Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05307/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 August 2015	**On 6 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M H N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss A Everett, Home Office Presenting Officer
For the Respondent: Unrepresented

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the respondent but nonetheless for the purposes of this decision I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr MHN as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Tunisia born on 4 November 1974 and he appealed against the respondent's decision of 12 January 2014 to refuse

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to issue him with a derivative residence card under Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) (as amended) and following the case of **Zambrano [2011] EUECJ C-34/090**.

3. The Secretary of State's decision refused the appellant's appeal under Regulation 15A and 18A of the EEA Regulations. In her reasons for refusal letter, The Secretary of State set out that the appellant was not considered to be a family member and there ruling in **Zambrano** did not state that a third country national would have a right to reside as such.

4. He was applying on the basis that he was the primary carer of ANHN, AHN and MHN who are British citizen children. The appellant submitted a UK marriage certificate and he stated that he was in fact the joint primary carer of the children with LNC, a British citizen, who resided in the family home with him. It was noted he had provided no official documentation to support the claim that the children lived with him.

5. As LNC, his partner was a British citizen the appellant did not share equally in the responsibility for the children with one other person who was not an exempt person.

6. Under Regulation 15A(4A)(c) he needed to demonstrate that the relevant British citizen, in this case the children, would be unable to reside in the United Kingdom or in another EEA state if he was required to leave.

7. There was no reason why the children could not continue to live with the mother if he were required to leave the United Kingdom. The unwillingness to assume the care and responsibility was not in itself sufficient for the claimed primary carer to assert that he was such and that the British citizen was unable to care for the children. The refusal stated "*It was your wife's choice to undertake any commitments as regards his employment.*" The burden of proof remained with the appellant and the Secretary of State did not consider that the requirements of the derivative right of residence had been fulfilled.

8. Consideration was given to his application with regard to Appendix FM and paragraph 276ADE but it was the Secretary of State's position that the appellant needed to make a separate charged application using the appropriate specified application form.

9. Judge of the First-tier Tribunal C M Philips allowed the appeal on the basis as this the decision was not in accordance with the law. He stated at paragraph 19 that the application took over a year to consider but the respondent did not seek further information about the appellant's children or consider Article 8, and whilst referring to Section 55 of the Borders, Citizenship and Immigration Act 2009, no evidence was taken from the appellant or his wife at the appeal of the appellant's circumstances and no challenge was made to any of the evidence presented by the appellant. The judge recorded that the appellant had three children which were

affected by the decision and his interests therefore in terms of the Section 55 must be paramount. The judge recorded at paragraph 21 that it was the respondent's established position that in order to consider Section 55 of the 2009 Borders Act the route was under the Immigration Rules Appendix FM.

10. The judge at paragraph 23 noted **Dereci & Others [2011] EUECJ C-256/11** which stated at 72:

> *"If the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR."*

11. In essence the judge found that inline with **JO and Others (section 55 duty) Nigeria** [2014] UKUT 00517, there was an error of law in that the respondent failed to duly perform the duties under Section 55.

12. There was an application for permission to appeal by the Secretary of State who contended that the appellant did not dispute that he could not succeed under **Zambrano** grounds but argued on the basis of Article 8 of the ECHR. The judge indicated the application to remain before the Secretary of State awaiting a lawful decision.

13. It was contended that the judge had misdirected himself in law because there was no removal decision before him and hence no proposal that the appellant be separated from his children. The only decision taken by the Secretary of State and therefore the only issue for the judge to resolve was whether or not the children would be required to leave the UK if the appellant were required to leave. It seems to be undisputed that they would not be so the judge can only have dismissed the appeal that was before him.

14. It was contended that when the decision was taken it did not alter the situation of the children in any way and there was no reason to consider that the children were at risk of harm. The decision letter stated very clearly that the decision to refuse to grant residence card did not require the appellant to leave the UK and that if he wished to have his claimed right to reside on the basis of his family and private life considered then he should make the appropriate application under the Immigration Rules. It also explained that if he did not make a further application or voluntarily depart then enforced removal would be considered, at which point he would be entitled to raise Article 8 arguments.

15. The judge was wrong in law to find that the Secretary of State was bound to consider the consequences of removal of the welfare of the children

when no such removal was yet envisaged. To the extent that the judge took support for his approach from the recent Presidential decision in **JO** it was contended that the decision was readily distinguishable as in **JO** a removal decision had already been made.

16. Permission to appeal was granted by Upper Tribunal Judge Martin who stated that it was arguable as asserted in the grounds that the judge erred in going beyond the issues under appeal which were simply whether the appellant was entitled to a derivative right of residence.

17. At the hearing before me the appellant attended and stated that he had three children, the eldest of whom was born on 16 May 2009 and that he looked after those children all he time.

Conclusions

18. The Immigration history of the appellant is that he sought leave to remain outside the Immigration Rules in 2002 having claimed to have entered in 2001 and then again in 2002. On 10th June 2003 he sought leave to remain as the spouse of a settled person and was granted discretionary leave until 13 July 2008. He sought leave to remain on 5th July 2008 which was rejected, and on 24th July 2008 he sought leave again, this time outside the rules. His appeals on this were finally rejected on 12th December 2008 when he was refused a High Court Review. The appellant married his current wife, who is a British citizen, on 6th June 2011 and they have three children (all British citizens) born on 16th May 2009 and 20th November 2011 (twins).

