Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09149/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 28th August 2014	**On 1st October 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RANIBEN MERKHI RANAVAYA
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Mills – Senior Home Office Presenting Officer.
For the Respondent: Ms Dasani instructed by Just Legal Group.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Lagunju promulgated on 9th June 2014, following a hearing at Sheldon Court on 22nd May 2014, in which the Judge allowed the above Respondent's appeal against the refusal of the Secretary of State to issue a Derivative Residence Card as the primary carer of a British citizen resident in the United Kingdom. The

Judge found that the decision was 'not in accordance with the law' and allowed the appeal.

2. The above Respondent is a citizen of India born on 5th June 1981. The Judge set out her findings from paragraph 8 of the determination which can be summarised as follows:

i. In order to qualify for a derived right of residence the applicant must show she is the primary carer of an EEA national, under the age of 18, in the UK, and that the EEA national will be unable to remain in the UK if the applicant is required to leave. The EEA nationals concerned are two minor children, aged one and two respectively at the date of the hearing, who are both said to be British citizens by virtue of their father's status. The application only mentions one child as when the application was made the second child had not been born [8].

ii. Regulation 15A(7) of the Immigration (European Economic Area) Regulations 2006 (as amended) [the EEA Regulations] defines a primary carer as a direct relative with primary responsibility for a person's care or who shares equally the responsibility of the person's care with one who is not entitled to reside in the UK. Financial contribution alone does not amount to care or responsibility [8].

iii. The appellant relies upon the fact her husband works full time thus is not at home during the day and accordingly she is responsible for waking the children in the morning and their general day-to-day care [9]. The youngest child has a cow's milk allergy and specific dietary needs as result of which he is breastfed at mealtimes although it is accepted an alternative milk supplement has been prescribed. The benefit of the health and well-being of the youngest child requires his mother to be on hand [10].

iv. Although the appellant accepts her husband comes home in the evenings after work and interacts with the children this involves playing with the children and spending time with them before bedtime, and does not amount to primary care [11].

v. The appellant is the primary carer of the children, is a direct relative, the children are under 18 and in the UK. The question is whether the children will be unable to remain in the UK if the appellant were required to leave [12].

vi. There is a strong bond between the primary carer for the children and their mother. As the children are British citizens and of the Union it would not be reasonable to expect them to

leave the UK and be deprived of various benefits attached to British citizenship [13].

vii. If they remain in their mother's absence they will be affected by the separation. The specific needs of the child's allergies would not be properly met. For this reason and due to the father's work commitments he will be unable to care for them in the same way.

3. Permission to appeal was sought by the Secretary of State on the basis of an assertion the Judge materially misdirected herself in law in failing to correctly apply the provisions of Regulation 15A (4A) (c) of the 2006 Regulations.

4. It is also asserted the Judge erred as the rights of the children will not be infringed if they are not compelled to leave the territory of a member state such as would occur if there is another ascendant relative who has the right of residence in the EU and who can and will in practice care for the child.

5. Permission was granted by another judge of the First-tier Tribunal on the basis it was arguable the Judge approached the appeal on a simple premise that all the appellant had to establish was that she was the mother of a child who was a British citizen and that her partner did not wish to give up his employment to care for the child or to pay for childcare. It also said there is no reference in the determination to the guidance to be found in relevant case law.

Error of law

6. It is accepted that the relevant regulation is Regulation 15A of the 2006 Regulations which deals with the issue of derived rights of residence. That states:

15A. Derivative right of residence

(1) A person (“P”) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4) **[** , (4A) **]** **3** 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.

(2) P satisfies the criteria in this paragraph if—
(a) P is the primary carer of an EEA national (“the relevant EEA national”); and
(b) the relevant EEA national—

(i) is under the age of 18;
(ii) is residing in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if—

(a) P is the child of an EEA national ("the EEA national parent");
(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and
(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and
(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(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.

(5) P satisfies the criteria in this paragraph if—

(a) P is under the age of 18;
(b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);
(c) P does not have leave to enter, or remain in, the United Kingdom; and
(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation—

(a) "education" excludes nursery education;
(b) "worker" does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2); and
(c) "an exempt person"is a person—
(i) who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;
(ii) who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;
(iii) to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(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

(b) P—

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.

(7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State has made a decision under regulation 19(3)(b), 20(1) or 20A(1).

7. Regulation 15A(4A) came into force on the 8th November 2012 and contains the criteria the above Respondent was required to show she is able to meet which are that (a) she 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 the above Respondent were required to leave.

8. On behalf the Secretary of State it was submitted that rather than focus upon the required test the Judge conflated the residence card application with an application requiring consideration of section 55 or Article 8 ECHR. It was submitted the Judge misdirected herself in law as the question is not whether it was reasonable to expect a child to leave the United Kingdom but whether there was no option other than for the child to leave. The Secretary of State's refusal does not mean there is a requirement or compulsion to take the British citizen children out of the UK the fact it may be ' inconvenient' to their father

to have to rearrange his working conditions does not mean that the necessary test is met.

