IN THE UPPER TRIBUNAL **Case No** CH/1746/2018
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Ms Blackmore, Principal Legal Officer

For the Respondent: in person

Decision: The local authority's appeal is allowed. The decision of the First-tier Tribunal sitting at Leeds on 20 March 2018 under reference SC007/17/01586 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision in the following terms:

The claimant's appeal against the local authority's decision of 19 January 2017 is dismissed.

REASONS FOR DECISION

1. In this case to avoid confusion I refer to the appellant before me as "the local authority" and the respondent as the "claimant."

2.The claimant is a national of Nigeria. She states that she is a Level 2 authorised immigration adviser. Her son, A, born in July 2003, is an Irish national.

3. The local authority refused the claimant housing benefit from 18 September 2014, on the ground that she was a "person from abroad" for the purposes of section 115(9) of the Immigration and Asylum Act 1999 ("the 1999 Act") and was by s.115 excluded from entitlement to housing benefit.

4. Sections 115(9) and (10) of the 1999 Act provide as follows:

> "(9) *"A person subject to immigration control"* means a person who is not a national of an EEA State and who—
> (a) requires leave to enter or remain in the United Kingdom but does not have it;
> (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
> (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
> (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4.
>
> (10) *"Maintenance undertaking"* , in relation to any person, means a written undertaking given by another person in pursuance of the immigration rules to be responsible for that person's maintenance and accommodation."

5. The claimant appealed to the First-tier Tribunal ("FtT"). Her primary submission was that she fell within reg 2(1) of, and para 3 of the Schedule to, the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000/636 ("the 2000 Regulations"). Their combined effect is that a person falling within the wording below is not excluded from (among other benefits) housing benefit, even though they are within the definition of a "person from abroad". Para 3 of the Schedule provides:

> "3. A person who–
> (a) has been given leave to enter or remain in, the United Kingdom by the Secretary of State upon an undertaking by another person or persons pursuant to the immigration rules within the meaning of the Immigration Act 1971, to be responsible for his maintenance and accommodation; and
> (b) has been resident in the United Kingdom for a period of at least five years beginning on the date of entry or the date on which the undertaking was given in respect of him, whichever date is the later."

There is a clear link between the language used in s.115(9) and (10), which define when a disqualification arises, and that in para 3 of the Schedule to the 2000 Regulations, which define when it is lifted, and in my view they are to be construed of a piece.

6. Alternatively, she asserted that she had a right under article 20 of the Treaty on the Functioning of the European Union. As a Nigerian national, she could have no such right in her own right, but A as an Irish national could have such a right and she could have a derivative right. What sort of derivative right was at times unclear but before me she confirmed that she did not seek at the date of decision to rely on rights as a *Chen*[1] carer of A, but on rights as his *Zambrano*[2] carer. I deal below with the question of derivative rights.

7. The claimant's reliance on the provision set out in [5] above created an unusual situation, in that it was she who was seeking to establish that she had previously been granted leave to remain upon an undertaking given pursuant to the immigration rules. In much, if not all, of the existing caselaw it has been the public body concerned, typically the DWP, seeking to argue that that was the case, as part of an argument that a person was disqualified from benefit for 5 years.

8. The situation came about because in 2006 the claimant made an application to the Home Office for registration cards for herself and A's father and a registration certificate for A. A letter dated 22 August 2006 from the Home Office referenced indirectly the *Chen* case without naming it and observed (with questionable accuracy):

> "Please note that if you qualified for leave to remain in the United Kingdom as the family members of your EEA child you would not have the right to work or be self-employed in the UK. [You] are therefore required to demonstrate that you and your family are self-sufficient.

[1] See C-200/02 Zhu and Chen v Secretary of State for the Home Department
[2] See C-34/09 Ruiz Zambrano v Office National de l'Emploi

> [The claimant] has stated…that her mother and sisters are wiling to financially support the family. In view of this I would be grateful to receive your responses to the following questions supported by corroborating evidence where applicable:
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> [By 1. and 2. evidence was asked for about the mother's and sisters' source of funds, their ability to provide for themselves and any dependants and their ability to support the claimant's family "for the foreseeable future".]
>
> 3. Please provide a written undertaking in the form of a statement from [the claimant's] mother and sisters indicating that they are wiling and able to provide maintenance for yourselves and your children. …"

9. On 18 September, the claimant wrote the Home Office a letter which stated that her sisters and mother had each undertaken to give £250 per month and that one of them, EO, had undertaken to provide accommodation for the family in her three-bedroom house at an address which was given. The letter recorded that a "written undertaking" was enclosed from EO and OO.

