IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39902/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th August 2015	**On 20th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS THI THANH HUYEN NGUYEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms A Nizami, Counsel instructed by Gulbenkian Andonian Solicitors

DECISION AND REASONS

1. Ms Nguyen is a national of Vietnam (referred to as the claimant) who applied for a derivative residence card from the Secretary of State as confirmation of a derivative right of residence in the United Kingdom. That was refused but her subsequent appeal to First-tier Tribunal Judge Gillespie was allowed under the Immigration (EEA) Regulations. The essence of the judge's reasoning was that the judge found that the claimant's son was still suckling at the breast of Ms Nguyen and as such remained completely dependent upon his mother. Were she to be

removed in the present circumstances he too would be obliged to leave the United Kingdom.

2. The grounds of application lodged by the Secretary of State challenge his findings pointing out that the child could continue to reside here with his father if the claimant were required to leave. There was no finding that the claimant's partner would not care for the child should Ms Nguyen leave the United Kingdom and as such the child would not be compelled to leave the European Union. Reference was made to **MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380**.

3. Permission was granted on the basis that the judge did not fully consider the EEA Regulations and that this was an arguable error in law.

4. Before me Ms Isherwood for the Home Office relied on her grounds. In particular reliance was placed on **MA** with reference made to paragraphs 55 and 56. There was no suggestion that the Sponsor was not capable of looking after the children in **MA** and the same applied on the particular facts of this case. The right of residence was a right to reside in the territory of the EU and was not a right to any particular quality of life or to any particular standard of living.

5. I was asked to set the decision aside and re-make the decision dismissing the appeal.

6. For Ms Nguyen it was submitted that this was simply an attempt by the Secretary of State to reargue the case. It was unsatisfactory for permission to have been granted in the manner it had been, namely the judge finding that the matter was arguable – see what was said by the President, The Hon. Mr Justice McCloskey, in the case of **MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 29 (IAC)** on such an approach. The judge had given reasons why Mrs Nguyen was the primary carer. At the date of the hearing he was entitled to find that no one else could look after the baby given that she was still breastfeeding. Such a finding was unimpeachable. Even if the finding could be said to be generous that was not the same thing as an error in law. Reference was made to **Mukarkar v SSHD [2006] EWCA Civ 1045** when it was said that the mere fact that one Tribunal had reached what may seem "an unusually generous view of the facts" did not mean that it had made an error in law.

7. I reserved my decision.

Conclusions

8. The judge gave very clear reasons for finding that Mrs Nguyen was a primary carer of the infant, Reims. He accepted that she was a nursing mother and noted that the hearing of the appeal had to be interrupted in order that the child might suckle. He considered that for as long as the child was nursing at the breast and had no other source of nourishment his

mother had to be regarded as the primary carer. He observed that the claimant admitted that from time to time she fed the child small quantities of thin rice soup but nevertheless the child took no solids and was dependent on the breast. The judge set out the relevant Regulations and was satisfied, for reasons he gave, that the child would be unable to remain in the United Kingdom if Ms Nguyen was required to leave. He was therefore attaching a considerable importance to breastfeeding concluding that the interruption of that would not be tolerable and as such the Regulations were satisfied.

9. It seems to me important to note that the judge was correct to view the issue as one which had to be considered at the date of the hearing – see **Boodhoo (EEA regs: relevant evidence) [2013] UKUT 00346 (IAC)**. By definition the act of breastfeeding is not a permanent one but is temporary in nature particularly given that the child in this case was aged 16 months. It may be that the act of breastfeeding was nearing its end. However the judge was not looking at the future, but rather was considering the position before him as it stood as at the date of the hearing as he was bound to do.

10. It can readily be seen that it was open to the judge to conclude that the act of breastfeeding was so fundamental to the welfare of the child that he would have had to leave the United Kingdom with his mother should the decision have gone the other way. The element of "compulsion" referred to in the grounds of application can be inferred from the judge's clear findings. It may be, of course, that other judges would have decided the case differently and in a more robust way and very much on the basis of the grounds set out by the Secretary of State. It might well be said that the decision was undoubtedly a generous one. That may be so but in my view this is not at all the same as saying that Judge Gillespie erred in law. In my view, the reasons he gave can be said to be coherent and do not cross over into the territory of perversity or irrationality. He was bound to look at the circumstances as they were as at the date of the hearing before him in respect of which he made decisive findings which he was entitled to make.

Decision

11. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

12. I do not set aside the decision.

13. There is no need for an anonymity order.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald