IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47142/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 May 2015	**On 22 June 2015**

Before

THE HONOURABLE MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS EMMAH TAWONA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Fijiwala, Home Office Presenting Officer
For the Respondent: Ms C Hulse, Counsel instructed by Oliver & Hasani Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal, Judge of the First-tier Tribunal Hussain, which was promulgated on 28 August 2014. The respondent is a Zimbabwean national who is the mother of a child born in 2009 who is a United Kingdom national. She seeks a residence card to permit her to remain in this country as a third country national upon whom a British citizen is

dependent in the United Kingdom on the basis of the Court of Justice of the European Union judgment in the case of **Ruiz Zambrano**. Hers is a claim for a derivative right of residence.

2. The appeal is framed in writing on the basis that the judge adopted an inappropriate construction of the requirement in Regulation 15A(4A)(c) of the Immigration (European Economic Area) Regulations 2006 which provides "the relevant British citizen would be **unable** to reside in the United Kingdom or in another EEA state if P were required to leave". The argument is that as a matter of law the judge did not address himself properly to the requirement that the applicant for the residence card, the respondent to this appeal, had to demonstrate that if she were removed from the United Kingdom her child would be **unable** to reside in the United Kingdom. The factual case being advanced by the Secretary of State before the Judge of the First-tier Tribunal was that there was no reason why the child could not remain in the United Kingdom with his father, perhaps with additional support from other members of the extended families both of the respondent, Miss Tawona, and also of the father of the child. In essence, the appeal is predicated upon the assertion that the FTT Judge rejected this case applying the wrong test in law.

3. That appeal having been lodged it came before a Judge of the First-tier Tribunal to review it and to decide whether or not to grant permission to appeal. On 31 October 2014 Judge of the First-tier Tribunal Hollingworth gave permission to appeal, not on the basis that he thought that any of the arguments advanced in the notice of appeal were arguable but on a different basis altogether, namely that the reasons given by the judge for his conclusion were unclear because of the way in which they had been expressed and therefore it was unclear how the relevant criterion had been applied by the judge in this case. We will set out the last two paragraphs of the decision of the judge.

> "34. The appellant appears to have the benefit of support from her extended family members. Since being given permission to work she has to her credit been working full-time. When she is not at home the child is looked after by her brother and his wife. I find that the suggestion that these individuals will be willing to assume permanent and full-time care of the appellant's child sustainable. It must be recalled that it is only when the appellant is not at home doing shift work that they have to step in. I assume that it will be at night when the appellant is not at home that the brother and his wife step in. The role they would play would be limited. I also note that the child is approaching school age, his future needs would therefore be greater. He would require to be woken up, clothed, fed and then taken to school and brought back home. I do not accept the Home Office suggestion that these responsibilities can be assigned to the appellant's extended relatives.
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> 35. In summary, I find that the appellant has always been her child's primary carer. She remains his primary carer. If she is not permitted to remain in the United Kingdom the child would be unable to reside

> here simply because there is no-one else to care for him in this country."

4. The confusion noted by the First-tier Judge when granting permission arises from the use of the word "sustainable" in paragraph 34. In our judgment, reading paragraph 34 in a way so that it makes sense, it is perfectly obvious that that is a misprint and that the First-tier Judge in drafting his decision meant to write "unsustainable" and left out the prefix "un". That is the only way in which that paragraph can be given any sense because otherwise, having accepted the representations being made on behalf of the Secretary of State by describing them as "sustainable", he then rejected what she had said and allowed the appeal.

5. After the grant of permission the matter was referred back by the Upper Tribunal to the FTT Judge Hussein with a request that he should clarify what in fact he meant and he confirmed that our understanding of his judgment which we have just recorded is in fact correct and that it should have read "unsustainable". It therefore follows that the basis on which permission was actually granted affords no ground whatever for allowing the appeal and as a matter of fact the Secretary of State has never suggested that it did. It forms no part of her grounds of appeal, either in writing or now. Therefore the only basis on which permission has been granted to appeal against this decision is wholly without merit and the appeal cannot be allowed on that basis.

6. We have gone on to consider the points which are made in the notice of appeal by the Secretary of State for which technically it seems permission has not been granted to determine whether they have any merit. In our judgment they do not. As appears from paragraphs 34 and 35 of the decision, which we have set out in full above, the judge had heard evidence. He heard evidence from Miss Tawona and other members of her family and the import of that evidence was that the father of the child had shown no interest in him since his second birthday and had had no contact with him since that time; that he had participated in the preparation of his case before it came to the First-tier Tribunal by taking part in a DNA test which proved that he was in fact the father of the child but otherwise nothing had been heard of him, according to the evidence, by Miss Tawona or by the Tribunal or indeed by the Secretary of State. In other words, before First-tier Judge Hussain there was no evidence to suggest that the father of this child had any interest in him at all or was willing or able to care for him if he were to find himself in the United Kingdom without his other parent, his mother, Miss Tawona. That is why the judge came to the conclusion that he did. The suggestion that he applied the wrong test in law is in our judgment unsustainable. At paragraph 27 of the decision he said this:

> "27. The relevant Regulation governing rights of derivative residence is to be found in Regulation 18(a) which requires an applicant to show that they are the primary carer of a British citizen child and that child would be unable to reside in the United Kingdom or another EEA state if she were required to leave this country."

8. That actually recites the Regulation which he was concerned to apply and contains the word "unable" which, as we have recorded above, is also repeated in the very final sentence of the decision at the end of paragraph 35 which is "If she is not permitted to remain in the United Kingdom the child would be unable to reside here simply because there is no-one else to care for him in this country." This suggests that he had the test created in the Regulation well in mind. The word "unable" has received a considerable amount of consideration by the higher courts in this country and by the European Court of Justice. Most recently the Court of Appeal Civil Division in the case of **Maureen Hines v London Borough of Lambeth [2014] EWCA Civ 660** reviewed the authorities since the decision of the European Court of Justice in **Zambrano** and applied them in a way which provided an opportunity for that court to restate the proper approach to be taken to the word "unable". Having referred to a previous decision of the Court of Appeal Civil Division in **Harrison [2012] EWCA Civ 1736** the Court of Appeal in **Hines v Lambeth** said this at paragraph 21:

> "21. Accordingly, in my judgment, the judge was right, applying **Harrison**, to conclude as he did in paragraph 21 of his judgment that the appellant was only entitled to accommodation if Brandon would be effectively compelled to leave the United Kingdom if she left. He was also right to point out that what amounts to circumstances of compulsion may differ from case to case. As Lord Justice Elias said:
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> > 'To the extent that the quality or standard of life [of the EU citizen] will be seriously impaired by excluding the non EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national'.
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> It is for this reason that the welfare of the child in this case comes into play, again as the judge held.
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> 22. In my judgment, however, the welfare of the child cannot be the paramount consideration because that would be flatly inconsistent with the statutory test which is whether the child would be unable to reside in the UK if the mother left. It will, in normal circumstances, be contrary to the interests of a child for one of its parent carers, whether the primary carer or not, to be taken away from him or her. It would certainly be contrary to Article 24(3) of the Charter. But Mr Berry shied away from contending that the Immigration Regulations were inconsistent with EU law or that they should be read down so as to comply with it.
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> 23. I have no doubt that the test applicable under Regulation 15A(4A)(c) is clear and can be given effect without contravening EU law. The reviewer has to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child."

9. At the end of the following paragraph, paragraph 24 of the decision, the Court of Appeal said this:

> "I do not, however, think that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the United Kingdom. Apart from anything else, he would, even if he did leave, still only have the care of one of his previously two joint carers."

10. In argument before us Ms Fijiwala accepted, in our judgment quite rightly in the light of that authority, that if the effect of the removal of Miss Tawona was to deprive the child of the care of both of his natural parents if he were to remain in the United Kingdom, because the father would not in fact care for him, then he was for the purposes of the test to be applied in considering the Regulation "unable" to live in the United Kingdom.

11. It seems therefore to us that the judge applied the right test, and the finding of fact he made fully justified the result to which he came. He carried out the necessary careful enquiry into the evidence to determine whether compulsion arose on the facts of this case and reached the conclusion that on the evidence before him removing the child from his mother's care would not mean that he would be cared for by his father. It would mean that no-one had any idea who was going to care for him or in what circumstances. On that finding of fact he was entitled to conclude that for the purposes of the Regulation the child was unable to exercise his right to reside in an EU state without the care of his mother, and in those circumstances he was right to allow her appeal against the Secretary of State's initial determination, and for those reasons therefore we dismiss her appeal against the notice of decision of the First-tier Tribunal.

COSTS

11. Having dismissed the appeal of the Secretary of State against the substantive decision in this case we have now heard an application on behalf of the respondent for her costs under the Tribunal Procedure (Upper Tribunal) Rules 2008 as now in force since last October which by amendment includes Rule 10 which permits the Upper Tribunal to make an order for costs in various circumstances including, relevant for present purposes, if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. These proceedings, as our judgment on the substantive issue made clear, have an unusual history. The appeal was set out in writing in the same way precisely as it has been argued today before us. The judge granting permission granted permission on a ground of his own devising without expressing a view about whether the substantive merit of the appeal warranted a grant of permission or not, but in the end permission was granted and the appeal has come here and it has been determined. We are unable to say that the Secretary of State has acted unreasonably in bringing, defending or conducting the proceedings in these circumstances.

12. It is extremely unfortunate for Miss Tawona that this has involved two hearings but that was not the fault of the Secretary of State except insofar as she wanted a determination of the argument that she wished to pursue which is one of her responsibilities. The reason for the duplication of hearing costs was the lack of clarity, or confusion, in the initial judgment which required to be interpreted and the consequent lack of clarity in the mind of the reviewing judge about whether there had been an error of law or not, and that certainly was not the fault of the Secretary of State, who never sought to pursue that point, appreciating no doubt that there was not a great deal in it.

13. In those circumstances, although we have a good deal of sympathy for Miss Tawona, who has been put to a good deal of expense as a result of these proceedings, we do not feel able to make a decision that the Secretary of State has behaved unreasonably in any respect in regard to these proceedings and in those circumstances we have no jurisdiction to grant costs to the respondent.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Mr Justice Edis

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed Date

Mr Justice Edis