10. On 29 March 2007 the Home Office wrote referring to the *Chen* case by name. The letter indicated that the effect of *Chen* was not that the carers of a self-sufficient EEA national should have a right to reside as a "family member" within Article 2 of Directive 2004/38/EC. Rather, it was possible to apply for leave to remain as the parent/carer of an EEA national minor under paragraph 257C of the immigration rules. The claimant confirmed that this was what she wished to do and by a letter date-stamped 4 May 2007, A was issued with a registration certificate, the covering letter noting that:

> "You have provided evidence that your relatives are willing and able to provide maintenance for you and your two children for the foreseeable future."

The letter of 4 May 2007 indicated that the claimant was granted leave to remain as A's primary carer for approximately three years.

11. Documents such as registration certificates are declaratory rather than constitutive of EEA rights, so it does not avail the claimant that A's registration certificate is without end date. It is noted that by as soon as 2007 or early 2008 the claimant is said to have claimed public funds and appears to have claimed social housing and it is not easy to see how that is consistent with the continuing self-sufficiency of A on the basis of which his registration certificate and with it the grant of leave to the claimant had been obtained.

12. The decision in *Chen* was given on 19 October 2004. Although the rights of *Chen* carers were subsequently addressed by introducing regulation 15A(2) to the Immigration (European Economic Area) Regulations 2006 from 16 July 2012, initially it appears that the UK gave effect to the judgment by adding paragraph 257C to the immigration rules, with effect from 1 January 2005. It listed among the requirements for leave to be granted that the applicant "can, and will, be maintained and accommodated without taking employment or having recourse to public funds."

13. As part of the FtT proceedings, the local authority submitted evidence from the Home Office in the form of proformas dated 25 April 2016 and 16

February 2017. It appears that the former dealt with the claimant's then current immigration status (which was that in 2014 she had been given leave to remain on Article 8 ECHR grounds, subject to a prohibition on working and to having no recourse to public funds), while the latter attempted additionally to provide particulars of her rather complex immigration history.

14. The FtT judge found that the claimant did fall within the provision in the 2000 Regulations on which she sought to rely and therefore did not consider any alternative ground based on derivative rights any further. His reasons in relation to the evidence before him were that he could attach "no weight" to any of the Home Office evidence, for reasons which I consider below. He found that that evidence was contradicted by the material I have summarised at [8] to [10], which he considered corroborated the claimant's oral account. He considered the Home Office evidence unreliable, inter alia because it did not refer to the leave granted on 4 May 2007, nor did it refer to leave having been granted in consequence of the claimant's relatives having provided an undertaking, and he found that the latter had indeed occurred. The FtT's reasons make no reference to s.115(10) of the 1999 Act.

15. Ms Blackmore for the local authority submits that:

> a. there was no evidence before the FtT that leave had been given upon an undertaking, when "undertaking" is properly understood;
>
> b. evidence to the contrary was ignored;
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> c. the FtT's findings of fact were inadequate;
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> d. the FtT misdirected itself in law; and
>
> e. its conclusion that leave had been granted upon an undertaking was perverse.

16. The claimant, understandably enough, submits that the FtT judge heard the evidence and was entitled to reach the conclusion that he did.

17. To evaluate the competing submissions it is necessary to look at the immigration rules as they then stood. Paragraph 257C is set out in the Schedule to this decision. More immediately germane is paragraph 35. At that time, it read, so far as material:

> "**Undertakings**
>
> 35. A sponsor of a person seeking leave to enter or variation of leave to enter or remain in the United Kingdom may be asked to give an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted, including any further variation. Under the Social Security Administration Act 1992…the Department of Social Security…may seek to recover from the person giving such an undertaking any income support paid to meet the needs of the person in respect of whom the undertaking has been given…"

The definition of "sponsor" appeared in paragraph 6:

> 'sponsor' means the person in relation to whom an applicant is seeking leave to enter or remain as their spouse, fiancé, civil partner, proposed civil partner, unmarried partner, same-sex partner or dependent relative, as the case may be, under paragraphs 277 to 295O or 317 to 319."

18. It can be seen that an undertaking given by the claimant's mother or sisters to support A as a potential *Chen* child and his mother does not fall within that definition. If what was given were in other respects to constitute an "undertaking", it would still not be an "undertaking" under the immigration rules. There is a clear link between the wording of s.115(10) and paragraph 35, in that both use the identical formula "to be responsible for that person's maintenance and accommodation". None of the persons providing assurances as to future support for A and the claimant were within the categories described in paragraph 6, which defines the scope of application of paragraph 35, nor did an application under paragraph 257C of the rules fall within the list of provisions in connection with which a sponsor might be asked to provide an undertaking.

