Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01171/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 06 August 2019	**On 28 October 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE CANAVAN

Between

O S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. For this reason, we find that it is appropriate to make an order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellant: Mr R. A Jafar instructed by Kothala & Co.
For the respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica whose date and method of entry is unknown. On 24 October 2002 he applied for asylum. The claim was refused on 19 December 2002. He remained in the UK without leave until 18 April 2007 when he applied for a residence card recognising a right of residence as the family member of an EEA national. The application was initially refused, but after a successful appeal, he was issued with a residence card on 10 January 2011. On 21 December 2015 he applied for a permanent residence card. The application was refused in a decision dated 14 June 2016. There is no evidence to indicate that the appellant appealed the decision.

2. The appellant has a son from his relationship with the EEA national. We were told that he is a Swedish national who was born in the UK on 25 June 2010 (nine years old). Although there is no direct evidence of his nationality it does not appear to be disputed. The appellant donated a kidney to his EEA partner in early 2014 but says that she still requires regular treatment. Their relationship ended in 2015 but he continues to have regular contact with his son. In particular, he looks after him when his mother attends hospital for dialysis.

3. The appellant established a relationship with a British citizen. They have a daughter who is a British citizen born on 03 June 2017 (two years old). Although the appellant is no longer in a relationship with her mother, he says that he continues to have regular contact with his daughter.

4. The appellant appealed the respondent's decision dated 16 January 2018 to administratively remove him with reference to regulations 23(6)(a) and 32(2) of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") on the ground that he ceased to have a right to reside in the UK under EU law. The respondent was not satisfied that he had acquired a right of a permanent residence. The notice of decision stated that the appellant had a right to appeal and went on to provide the following information:

> "The appeal must be made on one or more of the following grounds:
>
> - That the decision is unlawful because it racially discriminates against you;
> - That the decision is unlawful because it is incompatible with your rights under the European Convention on Human Rights;
> - That the decision breaches rights which you have as an EEA National or member of such a person's family under Union Treaties relating to entry or residence in the UK;
> - That the decision is otherwise not in accordance with the law;
> - That your removal from the United Kingdom as a result of the decision would:
>   - breach the United Kingdom's obligations under the 1951 Refugee Convention;
>   - be incompatible with your rights under the European Convention on Human Rights.
>
> You should not appeal on grounds which do not apply to you. You must also give arguments any supporting evidence which justifies your grounds."

5. Pausing there, it becomes apparent from our discussion on jurisdiction below, that the notice of decision was out of date and misleading in relation to the information provided regarding the grounds of appeal that might be available to the appellant. Having been told that one available ground of appeal might be that his removal would be incompatible with his rights under the European Convention, the appellant proceeded to appeal the decision citing human rights grounds. He raised family life issues with his children in the sections of the appeal form entitled "Human Rights Decision", "EEA Decision" and "New Matters".

6. A note from the respondent's GCID records printed on 11 March 2019 indicates that the appellant was interviewed after the police encountered him on 15 January 2018. In that interview he notified the respondent that he had two children in the UK. The GCID entry from 13 November 2018 shows that the appeal was adjourned on 06 September 2018 for the Home Office Presenting Officer to take instructions and for the Secretary of State to consider further evidence relating to the appellant's family life in the UK. At the hearing before the Upper Tribunal, Mr Melvin confirmed that he could find no evidence to suggest that a further decision was made in relation to the family life issues raised by the appellant.

7. First-tier Tribunal Judge Carroll ("the judge") dismissed the appeal in a decision promulgated on 25 March 2019. Inaccurately, she identified the decision that was the subject of the appeal as the earlier decision to refuse a permanent residence card [1] although she noted that a subsequent decision was made to remove the appellant on 16 January 2018 [7]. In relation to the jurisdiction of the First-tier Tribunal to consider the human rights issues the judge said: "By virtue of removal directions being in force, the appellant relies upon a breach of Article 8 in the context of his family and private life, principally his relationship with his two children…" [9]. The judge noted that limited evidence had been produced from the mothers of the two children, but after having heard evidence from the appellant, concluded:

> "15. The limited evidence before me falls very far short of demonstrating that the appellant has a genuine and subsisting parental relationship with his two children in the UK. Insofar as he sees those children, his role appears to be that of a babysitter and I have referred above to the discrepancies between the written and the oral evidence as to the frequency of contact between the appellant and the children. The evidence from [the oldest child's] school is now very out of date (June 2018) and not supported by any evidence from his mother.
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> 16. I was referred by the appellant's Counsel to the Upper Tribunal decision in **JG (Section 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072**. The factual matrix in that decision is entirely different from that in the appeal before me. In JG the Upper Tribunal considered the position of a nuclear family. In this case, the appellant is no longer in a relationship with the mothers of either of his two children and there is, quite simply, no expectation that either of the children should leave the United Kingdom."

8. Upper Tribunal Judge Jackson granted permission to appeal to the Upper Tribunal on the following grounds:

(i) It was arguable that the First-tier Tribunal failed to have regard to the nature of a relationship between a parent and a minor child, where family life is normally presumed, in circumstances where it appeared to be accepted that the appellant had contact with both children. It was arguable that the judge erred in characterising the appellant's role as a "babysitter" rather than having a parental relationship with his children.

(ii) It was arguable that the First-tier Tribunal's finding relating to *JG (Section 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 00072 was contrary to the findings made in that case. The First-tier Tribunal was required to conduct a hypothetical assessment whether or not the children would in fact be expected to leave the UK.

(iii) Although it was not pleaded in the grounds of appeal to the Upper Tribunal, Judge Jackson noted that consideration might need to be given to whether the First-tier tribunal had jurisdiction to consider human rights grounds in light of the Court of Appeal decision in *Amirteymour v SSHD* [2017] EWCA Civ 353 given that removal directions had not been set and there was no evidence to suggest that the appellant was issued with a notice under section 120 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). After the hearing, the Upper Tribunal also made directions to the parties requesting further submissions on the scope of the appeal in light of the recent decision in *Munday (EEA decision: grounds of appeal)* [2019] UKUT 00091.

LEGAL FRAMEWORK

Rights of European citizens

9. Article 20 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 17 TEC) sets out rights arising from citizenship of the Union.

> "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 replace 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;
>
> …
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

10. Article 21 (ex Article 18 TEC) states:

> "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 the Treaties and by the measures adopted to give them effect. …"

11. In *Baumbast and R (Free Movement of Persons)* [2002] EUECJ C-413/99 the Court of Justice of the European Union (CJEU) outlined the underlying importance of the rights arising from European citizenship even if the citizen was not exercising rights of free movement as a worker.

> "94. The answer to the first part of the third question must therefore be that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality."

12. The principle was summarised by Mrs Justice Lang in *R (on the application of Gureckis) v SSHD* [2018] EWHC 3298 (Admin).

> "89. Freedom of movement for workers was one of the founding principles of the EU, now found in Article 45 TFEU. Its primary purpose was to promote the economic objective of a common market, together with the freedom of movement of goods, services and capital. This was reflected in the earlier cases relied upon by Mr Eadie QC, such Case 53/81 *DC Levin v Secretary of State for Justice* [1982] 2 CMLR 454, at [17]. However, since the Treaty of Maastricht, which introduced the notion of EU citizenship, the concept of freedom of movement has broadened into a right to freedom of movement and residence for EU citizens, and their families, without a requirement to be economically active, provided that they do not seek social assistance from the host Member State. Articles 20 and 21 of TFEU grant EU citizens "the right to move and reside freely within the territory of the Member States", subject to the limitations and conditions laid down in the Treaties and Directives. These principles are reflected in Recitals (1), (2), (3), (5) and (11) to the Directive. See also Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] 3 CMLR 23 at [81] – [84]."

