and Mr Gbeminija Ayeni, a British citizen, and the father of the appellant's child Queen Comfort Ayeni, date of birth 18.5.09, a British citizen by reason of her father's nationality. In 2012 the appellant changed her name from Evy Sophie Ayeni, the same surname as Mr Ayeni. For an offence of making a false identity document, Mr Ayeni was sentenced to 42 months imprisonment on 8.11.11. Taking into account he served 221 days on remand prior to sentence, he was released on licence on 21.8.12 and continues to live with the appellant.

7. The application was refused on two grounds: (a) that the appellant has failed to demonstrate that the child would be unable to remain in the UK if the appellant were forced to leave; and (b) that the appellant failed to prove that she is the child's primary carer.

8. Judge Lal found that the appellant had failed to demonstrate that she was the child's primary carer as defined by the regulations. The judge found that the family lived together as a family unit and rejected the claim that he did nothing, noting that at the hearing he was looking after the children. The judge considered but placed little weight on the documents submitted in support of the contention that the appellant was the primary carer, noting that it would not be unusual for a school to have one parent as the primary contact. The appeal was dismissed.

9. In essence, the grounds complain that the First-tier Tribunal Judge failed to give adequate consideration to the totality of the evidence, including the school letter, the surgery letter, and other documents purporting to confirm that the appellant is the primary carer of the child. It is also submitted that the judge made no reference at all to the probation service letter, dated 29.7.14, confirming details of Mr Ayeni's licence following release from custody. It is submitted that the circumstances render Mr Ayeni an unsuitable person to be a primary carer.

10. In granting permission to appeal, Judge Page considered that, as there is no reference to the probation service evidence in the determination, it is arguable that the First-tier Tribunal Judge made an error of law.

11. For the reasons set out herein, I find that the First-tier Tribunal Judge did not make an error of law and that there is no merit in this appeal.

12. The relevant provisions of the regulations are as follows:

> "**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)."

13. The appellant's case was that she was the primary carer and that Mr Ayeni did absolutely nothing when he came home from his part-time work. She relied on a letter from the school and one from her GP surgery as evidence that she and not Mr Ayeni is the primary carer. Neither letter demonstrates any such thing. The school record that the appellant is the primary carer is not determinative. In any event, I note the school states that they have had no dealings with either parent. The surgery letter merely states that they have no record showing Mr Ayeni accompanying the child on visits to the surgery. Another document from the London Early Years Foundation has no relevance as it is dated 28.5.12, several months before the application in October 2012.

14. In her statement dated 23.7.14 the appellant claims that at the time she made her application Mr Ayeni was in prison. That is not accurate. He was released on 21.8.12 and her application was made on 16.10.12, some two months later. Mr Adams seems to have been unaware of this when he submitted to me that he was in jail and could not look after the child. The truth was he had rejoined the family unit.

15. Having taken into account the documentary evidence, the First-tier Tribunal Judge made a finding of fact that the appellant and Mr Ayeni live together with the children as a family unit and rejected the submission that he made no contribution. In the circumstances, the judge was not satisfied that the appellant is the primary carer of the child. That was a conclusion to which the judge was entitled to come, and for which cogent reasons have been given. Mr Ayeni was an exempt person under the regulations and thus if she shares the parental responsibility equally with him, she is not the primary carer.

16. Although there is no reference in the determination to the letter from the probation service, I fail to see how that would or could change the outcome of the determination. In addition to demonstrating that she is the primary carer, the appellant also has to prove that the child would be unable to reside in the UK or another EEA state if she were required to leave.

17. The evidence produced to the First-tier Tribunal does not support that. Mr Ayeni is the father of the child and a British citizen. Neither he nor the child can be required to leave the UK. There is no practical reason demonstrated in the evidence why he cannot look after the child if the appellant is required to leave.

18. It is important to point out that this assessment does not require the appellant to leave; it is merely an assessment as to whether she has a derivative right of residence in the UK because she needs to be present to look after the child. That Mr Ayeni may be subject to licence following his sentence, which in any event is now likely to have expired, does not render him unable to look after the child. To follow that logic all ex-felons would be unsuitable to look after children. That cannot be right. I note from

§5 of the determination that the appellant has also criminal convictions for identity offences. On the basis of Mr Adams' submission, she too would be unsuitable to be the child's primary carer.

19. Mr Whitwell referred me to Hines v LB Lambeth [2014] EWCA Civ 660, where the Court of Appeal considered the issue of the welfare of the child in relation to regulation 15A(4A(c). It stated that the reviewer has to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. It is said that to all intents and purposes this is answering the question as to whether the child would, as a matter of practicality, be unable to remain in the UK if the non-EU citizen were required to leave. It was suggested that placing a child in foster care would so impair the life of the child that it equated to being compelling to leave. Lord Justice Voss stated, "I do not, however, think that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected to so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK."

20. The regulations contain no requirement of suitability and there is no evidence that Mr Ayeni is unsuitable to look after a child, even though that is a term used in the Secretary of State's European Operational Policy Team's guidance document dated 12.12.12. There reference is made by way of example of unsuitability to child protection issues, or because of a particular conviction would prevent the child being placed with him, or mental or physical disabilities that would prevent him from caring for the child. That he simply states he doesn't want to is insufficient, neither are a lack of financial resources.

21. The appellant does not need to be present in the UK to enable the child to remain, or in the way it is expressed in the regulations, the appellant has failed to demonstrate that the child would be unable to reside in the UK or in another EEA state if the appellant were required to leave. I find no evidence to suggest that Mr Ayeni would not be a responsible parent. It is clear that he could look after the child and clearly has demonstrated his support for the appellant by looking after the children whilst they were at the First-tier Tribunal appeal hearing. The onus is on the appellant to demonstrate that her removal would effectively force the child to also leave to be able to continue to be cared for. It is clear the appellant failed to discharge that burden.

22. In the circumstances, it is clear that the decision of the Secretary of State was correct and the judge was right to dismiss the appeal on the evidence before her.

23. The grounds also alleged that the judge failed to consider article 8 ECHR. However, article 8 does not arise, as there was no removal decision. The status quo continues. As the refusal decision explained, in the event of the Secretary of State taking steps to remove the appellant she will have a separate opportunity to make representations at that stage. Mr Adams sought to rely on JM (Liberia) [2006] EWCA Civ 1402, to suggest that once it is raised the Tribunal is required to address an article 8 issue.

However, that case turned on the interpretation of section 84(g) of the Nationality, Immigration and Asylum Act 2002, which provides as a ground of appeal that "removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations," (under the Convention). Whilst there had been no removal decision in that case, the refusal decision stated that it had been concluded that the appellant's removal was not contrary to ECHR obligations. That is plainly not the case here; there is no removal decision and the facts of JM are very different to the present case.

24. In the circumstances there was no error of law in not addressing article 8 ECHR rights in the decision of the First-tier Tribunal.

25. In the circumstances, I find that if there was an error in failing to reference or take into account the letter from the probation service, it was not material to the determination. I also find that there was no disclosable error in relation to the judge's findings as to primary carer. In essence, the grounds of appeal are no more than a disagreement with the judge's findings.

Conclusion & Decision

26. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup