Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19185/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 August 2014	**On 05th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ANITHA VELDA JEFFERS
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr N. Bramble, Specialist Appeals Team
For the Respondent: Mr M. Blundell, Counsel instructed by Makka Solicitors Ltd

DETERMINATION AND REASONS

1. The Secretary of State ("SSHD") appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge A.J. Parker sitting at Taylor House on 24 April 2014) allowing the claimant's appeal against the decision by the SSHD on 9 May 2013 to refuse to issue her with a derivative residence card on the basis that she was a third country national upon whom her British citizen daughter (born in 2006) was dependent in the UK.

2. The application was made on 13 December 2011. By the time of decision, the appellant was pregnant with a second child by the same British citizen father.

3. The application was refused under Regulation 15A on the ground that the father, Mr Hall, was an exempt person who was able to care for their daughter, and she had not shown that her removal would force her daughter to leave the EEA.

The Hearing before, and the Decision of, the First-tier Tribunal

4. At the hearing Judge Parker received oral evidence from the appellant and Mr Hall. In his subsequent determination, he found that the appellant did not live with Mr Hall, but had moved out of his parental home in December 2012 due to the cramped conditions there. Mr Hall continued to live with his parents, and he had four other children (including two minors aged 12 and 14) who lived elsewhere. The appellant had recently given birth to their second child, Alayna. It was clear to the judge that Mr Hall was not the children's primary carer, and if she left the UK, he would be unable and unwilling to look after them. He worked irregular hours as an electrician, and strove to maintain his relationship with his four children by a previous relationship. It was not possible that he could discontinue this employment, become dependent on the state, and become the primary carer of his children by the appellant:

> The youngest child is still being breast fed and is four months old so there is no realistic prospect that this is a possibility.

5. The judge concluded that the appellant met the requirements of Regulation 15A, and so had established a derivative right of residence. He went on to conduct a best interests assessment, and found that the appellant's removal would be a disproportionate interference with the family life of her and her partner and the two young children.

The Application for Permission to Appeal

6. The SSHD applied for permission to appeal to the Upper Tribunal, arguing that the judge had failed to have proper regard to Regulation 15A(4A)(c) which required that the relevant British citizen should be *unable* to reside in the UK or in another EEA state. The judge had failed to give adequate reasons for finding inability on the part of the sponsor to care for the children as opposed to mere unwillingness.

7. The SSHD also appealed on the ground that the judge erred in law in failing to apply **Gulshan** when considering the Article 8 claim.

The Grant of Permission to Appeal

8. On 5 June 2014 Judge White refused the SSHD permission to appeal against the finding under Article 8, but granted the SSHD permission to appeal on the question whether the judge had made an error of law in concluding that "the child" would be *unable* to reside in the UK or another EEA state as a consequence of the appellant's removal.

The Hearing in the Upper Tribunal

9. At the hearing before me, Mr Bramble referred me to **MA and SM (*Zambrano:* EU children outside EU) Iran [2013] UKUT 00380 (IAC)**, in which the UT dismissed the appeal of one of the claimants (SM) on the ground that inability to reside was not made out, but allowed the same claimant's appeal under Article 8. He agreed that the UT's approach was not helpful to the error of law challenge in respect of Judge Parker's Article 8 finding, and he confirmed that he was not pursuing this challenge.

10. With regard to Regulation 15A(4A), Mr Blundell referred me to his skeleton argument before the FTT and to **Hines v London Borough of Lambeth [2014] Civ 660** where Vos LJ at paragraph [21] held that the judge below had rightly taken into account the welfare of the child and had rightly directed himself that the circumstances of compulsion varied from case to case. The Court of Appeal found no error of law in, and indeed approved, the reasoning of the judge below on the application of Regulation 15A(4A) to the facts of the case. His reasoning is set out at [10]:

> I am satisfied…that the Appellant is entitled to accommodation only if Brandon would be effectively compelled to leave the United Kingdom if she left. However, what amounts to circumstances of compulsion may differ from case to case. The welfare and individual physical and emotional needs and circumstances of the child have to be considered. Those circumstances may include the impact which separation from the primary carer would have on the child. The younger and more dependent the child, the more likely it is that the child would also have to leave.

Discussion

11. While it is open to argument whether the inability test was met with regard to the oldest child, it is beyond argument that it was met in the case of the youngest child. Alayna was only four months old, and she was still being breast fed. So removal of the appellant would mean that Alayna would have to go with her, and she would be unable to reside with her father in the UK or another EEA state.

12. In SM's appeal, the children had been born in 2004 and 2007. Thus the mere fact that the sponsor could not be as economically active as he would wish, because of his care responsibilities to them, was not sufficient to support the conclusion that they would be denied the genuine enjoyment of their EU rights if the refusal of entry clearance to the mother and to FM (born in 2007, and residing in Thailand with his mother) was maintained.

13. The situation of the youngest child here is completely different from that of SM's children, and this explains the different outcome. The judge has applied the correct law, and has given adequate reasons for finding that the appellant qualified for a derivative residence card at the date of the hearing before him.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and the decision stands. The SSHD's appeal is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed Date

Deputy Upper Tribunal Judge Monson