19. The claimant's submission was to rely on the fourfold test in CIS/4609/1997 at [26]:

> "(1) Had the claimant at any time been given leave to enter or to remain in the United Kingdom?
>
> (2) Had any person at any time given to the Immigration Authorities an undertaking that, if the claimant were to be granted leave to enter or remain in the United Kingdom, that person would be responsible for the claimant's maintenance and accommodation throughout the duration of that leave?
>
> (3) If such an undertaking had been given at any time, was the leave to remain granted on that account? and
>
> (4) Had the claimant, at the date of the claim relevant to the appeal, been resident in the United Kingdom for a period of at least 5 years from whichever was the later of the date of her entry to the country or the date of the undertaking?"

I am afraid her reliance on it in order to counter the above was misconceived: the fourfold test is fine so far as it goes but it does not ask nor answer the question of what sort of document, in what circumstances, constitutes an undertaking.

20. Of course, the Home Office was entitled to seek assurances as to the self-sufficiency of A, and by extension his mother, the claimant, as part of establishing that the criteria for a derivative right to be granted to the claimant were met and she would naturally have wished to offer them, but while it might not be stretching language as a matter of ordinary language to envisage that such documents might, depending on their terms, have amounted to "undertakings" (and the Home Office in correspondence did so), they did not amount to a "maintenance undertaking" for the purposes of s.115(10) nor an "undertaking" for the purposes of para 3 of the Schedule to the 2000 Regulations.

21. As to the judge's reliance on the evidence before him, I prefer the submission for the local authority. The FtT judge said the Home Office forms were undated; they were not - each bore the date they were issued. He said it was not clear who had sent them; that is true, but only because the names were redacted in accordance with what is understood to be a general requirement of the Home Office when it supplies such information. He said their source was unclear; yet each was headed so as to indicate that they originated from the Evidence and Enquiry Unit of the Home Office, based at Lunar House. He said it was unclear how the evidence had been obtained; but the forms indicate they were obtained by putting the claimant's name and details into the Home Office computer. He said the form dated 25 April 2016 was incomplete; but that is scarcely surprising if it was only providing the current position, as was plainly so given that it was supplemented by a form with more historical detail later. He said the form dated 16 February 2017 did not refer to the 2007 grant of leave or the undertakings which led to that grant; it did in fact refer to the grant of leave at the relevant time, for the relevant period and on the relevant conditions, but in terms that described the claimant as obtaining leave as a "family member", terminology which was appropriate to rights under Directive 2004/38, which was not the case and which was probably a reflection of the same confusion that is evident in the letter at [8] above.

22. All of these amply bear out Ms Blackmore's submission. To that one might add, as did Judge Jacobs when giving permission to appeal, that if for some reason (not immediately obvious to me) the judge thought it important to know the precise identity of those who had compiled the records, as that was an issue not foreshadowed in the appeal documents, he could (and in my view should) have adjourned to allow the local authority the opportunity to obtain the necessary permission from the Home Office to disclose that information.

23. The claimant had submitted that the Upper Tribunal had no jurisdiction in the matter. The submission was misconceived. The judge of the FtT had responded to the local authority's post-hearing application by a ruling dated 8 June 2018 refusing to review the decision, refusing to set it aside and refusing permission to appeal: in short, every single point in response to the local authority's application was in the claimant's favour. She says (a) that it was not sent to her; and (b) that it was in some way vitiated by the inclusion of a rubric stating that a party could apply for a direction modifying an earlier direction. As to (a), I do not need to resolve whether she received it or not; and as to (b), the judge's ruling did not contain any directions so the wording was unnecessary and may very possibly have been no more than wording from a standard form document left in in error. There is no possible advantage to the claimant in establishing that that ruling, entirely in her favour, was invalid and even if there had, contrary to the fact, been no application to the FtT at all for permission to appeal, it would have been open to the Upper Tribunal to waive the requirement for one. If, contrary to my view, it be necessary, I do so.

24. As therefore the Upper Tribunal does indeed have jurisdiction to consider the local authority's appeal, I conclude that for the reasons given at [15]-[22] the decision of the FtT was in error of law and set it aside. The parties had been advised in directions before the hearing that in such circumstances, it would be the Upper Tribunal's intention to remake the decision.

25. Directions had been given before the hearing requiring the claimant to produce the claimed "undertakings" if she still had them. She indicated that she no longer does. An order was served on the Secretary of State for the Home Department requiring him to produce them, if he still had them; various material was produced, including a note suggesting that something of the sort had existed for the purposes of the application for leave which was granted in 2007, but that the documents themselves could no longer be found.

26. Ms Blackmore submitted that if I were to be with her on my reading of the immigration rules then in force, it would not matter what the missing documents said as they could not, whatever their terms, amount to an undertaking for the purposes of the provisions with which we are concerned in view of the purpose for which they were given. The claimant's response continued to be to rely on the test in CIS/4609/1997. However, that test does not engage with what constitutes an "undertaking" in the first place, but rather looks at the link between the undertaking and the granting of leave required to bring the matter within the ambit of s.115. As indicated in [18], I do accept Ms Blackmore's reading of the immigration rules. I further agree that it follows from that that in the circumstances in which they were given, the documents could not amount to a maintenance undertaking for the purposes of s.115(10) or an undertaking for the purposes of para 3 of the Schedule to the 2000 Regulations whatever their terms. Accordingly, it is not necessary to examine here in any detail the caselaw concerning whether documents, which, unlike the present, were given in the context in which the immigration rules contemplate an undertaking being given, in fact constituted an undertaking for these purposes.

27. Accordingly, on the principal ground which was in issue before me, I remake the decision in favour of the local authority.

28. Both parties had been directed before the oral hearing to file a submission addressing how, if the Upper Tribunal were to set aside the decision of the FtT they would submit it should be remade. The local authority did so; the claimant did not, which was regrettable. At the oral hearing however (a) she expressly disavowed any continuing intention to rely on rights as a *Chen* carer; but (b) she did claim a right as a *Zambrano* carer. In this, she relied on the decision in *Ahmed v SSHD* [2013] UKUT 89 (IAC), in which the Immigration and Asylum Chamber of the Upper Tribunal had held at [68] that the ability to assert *Zambrano* rights in the UK, on appropriate facts, was not confined to the carers of British nationals. She referred to a decision of the FtT on 12 September 2017 in another appeal of hers, SC007/16/00401, where similar contentions had been accepted. As this had not been flagged up before the hearing and the available time had been used up without consideration of this point, I reserved the position for further consideration. I

have concluded that it is not necessary to express a view on the *Ahmed* decision, as even if it were to be assumed that the claimant could establish a right as a *Zambrano* carer, while it would take her outside s.115 of the 1999 Act, it would still not entitle her to housing benefit after the amendment made to reg 10 of the Housing Benefit Regulations 2006 with effect from 8 November 2012 by SI 2012/2587, which had the effect of excluding those relying solely on *Zambrano* rights from eligibility for housing benefit. The lawfulness of the approach adopted by SI 2012/2587 and similar regulations in relation to other social security benefits was subsequently confirmed by the Supreme Court in *R(HC) v SSWP* [2017] UKSC 73. I therefore do not consider it necessary to invite further submissions on possible *Zambrano* rights. I am doubtful whether the decision of 12 September 2017 is correct in what it says about the claimant's entitlement, but I am not hearing an appeal against it, nor is it determinative in the present appeal, so I say no more about it.

29. Finally, I had raised in directions whether the Common Travel Area could assist the claimant, given that her son is an Irish national. Ms Blackmore had not appreciated the point that was being made and so was not in a position to make any submission on it. The claimant indicated that she considered it could not avail her and that she would still have to make an application for leave. The content and operation of the Common Travel Area is somewhat elusive in legal terms. The Upper rise to no reason to suppose Tribunal's own researches have given that the Common Travel Area would confer any additional rights, material for present purposes, on the claimant as the carer of an Irish national in the UK, and thus I accept the claimant's concession that it could not avail her.

CG Ward
Judge of the Upper Tribunal
20 March 2019

SCHEDULE

Paragraph 257C of the Immigration Rules as it stood in May 2007

257C. The requirements to be met by a person seeking leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child are that the applicant:

(i) is:

(a) the primary carer; or

(b) the parent; or

(c) the sibling,

of an EEA national under the age of 18 who has a right of residence in the United Kingdom under the 2006 EEA Regulations as a self-sufficient person; and

(ii) is living with the EEA national or is seeking entry to the United Kingdom in order to live with the EEA national; and

(iii) in the case of a sibling of the EEA national:

(a) is under the age of 18 or has current leave to enter or remain in this capacity; and

(b) is unmarried and is not a civil partner, has not formed an independent family unit and is not leading an independent life; and

(iv) can, and will, be maintained and accommodated without taking employment or having recourse to public funds; and

(v) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

In this paragraph, "sibling", includes a half-brother or half-sister and a stepbrother or stepsister”