IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00052/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 October 2015	**On 6 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HINA SHAHID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Sreeraman of the Specialist Appeals Team
For the Respondent: Mr Z Jafferji of Counsel instructed by Royal Solicitors

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as "the Applicant" is a citizen of Pakistan, born on 17 August 1983. On 18 July 2012 she entered with leave as a visitor expiring on 4 December 2012.

2. On 21 October 2006 she married Shahzada Shahid Saeed in Pakistan. He is a British citizen. They have two children both born in Pakistan in 2007 and 2010 who are both British citizens. She lives with her husband and her children in the Midlands.

3. On 29 September 2014 the Applicant applied for a Derivative Residence Card as the primary carer of British citizens resident in the United Kingdom by way of reference to Reg. 15A of the Immigration (EEA) Regulations 2006 as amended (the 2006 Regs.).

The Home Office Decision

4. On 15 December 2014 the Appellant (the SSHD) refused the application for a Derivative Residence Card and by a letter of 15 December 2014 gave her reasons. This letter was not before the First-tier Tribunal Judge and was only produced at the hearing before me upon my request.

5. The Applicant was not directly entitled to a right of residence under the Citizens' Directive (2004/38/EC) because she was not a citizen of another Member State and her husband was a British citizen and had not exercised the right of freedom of movement within the European Union.

6. The Respondent went on to consider whether the Appellant could claim a Derivative right under Reg.15A which had been added to the 2006 Regs. In the light of the judgment of the Court of Justice of the European Union in *Zambrano* (C-34/09).

7. The Applicant had claimed that she had primary responsibility for her two children and so should be regarded as a "primary carer" under Regs.15A(7). This states:-

> "(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
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> (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."

8. The Respondent noted the Applicant's husband and father of her children was a British citizen and so for the purposes of the 2006 Regs. was "an exempt person" by reason of Reg.2(1) of the 2006 Regs.' definition of an "EEA national".

9. The Respondent found that there was no evidence the Applicant's husband was not in a position to care for their children if she was forced to leave the United Kingdom or to show that the children will be unable to remain within the European Union if she had to leave. The Respondent considered the Applicant shared responsibility for her children with her husband, their father and since he was not being required to leave the United Kingdom did not meet the requirements of Regs.15A(7A).

10. The Respondent referred to the provisions of paragraph 276ADE of the Immigration Rules and Appendix FM. If the Applicant wished to seek leave by way of reference to the State's obligation to respect her private and family life protected by Article 8 of the European Convention then she needed to make a separate application under the Immigration Rules.

11. The Respondent acknowledged her duties under Section 55 of the Borders, Citizenship and Immigration Act 2009 and noted she had not made a decision to remove the Applicant from the United Kingdom and accordingly the position of her children was unaffected by the decision to refuse a Derivative Residence Card.

12. By a letter dated 25 February 2015 received by the First-tier Tribunal on 3 March 2015 the Applicant lodged notice of appeal under Reg.26 of the 2006 Regs. and Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds are lengthy. Reference was made to the judgment in *Zambrano*. The Applicant stated she was wholly and solely responsible for the day-to-day care of her children and that their father, her husband:-

> "... is a very good father and contributes wherever he can ... My husband is self-employed. As he leaves for work by the time the children have arrived from school and is mostly away on the weekends. At times he is away for longer periods of time ... The children only turn to the father when they want toys or want to go out as majority of children of that age do."

13. The grounds refer to paragraph 41 of the determination in *MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC)*. They go on to assert that if the Applicant's husband were to care for their children on his own then it would affect his ability to work which would violate his right to work given by the Citizens' Directive. The grounds go on to refer to Article 8 of the European Convention and the judgment in *ZH (Tanzania) v SSHD [2011] UKSC 4*.

The First-tier Tribunal Proceedings

14. In the notice of appeal the Appellant had requested her appeal be decided without a hearing on the basis of the papers in the Tribunal file. Judge of the First-tier Tribunal Malone dealt with the appeal on the papers and by a decision promulgated on 11 May 2015 he noted that the SSHD had not filed any bundle and in particular no reasons for the decision under appeal. He considered whether the Applicant met the requirements of Regs. 15A(4A) and 15A(7) and allowed the appeal.

15. On 31 July 2015 Judge of the First-tier Tribunal Pirotta granted the SSHD permission to appeal on the basis that the Judge had arguably erred in concluding the Applicant met the requirements of Reg.15A because she was not the sole carer of her children, that their father was a United Kingdom citizen and he could not compel the United Kingdom to admit his wife because of his disinclination to care for his own children or choices about his work schedules. She noted there was no evidence before the Judge that the children would be compelled to leave the United Kingdom.

The Upper Tribunal Hearing

16. On 23 October 2015 the Applicant instructed Royal Solicitors. She attended the hearing with her two children.

Submissions for the SSHD

17. Ms Sreeraman relied on the grounds contained in the Respondent's application for permission to appeal. These assert that the Applicant is not exclusively caring for her children and that sharing responsibility for a child involves a number of factors not just who looks after a child for most of the time. Consideration had to be given to who provided financially for the children. The Applicant's husband provided financially for his children and so shared responsibility for them. Consequently, the Applicant did not fall within the scope of Reg.15A(7)(b)(i). Her husband was an exempt person and so the Applicant could not satisfy the requirements of Reg. 15A(7)(B)(ii) and consequently did not satisfy the criteria of Reg.15A(4A)(a). If the Applicant left the United Kingdom her children's father would remain living with them in the United Kingdom. That he might be disinclined or reluctant to care for his children was not reason enough to satisfy the significant requirements of the 2006 Regs.

18. The permission application set out substantial parts of paragraph 41 of the decision in *MA and SM*. It went on to assert that the working arrangements of the Applicant's husband were voluntary and the Judge had not expressly found that he would not care for his children if the Applicant left or that the children would be compelled to leave the European Union. For these reasons the Judge had arguably erred in law.

19. The Judge had found at paragraph 17 of his decision that the Applicant together with her husband and their children formed a family unit living

together and the Applicant and her husband as parents of the children shared responsibility for their care. That the Applicant spent more time with her children than her husband did because he was earning a living did not make her their "primary carer" within the meaning of Reg.15A(7). She referred to paragraph 56 of the decision in *MA and SM* which states:-

> "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. The 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)."

The children's father would remain in the United Kingdom if the Applicant left. The First-tier Tribunal's decision should be set aside and the appeal dismissed.

20. Ms Sreeraman went on to make the point that since there were no directions for removal of the Applicant then in the light of *Amrityemour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)* the Applicant was not in a position to bring a challenge under the Human Rights Act 1998.

Submissions for the Applicant

21. Mr Jafferji submitted the permission application grounds amounted to no more than a disagreement with the Judge and did not disclose any error of law. The Judge had made a clear finding at paragraph 12 that the Applicant's husband had no part in bringing up their children. His time was fully taken up by his work. The fact her husband provided financial support did not vitiate the Applicant's claim to be the children's "primary carer" and qualify under Reg.15A(7).

22. He referred to Reg. 15A(8) which provides that:-

> '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.'

Mr Jafferji's argument was that the father could not be regarded as sharing responsibility with the Applicant for their children because his financial contribution could not be the sole basis for considering an individual as a "primary carer" either individually or sharing equally for the purpose of Reg. 15A(7). The Judge had found at paragraph 17 the Applicant's husband's contribution was to provide financially for his family. The Applicant's claim was he contributed no more.

23. He continued that if the Applicant did not remain in the United Kingdom her children could no longer reside here because there would be no adequate care for them. Their father's arrangements meant he would not be able to care adequately for them. It was open to the Judge to find this and to conclude at paragraph 17 of his decision the children would have to leave the United Kingdom. This was a finding open to the Judge.

24. In response Ms Sreeraman pointed out that Reg.15A(8) was concerned with the Applicant. Her husband was a British citizen and so classified as an "exempt person" under Reg.15A(4)(6)(c). She referred me to paragraphs 41(ii) and 56 of *MA and SM*.

Applicant's Closing Remarks

25. Having spoken to Mr Jafferji, the Applicant informed me at the close of the hearing she is now expecting her third child and the uncertainty over her appeal coupled with her pregnancy was causing her "a lot of tension".

26. Ms Sreeraman then produced a copy of the decision in *Ayinde and Thinjom (Carers – Reg. 15A – Zambrano) [2015] UKUT 560 (IAC)*. She drew my attention to paragraph 5 of the decision quoting a passage from the Respondent's guidance entitled "Derivative Right of Residence – Ruiz Zambrano Cases" of 12 December 2012:-

> "27. Examples of when it may be appropriate to issue a Derivative Residence Card to a primary carer would be where:
>
> there are no other direct relatives or legal guardians to care for the British citizen; or
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> there is another direct relative or legal guardian in the UK to care for the British citizen but there are reasons why this carer is not suitable; or
>
> in the case of an adult British citizen, there are no alternative care provisions available in the UK."

Mr Jafferji confirmed he was familiar with this decision and did not seek to make any submission on it.

27. I stated I would reserve my decision on the error of law matter and enquired the parties' views whether, if I found there was an error of law, I might proceed to a substantive disposal of the appeal. Mr Jafferji said his instructing solicitors had been instructed only a day or two before the hearing. The First-tier Tribunal's decision had been made without a hearing and in all the circumstances he asked for indulgence that if there was an error of law the appeal should be considered afresh.

Consideration

28. The Judge was handicapped by the absence of a Reasons for Refusal Letter to which he referred in his decision. There is no indication in the decision notice which was before the Judge that there was a Reasons for Refusal Letter in existence. Given the request for a decision on the basis of

the papers in the file and the Respondent's consent to that the Judge was entitled to proceed. He was aware from the Refusal Decision that the refusal had been based on the Applicant's failure to meet the requirements of Regs. 15A(4A) and 15A(7) of the 2006 Regs.

29. In *MA and SM* promulgated after the decision in this appeal the Upper Tribunal adopted the reasoning of Hickinbottom J 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)* that:

    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.

    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.

    iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.

    iv) Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; 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.

30. With this in mind I find the Judge erred in law by giving inadequate reasoning to support his conclusion that the Applicant was the "primary carer" of her children for the purposes of Reg.15A of the 2006 Regs. The First-tier Tribunal's decision therefore cannot stand and is set aside.

31. I have considered Mr Jafferji's submission on the appropriateness of a hearing afresh and am persuaded that in the circumstances of this case it would be proper to direct a hearing afresh; although there is no reason why the findings of fact should be set aside since they were not challenged and as this is an in-country appeal, at any re-hearing it will be open to the Applicant to seek to have post-decision evidence admitted under Section 85(4) of the 2002 Act._

Anonymity

32. There was no request for an anonymity direction and having considered the appeal, I find none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained a material error of law. It is set aside on the basis referred to in para.31 and the appeal is remitted for hearing afresh.

Signed/Official Crest Date 05. xi. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal