Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11074/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination given orally at hearing. Promulgated on**
On 10 February 2014	**On 28 February 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

THEOPHILUS KUMANYI TANDOH

Claimant

Representation:

For the Appellant: Miss E Cantor, Counsel, instructed by Ronik Solicitors
For the Respondent: Miss A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Secretary of State (whom I refer to as the respondent) appeals with permission against the determination of First-tier Tribunal Judge Birk which was promulgated on 28th November 2013 in which he allowed the appeal of Mr Theophilus Kumanyi Tandoh (whom I refer to as the claimant) against the decision of the Secretary of State to refuse to issue him with a derivative residence card as confirmation of his right of

residence under European law as the primary carer of a British citizen, in this case his minor son.

2. The claimant is married to Miss Felicia Barnes who has indefinite leave to enter the United Kingdom. They have a son who is a British citizen by virtue of his birth in the United Kingdom in February 2011. His case is that he is the child's primary carer because Miss Barnes holds two part-time jobs and attends college and that it would not be possible for them to remain together in the United Kingdom with the child, or rather that the child would not be able to remain here because of his parents.

3. The claimant submits that he requires to be in this country to look after his son and that he does most of the day to day care because Miss Barnes is working part-time and at college. It is said that the effect of requiring him to leave the United Kingdom would be that his son would not be able to exercise his treaty rights and thus that Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (as amended) ("the EEA Regulations") are met.

4. The respondent was not satisfied that that was so for the reasons set out in refusal letter dated 26th March 2013. In summary the Secretary of State found that there was insufficient evidence to show that the child would be unable to remain in the United Kingdom if the claimant were forced to leave, noting that he failed to provide evidence as to why the appellant's mother is not in a position to care for the child and thus there was no evidence that the mother would not be able to care for him if the claimant were required to leave.

5. The appeal came before First-tier Tribunal Judge Birk who heard evidence from the claimant and his wife. He allowed the appeal under the EEA Regulations finding:

    (i) that there was no appeal before him with regard to Article 8 since no removal directions had been set;

    (ii) that the issue before him was whether or not the appellant was entitled to a residence card;

    (iii) that the claimant's son is a British national; that they had formed part of the same household since the child's birth,

    (iv) that he was not satisfied that the claimant had demonstrated that he had sole responsibility for the child as he did not place much weight on the assertions by the claimant and his wife that the child was primarily in the care of the claimant;

    (v) that the issue was whether or not the child could continue to reside in the United Kingdom if the claimant were removed and found that the child could not, accepting that if the claimant were required to leave the United Kingdom his son was likely to go with him because although there is joint responsibility for the child it is clear that the family dynamics are that the

claimant makes all the decision regarding the long term future of the child;

(vi) that if the claimant was removed then his son could not exercise his right of free movement; and,

(vii) having had regard to the principles set out in **ZH (Tanzania)** applying Section 55 of the Borders, Citizenship and Immigration Act 2009 that it was not in the child's best interests to be separated from the two parents and therefore allowed the appeal under the Immigration Rules.

6. The Secretary of State then sought permission on the grounds that the judge had materially misdirected himself in law in that:

(i) The judge did not accept the assertion that the child was primarily in the care of the appellant, but had gone on to allow the appeal under the EEA Regulations

(ii) the judge had erred in allowing the appeal under the EEA Regulations in light of these findings and had erred in applying this test under Section 55 under the Borders Act 2009; and,

(iii) that the judge had failed to take account the refusal under the EEA Regulations would not necessarily mean that the British citizen child could not exercise freedom of movement because the appellant is free to make a paid application under the Immigration Rules as the spouse of a person present and settled in the United Kingdom.

7. On 20th December 2013 First-tier Tribunal Judge Brunnen granted permission on all grounds, noting that the judge appeared to have overlooked the fact that the child's mother who has shared responsibility for his care is settled in the United Kingdom.

8. Whilst there was initially no letter pursuant to Rule 24 from the claimant or the claimant's solicitors, submissions were in fact made by fax sent on 6th February which I will deal with later. Suffice it to say at this point that the greater part of the submissions relate to the decision of the Tribunal in **MA and SM (Zambrano – EU children outside the UK) Iran [2013] UKUT 00380** and that the submissions also make the point that sole responsibility is not the issue within the EEA Regulations, the reference being to primary responsibility which is not the same concept.

Submissions on error of law

9. I heard submissions from Miss Holmes and Miss Cantor. Miss Holmes submitted that the judge had erred in finding that there was joint primary care and that it was clear that he had not found that there was sole responsibility. She submitted also, relying on the grounds, the judge had erred in applying Section 55 of the UK Borders Act 2009.

10. Miss Cantor submitted that the requirements under Regulation 15(2A) were cumulative; that the judge had stated [8] that what the father had said in his evidence is that he is the head of the house and that the wife follows him and in effect all the decisions are made by the father who also takes care of the child on a daily basis. She submitted the judge was entitled to conclude that the appellant was a primary carer and that having heard oral evidence from the appellant and his wife the judge was aware of the family dynamics and had thus reached a conclusion open to him.

11. Even assuming that the judge was entitled to reach the conclusion, or did in fact reach the conclusion that the claimant was a primary carer, it is less easy to see that it was open to him to conclude that the final part of 15(2A) is met, that is that the child would be *unable* to remain in the United Kingdom if the appellant were required to leave.

12. I asked Miss Cantor to address me on what was said in **Harrison v Secretary of State for the Home Department [2012] EWCA Civ 1736** in particular at [63] where Elias LJ (with whom the other members of the Court agreed) said:

> "I agree with counsel for the Secretary of State, that there is really no basis for asserting that it is arguable in the light of the authorities that the **Zambrano** principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in **Dereci**, but that is an entirely distinct area of protection."