13. Article 7 of the Charter on Fundamental Rights of the European Union protects the right to respect for 'private and family life'. Article 51 of the Charter makes clear that the provisions of the Charter apply in the following circumstances:

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

Rights of European citizen children

14. In *Ruiz Zambrano v Office national de l'emploi* [2011] EUECJ Case C-34/09 the CJEU considered the circumstances of European citizen children living in their country of nationality (Belgium) whose parents were third country nationals. The court noted

that the Citizens' Directive did not apply to the children because they had not exercised rights of free movement. However, the court observed that Article 20 TFEU conferred the status of citizen of the Union on every national of a Member State. As the court had stated on several occasions, including in *Zhu and Chen*, citizenship of the Union is intended to be the fundamental status of nationals of the Member States. In those circumstances, Article 20 TFEU precluded national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Article 20 precluded a Member State from refusing a residence permit to third country national parents in circumstances where the refusal would lead to a situation where the children would have to accompany their parents. The children would be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

15. In *Alfreso Rendón Marín v Administración del Estado* [2016] EUECJ C-165/14 the CJEU considered a case involving a Colombian national who was the sole carer for two European citizen children (Spanish and Polish citizens). The applicant was refused a residence card on public policy grounds. The CJEU emphasised that, as Union citizens, the children had the right to move and reside freely within the territory of the European Union and that any limitation on that right fell within the scope of EU law. In so far as Mr Marín's situation fell within the scope of EU law, the assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which must be read in conjunction with the obligation to take into consideration the children's best interests, recognised in Article 24(2) of the Charter.

16. In *Chavez Vilchez v Raadvanbestuur van der Sociale Verzekeringsbank & others* [2018] QB 103 the CJEU considered a number of cases involving the proposed removal of third country national parents who were the primary carers of European citizen children, where the other European citizen parent was either absent or played a minimal role in the child's life. The court considered what weight should be given to the best interests of the child and concluded:

> "1. Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the

Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

2. Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences."

17. The Court of Appeal in *Patel v SSHD* [2017] EWCA Civ 2028 considered the effect of *Chavez-Vilchez* and concluded:

> "25. It seems clear therefore that the underlying principle in *Zambrano* is undisturbed by *Chavez-Vilchez*, albeit that in the case of a child dependent on one parent who is a third country national with no right of residence, the State must ensure a careful process of enquiry. However, the third-country national bears the evidential burden of establishing that the child citizen will, in practice, be compelled to leave the EU, unless rights of residence are granted to the (principal) carer parent."

18. The Home Office Policy Guidance "Free Movement Rights: Derivative Rights of Residence" (Version 5.0 – 02 May 2019) says the following about the best interests of children in the context of derived rights of residence.

> "The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that consideration of the child's best interests is a primary consideration in immigration cases.
>
> You must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK when assessing whether a relevant child would be unable to remain, or to continue to be educated, in the UK, if the applicant left the UK for an indefinite period."

DECISION AND REASONS

Jurisdiction

19. We made further directions and invited submissions from both parties on the issue of jurisdiction in light of the decision in *Munday*. In response to directions the respondent asserted that *Munday* should be followed and that the scope of the appeal did not include consideration of human rights issues under Article 8 of the European

Convention. The appellant made general submissions asserting that the Tribunal should have regard to human rights issues without tackling the technical changes to the statutory appeal framework highlighted by the Upper Tribunal in *Munday* or the wider changes to the appeal framework introduced by the Immigration Act 2014 ("IA 2014").

20. Some background may assist in understanding the decision in *Munday*. The earlier decision of the Court of Appeal in *Amirteymour* involved a decision to refuse to issue a residence card under The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006") recognising a derived right of residence. The case was similar in that the EEA national child could remain in the care of his mother in the UK. No notice was issued under section 120 NIAA 2002 requesting a statement of additional grounds. The decision gave rise to a right of appeal against the EEA decision under regulation 26 of the EEA Regulations 2006. At the relevant time paragraph 1 of Schedule 1 of the EEA Regulations provided that the grounds contained in section 84(1) NIAA 2002 (except (a) and (f)) had effect in relation to an appeal brought under the regulations. The grounds of appeal available in an appeal brought under the EEA Regulations 2006 therefore included sections 84(1)(c) and (g), which allowed for an appeal against an EEA decision to be brought on the ground that the decision, or removal in consequence of the decision, was unlawful under section 6 of the Human Rights Act 1998 ("HRA 1998") i.e. a breach of the European Convention.

