Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04157/2014
VA/01547/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2015	**On 19 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between
ENTRY CLEARANCE OFFICER
(ISLAMABAD)

Appellant

and

MRS ANNAM HASSAN BUTT
MS MEHMONA HASSAN BUTT
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr N Bramble, a Home Office Presenting Officer
For the Respondent: Ms E Daykin of counsel

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal allowing the appeals of Mrs Annam Hassan Butt ('the first claimant') and Ms Mehmona Hassan Butt ('the second claimant') who appealed

against decisions of the Entry Clearance Officer taken on 28 February 2014 to refuse entry clearance to the claimants.

Background Facts

2. The claimants are citizens of Pakistan. The first claimant was born on 12 August 1991 and her daughter, the second claimant, was born on 5 September 2010. The first claimant claimed a right to reside in the UK as a third country national upon whom an adult British citizen was dependent in accordance with Regulation 15A(4A) 15A(4A) of the Immigration (European Economic Area) Regulations 2006/1003 (the "EEA Regulations"). That application was refused because the Entry Clearance Officer was not satisfied that the first claimant was the adopted daughter of the sponsor, that she was the sponsor's primary carer and questioned why the sponsor's husband was not capable of looking after the sponsor. The Entry Clearance Officer noted that the first claimant was married with one child and had stated that she would remain in the UK for a period of 6 months and her husband would not travel with her. The Entry Clearance Officer questioned what would happen to the care arrangements for the sponsor after 6 months.

3. Additionally the Entry Clearance Officer recorded that in December 2012 the first claimant had been refused a visa to visit the sponsor with her husband and child. They had made false representations and provided falsified or non-genuine documents in support of their application. The Entry Clearance Officer considered that the fact that the family had previously attempted to gain entry to the UK by using deception further undermined the first claimant's stated intentions in going to the UK now. The Entry Clearance Officer was not therefore satisfied that the EEA regulations were applicable and refused the application under paragraph 15A (4A) of the EEA Regulations. The Entry Clearance Officer was also not satisfied that the first claimant met the requirements of regulation 12 of the EEA Regulations.

4. The second claimant's application was refused on the basis that, as the first claimant's application had been refused and she was no longer travelling to the UK and no other reason for the second claimant to travel had been put forward, the Entry Clearance Officer was not satisfied that she was genuinely seeking entry as a visitor, that she intended to leave at the end of the visit or that suitable arrangements were in place for her reception and care in the UK.

The Appeal to the First-tier Tribunal

5. The claimants appealed to the First-tier Tribunal. In a determination promulgated on 22 April 2015, First-tier Tribunal Judge Eames ('the judge') allowed the claimants' appeals. The First-tier Tribunal made a number of findings of fact the most relevant of which were that the first claimant is the adopted daughter of the sponsor, that she is the sponsor's primary carer, that the sponsor would be unable to reside in the UK if the first claimant was not able to enter the UK to assist her and therefore regulation 15A(4A) is satisfied

giving the first claimant a derivative right of residence. With regard to the second claimant the judge found that she did not satisfy the requirements under the EEA Regulations but derives her own right of residence derivate on her mother's derivative right notwithstanding an apparent lacuna in the UK's codification of the 'Zambrano' principles (C-34/09 Ruiz Zambrano v Office National de l'emploi [2011] ECR I-1177 ("Zambrano")).

The Appeal to the Upper Tribunal

6. The Entry Clearance Officer sought permission to appeal to the Upper Tribunal. The grounds of appeal, in essence, asserted that the judge had erred by considering the sponsor's position at some point in the future and not at the date of decision, by finding that the first claimant was the primary carer of the sponsor, erred in applying the principles set out in the case of Zambrano and that the judge failed to give adequate reasons. On 19 June 2015 First-tier Tribunal Judge Chohan granted the Entry Clearance Officer permission to appeal. Thus, the appeal came before me.

Summary of the Submissions

Considering matters at a future date

7. The grounds of appeal assert that the judge made a material misdirection of law. The Entry Clearance Officer refers to paragraph 25(1) where the first-tier tribunal judge found:

> "I find that she would be unable to reside in the UK if the first appellant was not able to enter the UK to assist her. I reach that conclusion based on her own testimony, and the likelihood I infer that her increasing level of disability will make independent living impossible. It follows that if, theoretically, the first appellant entered the UK and then had to leave, the same consequences would flow: Mrs Hassan would not be able to continue living in the UK. No other EEA member state has been mooted as a possible place for her to live, nor is it sensible to consider that avenue. Though an EU citizen she would therefore have to leave the territory of the EU."

8. It is asserted that from this passage it is clear that the judge is considering the sponsor's situation at some future date. This is clearly erroneous the judge should consider the position of the sponsor as at the date of the decision not at some unspecified future date. Mr Bramble relied on the grounds of appeal. He submitted that this was an EC case which must be considered on the facts at the date of decision. By using words such as 'I infer' the judge is looking at a future date.

9. Ms Daykin submitted that with regard to future assessment the judge is making it clear that this is a long term problem not a passing and short term health disability. It is a chronic state and it is only going to deteriorate. The judge did make a finding of her needs at the date of the decision.

Finding that the first claimant was the sponsor's primary carer

10. The grounds refer to the First-tier Tribunal decision at paragraph 25(G) where the judge states that:

> "The first appellant is Mrs Hassan's primary carer in that she takes overall responsibility for overseeing Mrs Hassan's well-being – currently necessarily at a distance – but effectively by talking through Mrs Hassan's crises and upsets on the phone; this is a primary responsibility that she has adopted towards her mother."

11. It was submitted that the judge has materially misdirected himself by shoehorning both claimants into criteria which do not actually apply to them. It was submitted that the first claimant in this case cannot be the primary carer for the sponsor since she does not care for her in the sense intended by the EEA Regulations. It was submitted that talking through Mrs Hassan's crises and upsets on the phone does not constitute being a primary carer.

12. Ms Daykin submitted that the EEA Regulations define carer, although the extent of the limitations of the definition of care is in regulation 15(A)(8). The judge at Paragraph 25(g) and paragraph 28 sets out the findings of the sponsor's care needs, the sponsor is the person that is envisaged and catered for by the EEA Regulations. What the judge says quite clearly corroborates that need. The sponsor was accompanied by the instructing solicitor at the first hearing and today.

Requirement that the British Citizen would be unable to reside in the UK

13. With regard to 15A(4A)(c) -the relevant British citizen would be unable to reside in the UK if P were required to leave - it was submitted that this does not apply to the first claimant for two reasons: firstly, the sponsor clearly is able to reside here in the UK without the first appellant since she is doing so now and secondly, this part of the regulation cannot apply to the first claimant who does not live here and cannot be required to leave.

14. With regard to Regulation 15A(8) -P is to be regarded as a primary carer of another person if P is the person who has primary responsibility for that person's care. It was submitted that this does not apply to the first claimant, since she does not have primary responsibility for the sponsor's care. Mr Bramble referred to the judge's findings that the first claimant takes an overall responsibility for overseeing the needs, necessarily at a distance, he submitted that assisting by phone cannot be sufficient to satisfy being a primary carer. The judge at paragraph 25(k) talked about worsening common conditions and that the sponsor was alone and quite vulnerable. The sponsor is here today and was at the first hearing and gave evidence as set out at paragraph 18 of the decision. The social services are involved, she is dealing with these issues which suggests that the sponsor is dealing with these herself. The first claimant does not fall within the role of a primary carer. The sponsor is residing here on her own and getting assistance through the NHS and social services.

15. Mrs Daykin submitted that from Zambrano it is not an answer to say that a child can be cared for by social services and that this must extend to a dependant adult as well. She submitted that it is not a case where the Secretary of State has been able to identify an error of law. Both social services' and the NHS's input is limited to the extent that it is not personal care. The sponsor describes in evidence that her life is extremely tough.

The principles set out in the case of Zambrano

16. The judge found at paragraph 29 that the second claimant does not satisfy regulation 15(A)(5) but was nevertheless satisfied that the principle by which she derives her own right of residence is set out by the ratio in Zambrano. It is submitted that the judge has failed to explain what in the ratio of Zambrano can enable a provision of the EEA regulations to simply be set aside. Mr Bramble submitted that the judge did not explain the Zambrano point. Both claimants are not even within the jurisdiction of an EEA country so how can they fall within the Zambrano principle. How can Zambrano trump the position where it was found that they did not meet the regulations?

17. Mrs Daykin referred to 2 key points from the EEA Regulations. Regulation 11(5)(e) is prospective and deals with the point that the EEA Regulations create a right of entry. This meets the point that they are not in the UK currently.

18. The principal in Zambrano is that it must lead to a denial of the exercise of citizenship, which applied here because if the first claimant could not bring her dependant child she could not come to the UK and the citizen would have to leave the UK. There is no mechanism under the EEA Regulations for the second claimant but this is a directly effective European Union law provision so she can enforce her directly effective rights.

Failing to give reasons or any adequate reasons on a material matter.

19. The grounds set out that at paragraph 25(f) the judge states that, 'there is no one presently in the UK who takes care of Mrs Hassan.' It is submitted that this directly contradicts what is said at paragraph 18 'now, if she was unwell she would go to see her GP…social services in the UK have given her a chair and raised her sofa and given her a raised toilet seat and put bath aids in.' The sponsor plainly is being taken care of by the NHS and social services and the judge has failed to explain why, despite that care 'no one presently in the UK' is taking care of her.

20. At paragraph 25(l) the judge states 'I find that she would be unable to reside in the UK if the first appellant was not able to enter the UK to assist her.' It is submitted that the judge has failed to explain why this is so given that the sponsor attended the First-tier Tribunal hearing apparently unaccompanied which must have involved a journey from Ilford to Hatton Cross. She was able to give evidence without difficulty - this is not suggestive of a person in such ill health that she cannot live in the UK unless her daughter comes to look after

her. The same is also true of paragraph 25(f) quoted above she goes to her GP to renew her prescription. There is also the care provided by the NHS and social services referred to above.

21. Ms Daykin, in response to a question I asked of her, explained that the application made by the claimants was for a limited period of 6 months because this was the maximum she could apply for on a visit visa however there would be an opportunity to make further applications.

Discussion

22. The core question is whether, if the first claimant is not permitted to enter the UK, the sponsor would not, as a matter of practicality, be able to remain in the UK.

23. I will deal with the issue that the claimants are not currently in the UK first. Although Regulation 15A(4A)(c) provides for a derivative right if the primary carer were required to leave the UK Regulation 11(5)(e) provides:

> 'Right of admission to the United Kingdom
>
> 11…
>
> (2) A person who is not an EEA national must be admitted to the United Kingdom if he is—
>
> …
>
> (b)… a person who meets the criteria in paragraph (5)…
>
> (e) P is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and P would be entitled to reside in the United Kingdom pursuant to regulation 15A(4A) were P and the British citizen both in the United Kingdom.'

24. In the case of Campbell (exclusion; Zambrano) [2013] UKUT 00147 (IAC) at paragraph 30 the Upper Tribunal held:

> "30. ... We see no reason in principle why Zambrano principles cannot have application in entry clearance cases: in both in-country and out-of-country cases the Member State must ensure that any "refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union": Dereci & Others (European citizenship) [2011] EUECJ C-256/11, 15 November 2011, para 74. Indeed the ruling of the Grand Chamber of the Court of Justice in this case encompassed not just the cases of those applicants who were already living in the host Member State (Austria) but Mrs Stevic who resided in Serbia: see paras 26, 35, 74."

25. It is clear that the EEA Regulations permit a right of admission and a derivate right of residence even where the carer in not in the UK at the time of application. That is amplified in the Campbell decision.

26. Regulation 15A(4A) of the EEA Regulations, which was inserted with effect from 8th November 2012 by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012/2560, provides for a derivative right of residence for primary carers of British citizens as follows:-

> '(1) A person ('P') who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4) (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria. ...
>
> (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 would be unable to reside in the UK or in another EEA State if P were required to leave.'

27. Regulation 15A(4A) was inserted to comply with the interpretation of the Court of Justice of the European Union ("CJEU") of Article 20 of the Treaty on the Functioning of the European Union ("TFEU") in the Zambrano case where the Grand Chamber of the CJEU held that Article 20 of the TFEU "precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the European Union" (paragraph 42).

28. The judge found that the first claimant is the sponsor's primary carer finding that the care currently undertaken was as follows:

> 'The first appellant is Mrs Hassan's primary carer in that she takes overall responsibility for overseeing Mrs Hassan's well-being – currently necessarily at a distance – but effectively by talking through Mrs Hassan's crises and upsets on the phone; this is a primary responsibility that she has adopted towards her mother.'

29. The definition of primary carer is to be found in Regulation 15A(7)

> '(7) P is to be regarded as a "primary carer" of another person if
>
> (a) P is a direct relative or a legal guardian of that person; and
>
> …
>
> (i) is the person who has primary responsibility for that person's care; or…'

30. The first point to note is that this level of care currently undertaken by the first claimant can continue if the first claimant is not permitted to enter the UK. The sponsor is living independently in the UK presumably with assistance with her daily living needs. There is no suggestion that the care she is receiving will cease. If she is not receiving care then she must be able to currently manage to live independently without assistance. I agree with Mr Bramble's submission

that the level of care being performed by the first claimant identified by the judge is not sufficient to engage the EEA Regulations. I consider that the first claimant is not the primary carer of the sponsor and the EEA Regulations do not apply.

31. However, even if the first claimant was to be considered the primary carer, if the first claimant did not provide this level of care, it is highly unlikely that this would result in the sponsor being compelled to leave the UK (discussed below).

32. In this case the judge considered that the sponsor was in need of care finding that the medical evidence from the two GPs corroborates the need. The judge found that the doctor noted that she needed assistance with her daily living (paragraph 23) and that she has a number of chronic medical conditions including type 2 diabetes, kidney disease, cataracts and diabetic retinopathy. Her medical conditions cause breathlessness, tiredness and pain (paragraph 23). However, as the Entry Clearance Officer's representative pointed out, the sponsor was able to attend both hearings and attends at her GP every month. She is as a matter of fact currently living independently. The judge did consider her future need stating, 'I infer that her increasing level of disability will make independent living impossible'. There is no definition as to the level or type of care needs that must exist before the EEA Regulations are engaged. However, I consider that the level of care needed is inextricably linked to the requirement in 15A(4A)(c) that the removal (or in this case refusal of entry) would lead to the British citizen being unable to remain in the UK.

33. In Hines v Lambeth London Borough Council [2014] EWCA Civ 660 at paragraph 23 the court held:

> "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."

34. At paragraph 19 the court, referring to the case of Harrison v. Secretary of State for the Home Department [2012] EWCA Civ 1736 ("Harrison") set out:

> " ... Elias LJ's starting point in that case was that the Zambrano principle did not extend to cover anything short of the a situation where the EU citizen is forced to leave the territory of the EU (paragraph 63). Elias LJ then dismissed the notion that the CJEU in Zambrano was leaving open the possibility that the doctrine might apply "more widely and loosely" (paragraph Judgment Approved by the court for handing down. Hines v. Lambeth 64). In paragraph 66, Elias LJ makes clear that *Dereci v. Bundesministerium fűr Inneres (*Case C-256/11) [2012] 1 CMLR 45 (paragraphs 67-72) demonstrated that the reduction of the enjoyment of family life by the family members who remain when non-EU citizens leave was not sufficient to engage EU law. At paragraph 67, Elias LJ explained the matter as follows:-

> " … I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU right is in general forbidden by EU law in precisely the same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality or life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished …""

35. At paragraph 8 the court effectively summarised that the court in Harrison:

> " ... held at paragraph 63 that the *Zambrano* principle did not cover anything short of a situation where the EU citizen is forced to leave the territory of the EU."

36. In DH (Jamaica) and others v SSHD 2012 EWCA Civ 1736 the Court of Appeal held at paragraph 63:

> "I agree with Mr Beal QC, 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 …"

37. In the case of Jamil Sanneh v (1) Secretary of State for work and pensions and (2) The Commissioners for Her majesty's Revenue and Customs [2013] EWHC 793 (Admin) ('Sanneh') the court having considered the Zambrano case and subsequent authorities derived a number of propositions from those cases at paragraph 19:

> " …
>
> iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.
>
> iv) Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; …"

38. In MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC) the Upper Tribunal when applying the EU law principles as summarised in Sanneh held at paragraph 56:

> "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)."

39. The above cases repeat and amplify that there is no right to a particular quality of life or standard of living and nothing short of actual compulsion or being

forced to leave the UK as a result of the removal or refusal of entry of the carer will engage the Zambrano principles as enacted in the EEA Regulations. Applying those principles to this case it is clear that the level of care required must be such that without the care of the first claimant the sponsor would be compelled to leave the UK. The judge considered the sponsor's current need for care noting her many chronic medical complaints and that she needs assistance with daily living. I note that the sponsor's evidence was that if the first claimant did not come to the UK to care for her she would have to leave the UK. As a matter of choice the sponsor may wish to go to Pakistan to be with her daughter and receive the personal care she needs but, in my view, she would not be compelled or forced to leave the UK. The sponsor has described life as very tough. I do not wish to diminish the importance of having close family to attend to personal care but the reality is that the sponsor can obtain (and clearly is obtaining) the care that she needs. I note that the sponsor is in receipt of higher rate attendance allowance for help with personal care in the amount of £77.45 per week. She is living independently. Her quality of life might be enhanced if her daughter undertook the carer role but the right is not a right to any particular quality of life or to any particular standard of living.

40. The judge erred in considering the future needs of the sponsor. As at the date of the decision the sponsor was able to live independently and her care needs in relation to her daily living and personal care were clearly being met. However, even if the sponsor was unable to live independently that is not sufficient necessarily to engage Article 20 of the TFEU. Ms Daykin submitted that just as it is not an answer to removal of a parent that a child could be adopted or looked after by the state this applies equally to the sponsor. I do not accept that submission. There is a world of difference between the needs and status of a child who is reliant on adults in his formative years for ensuring his welfare, development, moral compass and to make decisions on his behalf and an adult. As a British citizen the sponsor is entitled to the level of care she requires whether that is support in her own home or in residential/nursing care. The sponsor would not be compelled to leave the UK to receive the care she needs either now or even in the future on the basis of a worsening of her current chronic medical conditions. The sponsor quite understandably would prefer to have her daughter care for her. However, the right under the EEA Regulations is not to a quality of life that the sponsor would prefer.

41. In relation to the second claimant the judge found that she does not satisfy regulation 15(A)(5) but was nevertheless satisfied that the principle by which she derives her own right of residence is set out by the ratio in Zambrano. The judge did not give reasons or explain how that right was derived. Ms Daykin submission was that a denial of the exercise of citizenship applied here because if the first claimant could not bring her dependant child she could not come to the UK and the citizen would have to leave the UK and that this is a directly effective right. In this case there is no evidence that the second claimant would have to accompany the first claimant. Her father is in Pakistan. There was no evidence as to why she cannot remain in Pakistan in the care of her father.

Conclusions

42. The decision of the First-tier Tribunal judge involved making material errors of law. I set-aside the decision pursuant to paragraph 12(2)(a) of the Tribunals Courts and Enforcement Act 2007.

43. I re-make the decision. For the reasons set out above the first claimant is not the primary carer of the sponsor and in any event the sponsor would not be compelled to leave the UK if the first claimant was not admitted to the UK. The second claimant's appeal fails as the first claimant's appeal has failed. Additionally, even if the first claimant's appeal succeeded the second claimant does not meet the EEA Regulations and has no directly enforceable derivative right of residence as there is no evidence that the first claimant could not come to the UK to care for the sponsor without bringing her daughter with the result that the sponsor would be unable to reside in the UK.

Article 8

44. The judge did not consider the claimants' Article 8 grounds given the findings on the EEA Regulations. I have not gone on to consider Article 8 as this is an appeal under the EEA Regulations. The claim was for admission to the UK under the EEA Regulations. By analogy the reasoning in the case of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) applies. The Upper Tribunal held at paragraph 75:

> "For these reasons, we conclude that, where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot in an appeal under the EEA Regulations bring a Human Rights challenge to removal."

45. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

46. The decision of the First-tier Tribunal involved the making of an error of law. I set aside that decision. I re-make the decision dismissing the first and second claimant's appeals against the decision of the Entry Clearance Officer.

Signed P M Ramshaw Date 18 October 2015

Deputy Upper Tribunal Judge Ramshaw