13. Here, when considering whether the child would be unable to remain in the United Kingdom if the claimant were required to leave, Judge Birk stated [19]:

> "I accept that the evidence demonstrates that if the [claimant] is required to leave the UK that his son is likely to go with him because although there is joint responsibility for the child it is clear that the family dynamics are that the [claimant] makes the decision regarding the long term future of the child."

14. In the light of what was said in **Harrison** it is not clear that the Judge directed himself properly as to the law, or that he has given adequate or sufficient reasons for a conclusion that the child would be unable to remain here; finding that it was "likely" that the child would leave is a not sufficient to reach the threshold which follows from force or compulsion. Further, there is little in **MA & SM** which assists the claimant.

15. That is not a finding of inability and is certainly well outside the bounds of what is considered to be the law in **Harrison** and accordingly I am satisfied that the judge erred in law in misdirecting himself and that it was not open to him to conclude that the child was unable to remain here. The judge appears to have misunderstood the

nature of the Regulation and on that basis I indicated that it would be necessary to remake the appeal on that part.

Remaking the decision

16. I heard evidence from the claimant and his wife and further submissions from both representatives. The claimant said that it would be difficult for his wife and child were he to leave the United Kingdom as he supports her looking after the child whilst his wife does two part-time jobs and goes to college. It would be difficult for them to follow him to Ghana. In cross-examination the claimant said that he had applied to remain as a spouse under the Rules but that had been refused and it would be difficult to pay the cost of making a fresh application now.

17. Miss Barnes said that if the claimant were returned to Ghana, she and her child have to go with him. She said that she did not want to raise the child by herself and did not want to take his father away from him, that she had two jobs which she would not be able to hold down if she were removed and that she would not be able to cope. She said it was not just the financial reasons that made it difficult but because the father would be taken away from the child and it would be very difficult physically and mentally. She said in the worst case scenario she would go with the claimant to Ghana.

18. Cross-examined Miss Barnes said that it cost a lot of money to make a fresh application for her husband to remain but whilst there was nothing stopping that, it was likely, she believed, that it would be refused and there would be nothing to stop the Secretary of State from refusing the application again. She said it would be difficult if not impossible for her to pay for nursery education or care for her child and she would have to stop college and probably at least one other job and that she simply could not afford it and she was struggling at the moment even with two jobs.

19. Miss Holmes submitted that the application could not succeed given that it had not been shown that the child was unable to remain here if the father was removed.

20. In reply Miss Cantor relied on the submissions made by the solicitor although she accepted that to a great extent they relied on **MA and SM (Zambrano)** which she accepted was not of particular relevance to the facts of this case. She drew my attention again to the decision in **Harrison** at paragraph 67 onwards.

21. I accept that it would be difficult financially for the claimant's wife and child were he to leave the United Kingdom given that without his presence here and looking after the child, it would be very difficult for Miss Barnes to hold down two jobs as she does at present and to return to college. In reality it may well be that she is unable to continue college or to continue more than one job but as Miss Holmes submitted, that is something that people have to do.

22. I have considered carefully what was said in **Harrison** at [67] and [68]. Lord Justice Elias said[68]:

> "It is highly pertinent that the CJEU has confirmed in **Dereci** that the fact that the right to family life is adversely affected, or that the presence of the non-EU national is desirable for economic reasons, they will not of themselves constitute factors capable of triggering the **Zambrano** principle. In practice these are the most likely reasons why the right of residence would be rendered less beneficial or enjoyable. If these considerations do not engage this wider principle, it seems to me extremely difficult to identify precisely what will. What level of interference with the right would fall short of de facto compulsion and yet would constitute a form of interference which is more than simply the breakdown of family life or the fact that the EU citizens are financially disadvantaged by the removal of a non EU national family member? The scope for this right to bite would be extremely narrow and in my judgment there would be very real uncertainty as to the nature and scope of the doctrine."

23. In essence I consider having had regard to what was said in **Harrison** that what must be shown is that the EU national would be compelled to leave the UK. That would not be as a result of any legal compulsion here. There is no suggestion that the mother is incapable of looking after the child (unlike the situationof the First Appellant in **MA & SM**). Even though there would be quite strong factors likely to cause it to happen, those are primarily financial and emotional and do not amount to the necessary legal compulsion to fall within the ruling in **Zambrano**. The factual situation is not materially different from the Second Appellant in **MA & SM** about whom the panel said [56]:

> 56. There is no suggestion that the sponsor is not capable of looking after JM and FM. He has tailored his working hours thus far to ensure that they fit in with the need to care for JM, and we have no doubt he would also ensure that FM was similarly cared for. There mere fact that the sponsor cannot be as economically active as he would wish, because of his care responsibilities to JM and FM, is not sufficient to support a conclusion that JM and FM would be denied the genuine enjoyment of their EU citizenship rights, nor would this be the case even if the sponsor were required to stop working altogether. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living (see *Dereci* at paragraph 68, and *Harrison* at paragraph 67).

24. Accordingly I conclude that the appellant has failed to show that the effect of his removal from the United Kingdom would be that his son would be unable to remain in the United Kingdom. He therefore fails to meet the requirements of Regulation 15A and I therefore dismiss his appeal under the EEA Regulations.

SUMMARY OF CONCLUSIONS

1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2 I remake the decision by dismissing the appeal on all grounds.

Signed Date: 27 February 2014

Upper Tribunal Judge Rintoul