21. However, the Court of Appeal concluded that there was a fundamental difference between an appeal brought against an 'EEA decision' made under the EEA Regulations 2006 and an appeal brought against an 'immigration decision' under section 82 NIAA 2002. The cross reference from paragraph 1 of Schedule 1 of the EEA Regulations 2006 to the grounds of appeal contained in section 84(1) NIAA 2002 was intended to give effect to human rights considerations only in so far as they related to the EEA decision under appeal. It did not give rise to a broader jurisdiction to consider "a general case" under Article 8, which would normally come under the ambit of an immigration decision.

22. If the Secretary of State only made a decision in relation to a right asserted under EU law, and did not made an immigration decision in relation to a human rights claim, the only way in which the statutory appeals provisions, as they then stood, provided for human rights issues to be considered by the Tribunal in an appeal against an EEA decision was:

    (i) If the EEA decision was to remove the applicant in which case the appeal against the EEA decision directly engaged human rights issues; or

    (ii) Wider human rights issues outside the context of an EEA decision could only be raised if a statement of additional grounds under section 120 NIAA 2002 had been completed. In such circumstances section 85(2), as it was then worded, allowed the Tribunal to consider any matter that was raised in the statement which constituted a ground of appeal of the kind listed in section 84(1).

23. The decision in *Amirteymour* predated the major changes made to the broader appeals provisions contained in Part 5 NIAA 2002 by the IA 2014. It also predated the introduction of paragraph 1 of Schedule 2 of the EEA Regulations 2016. In *Munday* the Upper Tribunal explained the effect of those changes in so far as they related to the scope of an appeal brought under the EEA Regulations 2016. The two main changes to the legal framework were:

    (i) Paragraph 1 of Schedule 2 did not cross reference an appeal brought under the EEA Regulations 2016 to the grounds of appeal contained in section 84 NIAA 2002; and

    (ii) The grounds of appeal under section 84 could only be relied upon in appeals against the specified immigration decisions outlined in section 82 e.g. immigration decisions to refuse protection or human rights claims.

24. The Tribunal concluded that the effect of these changes was that a person could no longer rely on the ground that the removal in consequence of an EEA decision made under the EEA Regulations 2016 would be unlawful under section 6 of the Human Rights Act 1998. The amended grounds of appeal under section 84(1) are only available in appeals against decisions to refuse protection and human rights claims and do not apply to EEA decisions. The wording of paragraph 1 of Schedule 2 of the EEA Regulations 2016 does not maintain the previous bridge between the human rights grounds of appeal in section 84 and an appeal against an EEA decision under the regulations. However, section 85(2) still gave the Tribunal scope to consider any matters contained in a statement made under section 120 if they constituted a ground of appeal under section 84.

25. In light of these changes the Upper Tribunal in *Munday* concluded that there is no longer a provision permitting an appellant to raise human rights grounds in an appeal against an EEA decision unless a section 120 notice has been considered or an immigration decision to refuse a human rights claim has been made [81].

26. Turning to the facts of this case, the respondent's interview with the appellant clearly raised human rights issues that engaged the operation of Article 8 of the European Convention. The respondent was aware that the appellant had two children in the UK when considering whether to make a removal decision. However, the respondent failed to consider the interests of the children in accordance with her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009"). Nor did she consider whether the decision to remove the appellant might engage issues relating to the appellant's family life with his children under Article 8 of the European Convention in accordance with her duty under section 6 of the HRA 1998. In the circumstances it would have been appropriate to issue a notice under section 120 asking the appellant to return a statement of additional grounds before the decision was made.

