Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06541/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 5 November 2018	**On 19 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MS SANDRINE [M]
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr T Lindsay, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the respondent's refusal to grant her a derivative right of residence in the United Kingdom pursuant to Regulation 15(4)(a) of the Immigration (European Economic Area) Regulations 2006 and also purporting to dismiss an Article 8 appeal with which the First-tier Tribunal was not seised.

2. The appellant neither appeared today nor arranged any representation: I put the appeal to the end of my list, but by 2.30 pm she still had not appeared nor explained

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her absence. I conclude that the appellant has no further interest in these proceedings, but since permission to appeal was granted, I shall deal briefly with the basis on which it comes before me.

Background

3. The appellant claims that she arrived in the United Kingdom from Cameroon as a pregnant teenager when she was about 17 years old, in July 1999. In August 1999 she unsuccessfully claimed asylum. In February 2000, she gave birth to a son; the birth certificate did not initially name the child's father but was later amended to do so. The child's father is another Cameroonian man in the United Kingdom. Both partners claimed asylum but the appeals were dismissed. The appellant and her partner were appeal rights exhausted in December 2006.

4. In March 2006, the couple had a second child, with the father's name recorded on the birth certificate. The evidence is that the appellant has joint responsibility for the child with the child's father who is her partner and who is an exempt person under Regulation 15A(6) of the 2006 Regulations.

5. The appellant's circumstances and those of her partner were considered in the legacy exercise in 2004 but the respondent did not consider that there was a reason to grant leave to remain to either of them. Indefinite leave to remain was refused for them both in October/December 2010.

6. The appellant is a foreign criminal as defined in section 32 of the UK Borders Act 2007. On 16 November 2010, she was reprimanded by the police for using threatening, abusive or insulting words or behaviour with intent to cause fear or provoke violence. On 7 July 2011, she was sentenced to 18 months' imprisonment on four counts of making dishonest representation to obtain benefits and possession or control of a false or improperly obtained identity document belonging to another person.

7. The sentencing judge noted that the appellant had claimed social services benefits in the name of another person and had received almost £200,000, all of which had been spent and no restitution or compensation order was possible. She had used a false passport and a false identity. The public order caution was not taken into account in sentencing her. There was no alternative but to impose a custodial sentence.

8. The appellant served half of her sentence and was released from prison on 10 January 2012, on licence conditions.

9. On 3 May 2011, the appellant and her partner applied for the naturalisation of their first child, who had been in the United Kingdom since her birth in February 2000. The application was successful. The elder child is now a British citizen.

10. On 15 September 2011, the respondent served the appellant with Notice of Liability for automatic deportation. The appellant responded, and her response included an application for EEA residency as the parent of a British child. She made two further

applications on the same basis, on 28 November 2011, 15 June 2012 and 5 November 2012: all three applications for EEA residence as the primary carer of her two children were refused. The appellant's partner was successful in the November 2012 joint application (based on them both being the children's primary carers): he has an EEA residence card on that basis.

11. On 31 October 2012, the appellant was again served with notice of liability for automatic deportation. On 29 November 2012, the respondent signed a deportation order which was served on the appellant on 5 December 2012. The appellant appealed, and the respondent agreed to reconsider the decision. The appellant's sentence expired on 7 January 2013.

12. On 3 August 2013, the appellant was again reprimanded by the police for common assault. On 12 August 2013, the respondent asked for further details of her family life in the United Kingdom, and the appellant responded on 17 September 2013. On 2 February 2015, the respondent made another deportation decision with no in-country right of appeal. The November 2012 decision was re-served at the same time: that also carried no right of appeal. The appellant objected to both decisions and that was treated as an application for leave to remain on human rights grounds.

Refusal letter

13. In his refusal letter on 8 September 2015, the respondent maintained his deportation decision, refused the appellant a derivative right of residence, and refused to grant leave to remain based on the appellant's Article 8 ECHR family and private life submissions.

14. The respondent considered that the appellant's removal was conducive to the public good and required by the public interest, finding that it would not be unduly harsh either for the two children to return to Cameroon with the appellant, or for her partner to look after them in the United Kingdom without her.

15. Nor was it accepted that there would be very significant obstacles to the appellant's reintegration in Cameroon, where she had lived for more than half her 33 years. There were no very compelling circumstances to outweigh the public interest in deportation.

16. The appellant appealed to the First-tier Tribunal.

Asylum determination (2006)

17. The decision of the First-tier Tribunal on the appellant's asylum claim is the *Devaseelan* starting point for the First-tier Tribunal in the present appeal. The Judge in 2006 found the appellant's personal account to be inconsistent and lacking in credibility, either as to her history or her reasons for leaving the country. He did not believe, even to the lower standard appropriate for protection claims, that the appellant's father had been a notable figure in Cameroon nor that she was at risk on return as his daughter.

