Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05842/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25 November 2014	**On 31 December 2014**
Oral Judgment given	

Before

THE HON. LORD BURNS
UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS GALYNA KANTANIST
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr R Kosarenko, Legal Representative, Sterling & Law Associates

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a determination of Designated First-tier Tribunal Judge Manuell promulgated on 13 August 2014, following a hearing at Richmond on 11 August 2014, in which he allowed the appeal of the Appellant before him, the Respondent before us

today, against the refusal of the Secretary of State to issue her with a derived residence card on the basis of her claim to be the primary carer of an EEA national child under Regulation 15A and 18A of the Immigration (European Economic Area) Regulations 2006 as amended.

2. Judge Manuell set out the background to the case in the early part of the determination and the evidence and submissions he considered before setting out his findings in Section D. The Judge noted that the evidence of the appellant before him and her partner, Mr Shostak, was supported by documentary material that was tested in cross-examination and that both witnesses gave evidence openly and clearly. The Tribunal accepted that both were reliable witnesses.

3. In paragraph 12 Judge Manuell made the following finding:

> "In the tribunal's view, it is highly significant that Christina who is the child is of tender years, barely two years old. While Mr Shostak is an experienced parent it is obvious and no reflection to him, that he cannot be sensibly regarded as able to care for his two year old daughter in the same way as her mother. His frank opinion was that if the mother, i.e. the appellant, had to leave the United Kingdom, then Christina would have to go with her."

4. In paragraph 13 Judge Manuell comments upon the fact that –

- Mr Shostak is responsible for maintaining a total of nine people – the appellant herself, his mother, his soon to be ex-wife, his five children and himself;
- He refers to his mother being elderly, having a large number of serious health problems including dementia;
- The fact Mr Shostak has a variety of business interests which no doubt require his careful and active attention, and
- that whilst it is perhaps possible that he could afford to hire child care for Christina and home help for his mother, that would obviously be costly and would be unsatisfactory in the child's case compared to the care available from her own mother.

The Judge found there is no realistic alternative to enable Christina's continued presence in the EU than the simultaneous presence of her mother.

5. The Secretary of State challenges that conclusion on one ground, namely a failure to resolve conflicts of fact or opinion on material matters, alleging that the Designated First-tier Tribunal Judge has failed to engage with the grounds submitted on 18 August 2014 and that this is a case in which the British citizen would be able to remain in the United Kingdom if the Appellant were required to leave. The grounds at paragraph 4 refer to the case of **MA & SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380** to which we shall refer later in the determination.

6. The father's position is relevant when one looks at Regulation 15A, which was introduced into the Regulations to enable an individual, who has no right of residence on any other basis set out in the Regulations, to succeed in certain limited circumstances. One of those is that the applicant is the primary carer of an EU national child and that removal of the primary carer, i.e. the applicant from the United Kingdom, will result in the EU national child also having to leave the United Kingdom or to leave the territorial boundaries of the European Union. It is not disputed before us that the issue in this case is whether arrangements exist such that the child would not have to leave the European Union and therefore not be deprived of the rights available to her as a union citizen. It is for that reason the Judge was required to consider, with appropriate care, whether there was an alternative person in the United Kingdom able, and we stress that word able, to provide the care that the child Christina required.

7. The case of **MA & SM (Zambrano)** is of particular relevance. Mr Tufan referred us to a number of paragraphs of that determination, the first of which set out the principle regarding the right of an EU citizen to enjoy the substantive benefits of rights flowing from or deriving from that citizenship. More particularly he referred to the Tribunal's findings in paragraphs 55 and 56 relating to the application of the EU principles to the second appeal before them. In paragraph 55 the Tribunal found:

> "Turning to the application of the **Zambrano** principle to the second appeal, whilst we accept that if JM and FM were both to reside in the United Kingdom without their mother life would be difficult for the sponsor and indeed the children, we do not accept that a refusal to admit the applicant to the United Kingdom would deprive either JM or FM of the genuine enjoyment of the substance of the rights associated with their status as EU citizens".

That last phrase is relied upon by Mr Kosarenko before us today which is an undisputed principle. However, in paragraph 56 the Tribunal went on to state the following:

> "There is no suggestion that the sponsor is not capable of looking after JM and FM. He has tailored his working hours thus far to ensure that they fit in with the need to care for JM, and we have no doubt he would also ensure that FM was similarly cared for. There mere fact that the sponsor cannot be as economically active as he would wish, because of his care responsibilities to JM and FM, is not sufficient to support a conclusion that JM and FM would be denied the genuine enjoyment of their EU citizenship rights, nor would this be the case even if the sponsor were required to stop working altogether. 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)."

8. We also referred at the opening of the appeal to an additional case, that of **Maureen Hines v London Borough of Lambeth [2014] EWCA Civ 660,** on the basis we had considered this judgment as part of our preliminary discussions. In that case the Court of Appeal examined the

test under Regulation 15A of the Immigration (European Economic Area) Regulations. It was considering whether requiring a child to seek alternative care within the statutory system, such as adoption or foster care if the primary carer was removed, was acceptable. It found in most cases that it was not, but the Court also went on to state the following:-

> "It was also said however 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 not normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK."

That is an accurate summary of the principles that are applicable in a Regulation 15A case.

9. If one applies those principles to the determination of Judge Manuell, it is arguable that he applied the wrong legal test in paragraph 12. The test is not whether the care that Christina will receive from Mr Shostak is the same as that her mother would give her. Ordinarily the standard of care that would be given by the child's mother where the mother is the primary carer would be better than that which could be offered by a working father. It is a material misdirection in law to consider that that was a factor determinative of the decision which was made.

10. The second error is that in paragraph 13. Judge Manuell went on to consider the current arrangements for Mr Shostak and found that those arrangements suggested that, although he may want to care for the child, there was no realistic alternative other than to enable Christina's continued presence in the United Kingdom being cared for by her mother. We find the Judge failed to consider whether alternative arrangements could be made, what those arrangements were, how those arrangements could be put into place, and whether, under those arrangements, appropriate care could be provided. This is a child who is now over 2 years of age (but was barely 2 years of age at the time of the decision) with no special needs, and for whom it has not been shown that her requirements are other than the normal ones of a child of this age, albeit that what is being proposed is that the arrangements would not enable the child to enjoy the company and care of her mother.

11. The errors in the determination are material such that the determination is set aside. The factual findings regarding family constitution, the issues of Mr Shostak's employment and business activities and those of his mother and his other domestic arrangements involving other children are not contested and are preserved findings.

12. However, when we move on to consider the re-making of the decision in light of the information and evidence that is available (all of which stands) we substitute the following decision. Our decision is that the appeal is dismissed. The reasons for that finding is, following **MA & SM,** that all possible arrangements have to be considered and shown to be such that it was necessary for the child to leave the United Kingdom. The evidence would have to show that any care that Mr Shostak was able to provide for

Christina would be of such a poor standard that it would seriously impair her quality and standard of life, such that she would be effectively forced to leave the United Kingdom. It is not a comparison between mum's care and dad's care. It is necessary to show that the standard of care that Dad would give, even if he had to give up all his business interests and become a permanent carer, is such that the child would be forced to leave the European Union. That has not been proved or substantiated on the evidence and therefore we have no choice but to dismiss this appeal.

Decision

13. **The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge. We remake the decision as follows. This appeal is dismissed.**

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 31st December 2014

Upper Tribunal Judge Hanson