27. In response to directions, the respondent confirmed that there is no record of a section 120 notice being issued. The only decision before the First-tier Tribunal was a decision to remove the appellant with reference to regulations 23(6)(a) and 32(2) of

the EEA Regulations 2016. The structure of the new appeals system no longer permits human rights grounds under section 84 NIAA 2002 to be raised in an appeal against a removal decision under the EEA Regulations 2016. No statement of additional grounds was made by the appellant under section 120 that would enlarge the scope of the appeal with reference to section 85(2). No decision to refuse a human rights claim was made that would give rise to an appeal under section 82.

28. It follows from the above analysis that the sole permitted ground of appeal in this case was that the decision breached the appellant's rights under the EU Treaties in respect of his entry to or residence in the United Kingdom. It was not open to the appellant to argue that removal in consequence of the decision would be unlawful under section 6 of the HRA 1998 with reference to Article 8 of the European Convention.

Error of law

29. We are satisfied that the First-tier Tribunal decision involved the making of errors of law and must be set aside. The appellant has contact with both children. Like many parents who are separated, his children do not live with him and he does not have daily contact. The fact that he provides less day to day care for the children than their mothers, who are the primary carers, does not diminish the fact that he has a genuine and subsisting parental relationship with the children. It was not within a range of reasonable responses to the evidence for the judge to describe such contact as "babysitting". In any event, the First-tier Tribunal Judge determined the appeal on an incorrect legal basis She made no findings in respect of the sole ground of appeal under EU law.

Remaking

Best interests of the children

30. The appellant has a genuine and subsisting parental relationship with two children in the UK. The first is a Swedish citizen; the second a British citizen. Although the appellant is not the primary carer, it is in the interests of the children to continue their family life with their father. His son's mother has a serious medical condition and still requires regular dialysis. The appellant's role in his son's life, and the care he provides when his mother is receiving treatment, is even more important in this context. The children would not be forced to leave the UK if the appellant was removed. It is likely that both children would remain in the care of their respective mothers. It would place his son in a precarious situation during his mother's treatment and/or at times when her health is poor. The appellant's removal from the UK would separate the children from their father on a long-term basis. We conclude that the best interests of the children point clearly towards them being brought up by both parents in the UK.

Rights under the EU Treaties

31. The appellant does not have a derived right of residence with reference to *Zambrano* principles because the children would not be forced to leave the area of EU if the appellant is removed. However, he can rely on the broader rights his son has under Article 20 TFEU. His son's rights as a European citizen are engaged, which must include consideration of the best interests of the child (Article 24(2) Charter) and his right to private and family life (Article 7 Charter): see *Rendón Marín*. The appellant has a genuine and subsisting family life with his son. His removal would lead to long term separation from the child, which would not be in his son's best interests, particularly given his mother's health problems. For these reasons, we conclude that the decision to remove the appellant would not be proportionate under EU law. The appellant derives a right of residence under EU law based on his family life with an EEA national child.

Human Rights

32. Although we have found that the appeal is confined to EU law grounds, we indicated at the hearing that, even if this was an appeal that could be brought on human rights grounds with reference to the European Convention, we would conclude that removal would amount to a disproportionate interference with the appellant's right to family life under Article 8 of the European Convention. This finding is not binding upon the Secretary of State, but given the confusion caused by the respondent's failure to consider obvious human rights issues raised in interview, and the misleading nature of the notice of decision, which suggested that human rights grounds could be raised in this appeal, it is appropriate to express our view.

33. Section 117B(6) NIAA 2002 is not specifically tailored to European citizen children. Both children meet the definition of a 'qualifying child'. The appellant's son, because he has been continuously resident in the UK for a period of seven years, and his daughter, because she is a British citizen. If this was a human rights appeal, we would be satisfied that the appellant has a genuine and subsisting parental relationship with both children. The 'real world' situation is that both children would remain in the UK with their mothers and would not be expected to leave the UK. However, the consequence of the appellant's removal would be the long-term separation of the children from their father. For the purpose of the hypothetical assessment under section 117B(6), in so far as it is said to be compliant with Article 8 of the European Convention, we conclude that it would be unreasonable to expect the children to leave the UK.

34. The decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is ALLOWED on EU law grounds

Signed  Date 24 October 2019
Upper Tribunal Judge Canavan