



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

Appeal Number: IA/19872/2014

THE IMMIGRATION ACTS

Heard at Field House

On 10th August 2015

**Decision and Reasons
Promulgated**

On 4th September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

DK

(ANONYMITY DIRECTION MADE)

Appellant

Claimant

Representation:

For the Appellant: Mr Tarlow, Senior Home Office Presenting Officer
For the Claimant: DK attended in person

DETERMINATION AND REASONS

1. The claimant is a citizen of Belorussia. These proceedings concern the status and interests of a child. In order to protect the child I make an anonymity direction.
2. The appellant in the present proceedings is the Secretary of State for the Home Department [SSHD].
3. This is an appeal by the SSHD against the determination of First-tier Tribunal Judge R A Cox and First-tier Tribunal Judge S Clarke promulgated

on 19th March 2015, whereby the judges allowed the claimant's appeal against the decision of the SSHD dated 15 April 2014. The decision by the SSHD was to refuse the claimant a Derivative Residence Card as the primary carer of a British Citizen, who is resident in the United Kingdom under Regulations 15A and 18A of the Immigration (EEA) Regulations 2006.

4. By decision made on the 18th May 2015 leave to appeal to the Upper Tribunal was granted. The matter appears before me to determine in the first instance whether or not there is an error of law in the original determination.

Factual background

5. The claimant came to the United Kingdom in 2004 on a student visa. Whilst in the United Kingdom she commenced a relationship with LRE, a British citizen. The claimant made application for certificate of approval to marry in 2006. The certificate was granted but it appears that the marriage never took place. As a result of the relationship the claimant gave birth to a child BE born on the 17th February 2007. The child is a British citizen.
6. The relationship between the claimant and LRE broke down in or about 2009. The claimant moved out of the family home and went to live at an address in Boston with the child. The child has lived with the claimant since that time but has visited and stayed with his father at weekends occasionally and during the summer holidays. In the First-tier Tribunal decision there is reference to the child staying with his father for up to 8 weeks in the summer holidays.
7. The claimant commenced a relationship with another man in 2013. For the purposes of the present proceedings that relationship is not material other than as background information.
8. LRE, who had moved and was living in Leeds, commenced a relationship with another lady, married and has a daughter by that relationship. LRE and his wife and child live in a two-bedroom bungalow.
9. The wider family of LRE, his parents and such, appear to live in the vicinity of Boston, where the claimant and her child BE are living. Clearly the claimant is currently the primary carer for the child, BE. The claimant wishes to remain in the United Kingdom to look after her child and in order to do so is claiming that she is entitled to a derivative right of residence under the regulations identified above.
10. However the child has a father in the United Kingdom. Although at the moment he does not have care of the child, the prospects of him looking after the child to enable the child to remain in the United Kingdom had to be considered.
11. The prospect of the claimant leaving her child to be looked after by LRE is specifically considered in paragraph 6 of the decision. The claimant asserts

that it would be wrong to separate mother from child, a mother, who the child has been with for over 8 years. The mother and child are very close and the claimant could not imagine leaving the child with the father.

12. When questioned about who made the major decisions in respect of the child the claimant indicated that she did and she did not discuss such with LRE. Between the period of 2009 and 2013 the claimant had looked after the child entirely by herself save for occasional help from LRE's mother, who lived in the locality.
13. With regard to the child BE's father [LRE] the claimant claims that the father could not look after the child full-time as he and his partner work; they do not have the accommodation suitable for a male and female child; and it is alleged that the father would not take responsibility for full-time care of the child. That has to be considered in light of the fact that the child was looked after allegedly for 4 weeks during the summer holidays, see paragraph 5 of the decision.

The Treaties, Regulations and caselaw

14. Regulation 15A and 18A are the material regulations and in the light of those regulations it had to be determined whether the child BE would be forced or compelled to leave the UK or does the availability of the father in the UK, who "should" be able to look after the child mean that the child would not have to leave the United Kingdom and therefore the claimant is not entitled to a derivative right of residence. The issue being whether in practice the father can and will look after the child.
15. The claimant was applying under the provisions of Regulation 15 A of the Immigration (EEA) Regulation 2006 for a residence card on the basis of a derivative right of residence. Those provision stem from Articles 20 and 21 of the Treaty on the Functioning of the European Union and from the case of Ruiz Zambrano v Office National de l'Emploi [2011] EUECJ C034/09
16. The case law examines that the rights identified are set out in the Treaty on the Functioning of the European Union Articles 20 and 21 which provide:-

Article 20

1 Citizenship of the Union is hereby established. Every person holding the Nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replaced national citizenship.

2 Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia;

a) the right to move and reside freely within the territory of the Member States;

b), c) and d) [not relevant for the current purposes]

Article 21

1 Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in Treaties and by the measures adopted to give them effect.

17. I also draw attention to the provisions of the Citizenship Directive

Article 24

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

18. Taking the provisions identified the Court of Justice of the European Union in Zambrano determined that an EU child citizen could not be compelled to forgo the benefits of being an EU citizen even if that meant that a non-EU parent had to be given a right to reside to enable the EU citizen child to enjoy such rights. Paragraphs 41 to 45 of the decision in the Grand Chamber contain the basis for the judgement.

41 As the Court has stated several times, citizenship of the European Union is intended to be the fundamental status of Nationals of Member States....

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of their rights conferred by virtue of their status as citizens of the union....

43 A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also refusal to grant such a person a work permit, has such effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such person, he would risk not having sufficient resources to provide for himself and his family, which would result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, though citizens of the Union would, as a result be unable to exercise the substance of the rights conferred on them by virtue of their status as a citizen to the union.