9. On the behalf of the above Respondent it was submitted that the evidence from the children's father was that he would be unable to care for them as a result of his work commitments; although was also accepted that if he gave up his work or possibly made alternative arrangements for the childcare he would be able to do so.

10. There is arguable merit in the submission the Judge misdirected herself in law or appears to have asked herself the wrong question or, if the right question, to have answered it an irrational manner, such that the determination must be set aside and the decision re-made.

Discussion

11. The authority to which the Judge appears to have given no relevant consideration is that of MA & SM (Zambrano; EU children outside EU Iran) [2013] UKUT 380 it was held that (i) EU law terms there is no reason why the decision in **Zambrano** could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship (ii) The above conclusion is fortified by the terms of The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (SI 2012/2560), brought into force on 8 November 2012. Paragraphs 2 and 3 of the Schedule to the Regulations give effect to the CJEU's decision in **Zambrano** by amending regulations 11 and 15A of the Immigration (European Economic Area) Regulations 2006 in order to confer rights of entry and residence on the primary carer of a British citizen who is joining the British citizen in, or accompanying the British citizen to [regulations 11(5)(e) and 15A(4A)], the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State.

12. It was specifically found by the Tribunal in that case:

40. The CJEU's decision in *Zambrano* has subsequently been considered in a number of other decisions of the CJEU: *McCarthy v Secretary of State for the Home Department* [2011] All ER (EC) 729; *Dereci & Others v Bundesministerum fur Inners* [2012] All ER (EC) 373; *O and S v Maahanmuuttovirasto* [2012] EUECJ C-356/11 and C-356/12 and *Yoshikazu Iida v Stadt Ulm [2012] EUECJ C-40/11:* and by the

Court of Appeal in *Harrison (Jamaica) & AB (Morocco) v Secretary of State for the Home Department* [2012] EWCA Civ 1736.

41. Hickinbottom J recently had occasion to consider the abovementioned authorities in his decision in *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); summarising the learning to be derived from them, which we respectfully agree with and adopt, in the following terms:

> i) All nationals of all member states are EU citizens. It is for each member state to determine how nationality of that state may be acquired, but, once it is acquired by an individual, that individual has the right to enjoy the substance of the rights that attach to the status of EU citizen, including the right to reside in the territory of the EU. That applies equally to minors, irrespective of the nationality of their parents, and irrespective of whether one or both parents have EU citizenship.
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> ii) An EU citizen must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For a minor, that freedom may be jeopardised if, although legally entitled to reside in the EU, he is compelled to leave EU territory because an ascendant relative upon whom he is dependent is compelled to leave. That relative may be compelled to leave by dint of direct state action (e.g. he is the subject of an order for removal) or by virtue of being driven to leave and reside in a non-EU country by force of economic necessity (e.g. by having insufficient resources to provide for his EU child(ren) because the state refuses him a work permit). The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.
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> 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.
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> 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; although (a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the a relevant ascendant relative, and hence the EU dependent citizen, to leave, and (b) such actions as removal or prevention of work may result in an

interference with some other right, such as the right to respect for family life under article 8 of the European Convention on Human Rights.

v) Although such article 8 rights are similar in scope to the EU rights conferred by article 7 of the Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to member states only when they are implementing EU law. If EU law is not engaged, then the domestic courts have to undertake the examination of the right to family life under article 8; but that is an entirely distinct area of protection.

vi) The overriding of the general national right to refuse a non-EU national a right of residence, by reference to the effective enjoyment of the right to reside of a dependent EU citizen, is described in both *Dereci* (paragraph 67) and *Harrison* (paragraph 66) as "exceptional", meaning (as explained in the latter), as a principle, it will not be regularly engaged.

13. At paragraph 56, applying the correct legal principles to the second appellant before the Tribunal it found:

56. 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).

14. In DH (Jamaica) and others v SSHD [2012] EWCA Civ 1736 the Court of Appeal said that the application of the Zambrano test required a focus on whether, as a matter of reality, the EU citizen would be obliged to give up residence in the EU if the non-EU national was removed. If the EU citizen, be it wife or child, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there was nothing in the jurisprudence to suggest that EU law would be engaged simply because their continuing residence was in some sense affected, for example, in relation to the quality of life. The right of residence was a right to reside in the territory not a right to any particular quality of life or particular standard of living and only if that was affected to such an extent that it was likely to compel the EU citizen to leave would the principle apply.