18. The Judge found that there was no credible evidence that the appellant had ever been arrested, nor that she was a wanted person in Cameroon, though he accepted that it was 'a regime endemically intolerant of political opposition, in which the security services largely ignore the human rights of government critics'. The appellant's account of a wealthy background with servants was inconsistent with other evidence and internally inconsistent with her account. The appellant had left Cameroon openly on a scheduled flight, the Judge finding that she had used her own passport to do so. She had failed to keep in touch with the United Kingdom immigration authorities which 'did nothing to promote the credibility of her claim to be living in fear of persecution'. The appellant's child and partner were both citizens of Cameroon and there was no reason why they should not return and live together in Cameroon.

19. The First-tier Judge dismissed the appeal. The appellant does not seem to have challenged that decision and the negative credibility finding stands.

First-tier Tribunal decision

20. The First-tier Judge in 2016 treated the 2006 decision as the starting point, and considered both the EEA derivative right of residence claim and the appellant's Article 8 ECHR claim. If the appellant were to be removed from the United Kingdom that would not force her children to leave the EEA as they could remain here with their father.

21. The appellant's derivative right of residence claim failed because the Judge found that the appellant was not the children's primary carer: she cared for the children jointly with her partner, who had derivative residence for that purpose, and who is an exempt person. On that basis, the appellant's claim for derivative right of residence fails because she cannot show that as a matter of European Union law she is the 'primary carer' as defined in Regulation 15(4A).

22. As regards the reasonableness of removal, and whether it would be unduly harsh to separate the appellant from her partner or her children, applying *KMO* (section 117 – unduly harsh) Nigeria [2015] UKUT 000543 (IAC), the Judge noted that no medical evidence had been produced about any particular difficulties in relation to the children, nor any social services evidence. the children had their father in the United Kingdom to look after them and the evidence was that he had family members in the United Kingdom, France and Germany, who had helped out financially in the past. Little weight could be given to the appellant's private life in the United Kingdom, all of which had been unlawful.

23. The public interest required deportation and the appellant had not shown that there was any lawful reason why that public interest should be displaced. The First-tier Judge dismissed the appeal. The appellant appealed to the Upper Tribunal.

Permission to appeal

24. The grounds of appeal were late but Upper Tribunal Judge Grubb extended time as the delay was not long, serious or significant and an explanation had been offered. He did not consider that the First-tier Judge had erred in finding that removal of this appellant to Cameroon would not be unduly harsh. As regards her application for derivative right of residence, the issue under Regulation 15(4A) of the 2006 Regulations should be considered on the basis that both would be required to leave the United Kingdom and it was 'by no means clear but … arguable' that applying Regulation 19(3)(b) read in by virtue of Regulation 15A(9), the criteria in Regulation 21 should have been considered.

25. Upper Tribunal Judge Grubb saw no merit in the appellant's challenge to the non-EEA based part of the decision to remove, holding that the First-tier Judge's assessment of whether removal would be 'unduly harsh' was unarguably rational and lawful.

26. Permission to appeal was granted, limited to the EEA Regulations point.

Rule 24 Reply

27. The respondent in his Rule 24 Reply noted that the appellant's partner is a British citizen and is an exempt person as defined in Regulation 15A(6)(c)(i), in consequence of which the appellant cannot bring herself within Regulation 15A(7)(b)(ii) and Regulation 15A(9) is not applicable.

28. That was the basis on which the appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. I heard brief submissions from Mr Lindsay on behalf of the respondent. Neither of the children would now be required to leave the European Union as their father was settled and they were both British citizens. European Union law was not engaged. Even applying the decision of the Supreme Court in *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53, which had not been available to the First-tier Judge, this appeal could not succeed under EEA law and permission had not been granted on the remaining grounds of appeal.

Analysis

30. At the date of hearing before the First-tier Tribunal, this appellant's partner had been granted a derivative right of residence as the parent of the elder child. The elder child has already been naturalised and the younger child now has more than ten years in the United Kingdom and if she has not already done so then that child can be registered as a British citizen. Accordingly, neither the appellant's children, nor her partner, would be required to leave the EEA by reason of her removal.

31. I have considered the EEA issue on which permission was granted. It is right that the First-tier Judge did not deal with Regulation 21 and that this appellant had been

in the United Kingdom for more than 5 years when she went to prison. She could have acquired a permanent right of residence in that time, provided that she was here in accordance with the Regulations. However, since she appears to have been claiming benefits (unlawfully and in large amounts) it is most unlikely that she would have been able to show that she was working or was otherwise here in accordance with the Regulations. The appellant has not asserted that such is her sign.

32. On the date of the two relevant decisions in November 2012 and February 2015, the appellant could not show 10 years' continuous residence in the United Kingdom before the making of the decision because in both cases, that residence would have been interrupted by the prison sentence served between 7 July 2011 and 10 January 2012.

33. I am satisfied, therefore, that although the First-tier Judge failed to engage with Regulation 21, that failure was immaterial because the appellant was entitled only to the basic level of protection, not the medium 'serious grounds' or the higher 'imperative grounds' protections.

Conclusion

34. The grounds of appeal disclose no material error of law in the decision of the First-tier Tribunal and I dismiss the appeal.

Signed *Judith AJC Gleeson* Date: 14 December 2018

Upper Tribunal Judge Gleeson