45 Accordingly, the answer to the question referred is that Article 20 TFEU is to be interpreted as meaning that the precludes a member state from refusing a third country national upon which his minor children, who are The European Union citizen's, are dependent, a right of residence in a member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those

children have the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

19. In compliance with the decision in Zambrano Regulation 15 A of the Immigration (EEA) Regulations 2006 was included in the Regulations. The Regulation provides : --

15A. Derivative right of residence

1) a person (' P ') who is not an exempt person and who satisfies the criteria in paragraph (2), (3) (4A) or (5) of this regulation is entitled to the derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

2) ..[not applicable]..

3) ..[not applicable]

4A) P satisfies the criteria in this paragraph if-

a) P is the primary carer of a British Citizen (' the relevant British Citizen ');

b) the relevant British Citizen is residing in the United Kingdom; and

c) the relevant British Citizen will be unable to reside in the United Kingdom or in another EEA State if P were required to leave.

20. The case for the SSHD is that the FTT Judges have failed to consider the requirements of the Regulation 15A properly. The grounds seek to rely upon the cases of Jamil Sanneh v Secretary of State for Work and Pension 2013 EWHC 793 and MA & SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 130.

21. In the case of R (on the application of Jamil Sanneh) v SSWP having identified the relevant treaties and regulations Mr Justice Hickinbottom summarises the case law including the case of Zambrano. The judge in paragraph 19 of the judgement sets out the following as the applicable legal principle of the decision; -

19 (ii) The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right to reside in the EU, and who can and will in practice care for the child

22. It is clearly the SSHD's case that there is another ascendant relative, i.e. the father of BE, who can and will look after the child. By comparison it is the claimant's case that the father cannot and will not look after the child.

23. It may be somewhat speculative but if one were to ask what would happen if the claimant mother herself was unable to look after the child whether through illness or other cause, would the father look after the child then, one might expect the father if asked in such circumstances to be willing to

take care of the child. He was capable of looking after the child for 4 weeks in the summer holiday.

24. The SSHD also places reliance on the case of MA & SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380. The case has to be approached with a degree of caution as the judgement is concentrating upon circumstances where, as set out in paragraph 43, an EU National child, from whom a non-EU National child is seeking to derive rights, is not living within the EU at the relevant date and has never lived in the EU.
25. The facts in MA & SM, specifically in the second appeal which is most relevant, relate to an appellant who was a Thai citizen. She married a British citizen husband in 2007 and had two children who were dual nationals having British nationality and Thai nationality. The eldest child of the family had been brought to the United Kingdom and was receiving education here but appeared not to be making as much progress as expected in education. The second child had always lived in Thailand with the mother/appellant. In the decision in the Upper Tribunal it was noted that the second child will be travelling to the United Kingdom in any event even if the appellant mother was not granted leave to do so.
26. As the Upper Tribunal concluded that the fact that there was another parent in the United Kingdom and that the sponsoring parent in the UK had managed to tailor his working hours to ensure that he could care for the first child meant that he could similarly care for the second child. The mere fact that the sponsor could not be as economically active as he would wish because of his responsibilities for the children is not sufficient to support the conclusion that the children would be denied the genuine enjoyment of the EU citizenship rights and that would be the case even if the sponsor were required to stop working altogether. It was noted that the right of residence was a right to reside in the territory of the EU and not a right to a particular quality or standard of life. In the circumstances the Upper Tribunal found that there would be no breach of the Article 20 of the Treaty on the Functioning of the European Union right of entry and residence of the EU citizen children by refusing the appellant/mother a derivative right of residence card.
27. I have to note that the Upper Tribunal went on to consider the appeal on the basis of Article 8 and allowed the appeal. It may be that the present claimant may be able to rely upon Article 8 should she make an application.
28. In the present appeal there is no decision to remove in line with the case of Amirteymour & others (EEA appeals; human rights) 2015 UKUT 00466. The issue of Article 8 would not arise on a mere decision to refuse a right of residence under the EEA Regulations.
29. To an extent the real issue is whether or not the First-tier Tribunal Judges considered that issue properly and determined whether the father could and would look after the child.

30. In dealing with the issues in paragraph 15 and 16 the First-tier Tribunal judges clearly state that they are dealing with this as a practical matter and an effective issue rather than on a theoretical speculative and illusory basis. Thereafter in approaching the issue of the suggestion on the part of the SSHD is that if the father can look after the child for eight weeks a year during the school holidays he could equally look after the child for 52 weeks a year. The judges come to the following decision “ *There is simply no evidence that he could or would do so. The practical and effective arrangements for BE are those that obtain now. That is what we can take his father to have agreed to is being the limits of his ability in all the circumstances*”.
31. In dealing with the matter in that way the judges were clearly minded to consider whether father could and would look after the child above and beyond the present support and assistance that he has provided. The conclusion that they reach given the circumstances of the father and applying a practical approach was that the father at the moment could not and would not. Any speculation as to what might happen in any other circumstance would be of no assistance at all. The judges were dealing with the position as presented before them and they were satisfied that the evidence produced had shown the limits of the father's ability to look after the child.
32. Accordingly they were satisfied that BE would be compelled to leave the United Kingdom if the claimant was not given a Derivative Residence Card. The judges have properly considered the issues in the case and have made findings of fact based on the evidence. The judges have given valid reasons for concluding that the child would be compelled to leave the EU and that have justified the decision that the appellant is entitled to a Derivative Residence Card.
33. There is a no material error of law in the determination. I uphold the decision to allow the appeal.

Signed

Date

Deputy Upper Tribunal Judge McClure

Direction regarding anonymity- rule 14 Tribunal (Upper Procedure) 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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed

dated

Deputy Judge.....