15. There is no challenge to the finding the above Respondent has primary-care of the British citizen children or that the British citizen children are residing in the United Kingdom. These are preserved findings. What is not established on the evidence is that as a result of the Secretary of State's decision the British citizen children will be unable to reside in the United Kingdom or in another EU state if the above Respondent was required to leave. The children live with their British national father too and it has not been shown that he will be unable to meet their needs notwithstanding the role that has been played by the above Respondent to date, if she was not able to continue to do so. A lack of willingness to care for his children is different from an inability to care for them and this element has not been established on the evidence. As it has not been established that the children would have to leave the United Kingdom or another EU state the requirements of regulation 15A(4A)(c) have not been shown to be met and neither has European law been shown to be engaged and/or breached on the facts. On this basis only the appeal must fail.

16. The submissions made by Mr Mills referred to consideration of the children's best interests, under the Immigration Rules, and in relation to an Article 8 claim. This was an element raised as an issue before the First-tier Tribunal but which the Judge failed to adequately consider or make a specific finding upon.

17. There is a divergence of opinion regarding whether in an appeal against a refusal to issue a residence card Article 8 is engaged or can be argued. The Secretary of State's position is that it is not as this is not a decision which will result in an individual's removal from the United Kingdom but a refusal to confer a document reflecting an individual's status under the Regulations. In the case of Bee and another (permanent/derived rights of residence) [2013] UKUT 83 a Tribunal composed of Mr Justice Blake and Deputy Upper Tribunal Judge Farrelly considered an appeal against a decision of a judge of the First-tier Tribunal who allowed the appeal against a refusal to issue confirmation of entitlement to permanently reside in the United Kingdom by virtue of European law. It was found on the fact that this decision was erroneous. In relation to Article 8 ECHR the Tribunal found at paragraph 43 of the determination:

> 43. .....The case was not concerned with refusal of a visa but the grant of permanent residence; there was no free standing human rights point before the judge as no immigration decision had been made under s.82 NIAA as noted above; no submissions had been advanced to the judge that the EEA decision was in breach of human rights and no reasons were given by the judge for the decision.
> Human rights are not an issue for determination before us.

18. Section 82 Nationality, Immigration and Asylum Act 2002 specifies when a right of appeal will arise, which is when in immigration decision is made in respect of a person who may then appeal to the Tribunal. An 'immigration decision' is defined in section 82 (2) which does not include a decision under the 2006 Regulations.

19. Appeal rights against a decision taken under the Regulations, the EEA decision, or provided for in Regulation 26. Regulation 26 (6) stating that except where an appeal lies to the Commission, an appeal under these Regulations applies to the First-tier Tribunal. Regulation 26 (7) states that the provisions made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that schedule.

20. Schedule 1 states:

1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under section 82 (1) of that Act :

Section 84 (1), except paragraphs (a) and (f);

Section 85 to 87;

Section 105 and any regulations made under that section; and

Section 106 and any rules made under that section.

2. Tribunal procedure rules have effect in relation to appeals under these Regulations.

21. Section 84 sets out in the available grounds of appeal from which is omitted the ground that the decision is not in accordance with the immigration rules (s.84 (1)(a)) and that the person taking the decision should have exercised differently a discretion conferred by the immigration rules (s.84 (1) (f). Section 85 to 87 deal with matters to be considered, determination of appeal, and a direction made upon a successful appeal. Section 105 relates to the giving of a notice of immigration decision and section 106 provisions relating to the Rules.

22. Section 84(1)(c) specifies that the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights. This is not an excluded provision within the Schedule 1 to the Regulations.

23. It appears, therefore, that notwithstanding the fact that a refusal to issue a Residence Card with no freestanding consideration of Article 8 is not an immigration decision for the purposes of section 82, according to the definition of the same to be found in the statute, Schedule 1 to the Regulations means that the relevant provisions of the 2002 Act, including section 84, shall have effect in relation to appeal under the Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under section 82(1).

24. Section 86 of the 2002 Act requires the Tribunal to determine any matter raised as a ground of appeal (whether or not by virtue of section 85 (1)) and any matter which section 85 requires it to consider. In this appeal Article 8 ECHR was raised as a ground of appeal and was not properly considered and has not been determined by the First-tier Tribunal.

25. The conclusion of the Upper Tribunal is, therefore, that the decision to allow the appeal by reference to Regulation 15A is infected by material legal error which has resulted in this aspect of the case being set aside and the decision remade to dismiss this head of appeal on the basis that the specific requirements referred to above cannot be met. In relation to the extant ground relating to Article 8 ECHR, this is remitted to the First-tier Tribunal to be considered by a salaried judge of that Tribunal nominated by the Resident Judge at which hearing, if the Secretary of State is not in agreement with the above analysis of the relevant provisions, proper argument may be raised relating to the jurisdiction of the First-tier Tribunal to consider Article 8 and, if established or accepted, the merits of the Article 8 claim itself following a proper analysis of the competing claims of the parties.

Decision

26. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed under the EEA Regulations. The appeal under Article 8 ECHR is remitted to the First-tier Tribunal sitting at Birmingham as a decision upon the same is still awaited.**

Anonymity.

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make not such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 30th September 2014