



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/06756/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 7 February 2020**

**Decision & Reasons Promulgated
On 10 February 2020**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MHB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A A Gbaja (sponsor/McKenzie Friend)

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal against the decision of the Secretary of State 26 September 2018 refusing the appellant's application for a derivative residence card confirming that she was the primary carer of a British citizen.
2. The decision of the First-tier Tribunal promulgated on 15 May 2019 was set aside following a hearing before me on 20 August 2019

Anonymity

3. Such a direction was made previously and is repeated below because this appeal concerns minor children, one of whom has additional vulnerabilities.

Procedural Background

4. Following the error of law hearing, directions were made which included that the appellant was to serve evidence of her child N's paternity and residence in the UK on the respondent and Upper Tribunal prior to the next hearing date.
5. This matter was twice adjourned at the request of the respondent pending the judgment in *Patel* [2019] UKSC 59. In the interim I directed the respondent to consider the relevance to the instant case of the judgment of the Administrative Court in *K* [2018] EWHC 1834 (Admin), regarding which the Secretary of State had withdrawn her appeal.
6. On 9 January 2020, Ms Isherwood replied on behalf of the Secretary of State and confirmed that DNA evidence had been provided showing that Mr Gbaja (the German national) is the father of N; that the child was also a German national and was not being discriminated against and that as Mr Gbaja acquired permanent residency on 11 March 2010, with N being born on 19 April 2016, it was accepted that he met the requirements to be considered British. The remaining issues for the respondent was whether the appellant was the primary or joint carer of N, the impact on the child of the removal of the appellant and whether the child would be compelled to leave the UK.

The hearing

7. Mr Gbaja, the appellant's partner and father of N attended the hearing as a McKenzie Friend. He was familiar with the decision in *Patel* and he explained in straightforward terms why N and indeed their younger child would be compelled to leave the United Kingdom if the appellant had to leave. In short, N was aged 3 and had speech and language delay and his sibling was aged just 6 months old and was still being breastfed. The appellant is their primary carer and looks after them "24/7." Mr Gbaja is studying for an LLM at the University of London and attends classes on Mondays, Wednesdays and Fridays, followed by long sessions in the library. On Tuesdays and Thursdays, he is undertaking work experience in a Citizens Advice Bureau, providing legal advice to the public for up to 10 hours a day. He explained that if the appellant were to leave the UK, he would be unable to cope with looking after the children, completing his studies and obtaining legal experience and therefore there would be no option but for the children to accompany their mother to Nigeria. It was not in the best interests of the children to leave the UK, particularly as N's treatment for his special needs would be undermined.

8. Upon hearing that evidence, much of which was supported by documentary evidence Mr Tarlow stated that he was persuaded by the evidence but as he was unable to change the respondent's decision, he invited me to "dispose" of the appeal in an efficient manner.
9. At the end of the hearing I announced that the appeal was allowed.

Decision on remaking

10. There is no challenge by the respondent to the facts. It is the case that the appellant's minor British citizen children will be compelled to accompany her to Nigeria should she be removed. The evidence before me is that the sponsor is unable to care for them because of his studies and work. Furthermore, the younger child is still being breastfed and N has special educational needs. It is overwhelmingly in the best interests of the children to remain in the United Kingdom and to continue to reside with both parents. There would also be a detrimental impact on the children were the appellant to leave them in the UK while she returned to Nigeria, given that the extent of the care she provides to them.
11. In the light of the judgment in *Patel*, the facts demonstrate that the appellant is the primary carer of both children and that she has a far greater role in their lives owing to their young ages as well as the fact that the sponsor is busy with his career for the vast majority of the time. Therefore, the children have the relevant relationship of dependency with the appellant. The element of compulsion has clearly been demonstrated by the fact the evidence that the children would be forced to go to Nigeria with the appellant if she were to be removed from the UK.
12. The appeal is allowed.

Notice of Decision

The appeal is allowed under the Immigration (EEA) Regulations 2016.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is 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 appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 7 February 2020

Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award of any fee which has been paid or may be payable for the following reason. The evidence of paternity and compulsion which was the basis of this allowed appeal, was not available to the respondent at the time of the decision in question.

Signed:

Date: 7 February 2020

Upper Tribunal Judge Kamara