19. An application was made under the EEA Regulations on 13th December 2012 but refused on 12th January 2014. The reasons for refusal letter rejected his application for a derivative right of residence as he lived with his British citizen wife and stated inter alia that the appellant should make a separate charged application under the Immigration Rules which now included separate provisions for applicants wishing to remain in the United Kingdom on the basis of private or family life. The appellant had made no formal application and merely set out his family/human rights application by letter 12th January 2014. It was pointed out in the Secretary of State's refusal that as the appellant had not made a valid application his human rights and his family life application was not considered under Article 8.

20. The appellant did not dispute that he was not the primary carer of the children. He shared equally the responsibility for his children's care with one other person who is wife and a British citizen (and therefore not an exempt person under the Regulations). He cannot fulfil the requirements under Regulation 15A. The judge did not appear to make findings in relation to the EEA decision and this is an error.

21. In his application of Section 55 and remittal to the Secretary of State, the judge enlisted the decisions of **JO** and **Dereci**. **JO** refers to a removal decision and is discursive on the interaction between section 55 and

Article 8 of the European Convention on Human Rights. **Dereci** is also proposition for the application of Article 8 where European Law does not apply. Those are not the circumstances in this case.

22. **ZH(Tanzania) v SSHD [2010] EWCA Civ 207** established that consideration of the *best interest*s of the child is an integral part of the *Article 8* balancing exercise (and not something apart from it), but it is a matter which has to be addressed first and as a distinct stage of the inquiry. The decision maker has first to make a decision to what is in the overall best interests of the child and only then to assess whether those interests are outweighed by countervailing factors such as those concerned with the rights and freedoms of others. The best interests are not the paramount consideration.

23. Section 55 states as follows

Duty regarding the welfare of children
(1)
The Secretary of State must make arrangements for ensuring that—
(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
(2)
The functions referred to in subsection (1) are—
(a)any function of the Secretary of State in relation to immigration, asylum or nationality;
(b)any function conferred by or by virtue of the Immigration Acts on an immigration officer;
(c)any general customs function of the Secretary of State;
(d)any customs function conferred on a designated customs official.
(3)A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

24. I have noted **Granovski** [2015] EWHC 1478 (Admin), which confirms that

'there is no category of immigration decision-making to which consideration of section 55 or the duty under section 6 Human Rights Act 1998 does not apply'.

25. I can accept that Section 55 may have an application to EEA decisions made by the Secretary of State but there is no evidence that the Secretary of State in making her decision, which did not involve removal, failed in exercising the statutory function to have regard to the *needs* of the children in these circumstances and this particular context where there was to be no removal the consideration was appropriate. The refusal letter referred to the children, and noted that there was little evidence relating to the children but that their mother lived with them. MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC) confirms that judges are to be guided by the reality of the litigation and states at [39] that

'Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child's best interests'.

26. Further the appellant made his application under the EEA Regulations and not as in **Granovski** under the Immigration Rules where a formal application was made.

27. The fact is that the only effective application made was in relation to the EEA documentation. No formal charged application was made by the appellant on the basis of his family life. There was no decision to remove the appellant who was the father of the children. The decision made by the Secretary of State was purely on the basis of the EEA Regulations in relation to a declaration of his status and the appellant was invited to make a charged application under Appendix FM.

28. As stated in **Amirteymour and others (EEA appeals; human rights)** [2015] UKUT 00466 (IAC)

'*As the consideration of an application for a residence document and an assessment of whether an applicant enjoys article 8 rights are inherently different, an appellant cannot raise article 8 ECHR matters within the scope of his appeal'*.

29. **Amirteymour** *also confirms that*

'*Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature.*

30. As explained, a right of residence under EU law which includes a derivative right is a different legal specie from the grant of leave and the exercise of the former does not require an act to be taken by the Secretary of State and is merely declaratory. This is not a removal decision. There is no requirement to obtain a residence document and no penalties for not doing so. When the Secretary of State had chosen not to serve a Section 120 notice an appellant is restricted to the scope of his original application.

31. The appellant did not make a valid application and secondly there was no Section 120 notice was served; thus consideration of Section 55 in relation to human rights was not applicable.

32. Paragraph 72 of **Amirteymour** makes clear of

'While we note the submission that a requirement to make an application and pay a fee is disproportionate, this is without substance. The Secretary of State is unarguably entitled to charge for applications for leave to remain under the Immigration Rules, and if an applicant is destitute, he can apply for a fee waiver. There is no element of discrimination in such a case, as what is being asserted is not a right under EU law, but under domestic law; no submission was made to us that there is any relevant "social advantage" in play such that Regulation 492/2011 is engaged'.

33. It is clear from the decision of Judge Butler that there was no actual decision with regard the EEA Regulations and the judge merely proceeded to make an analysis under Section 55 primarily in relation to Article 8 grounds. On the evidence of the appellant himself he did not have primary responsibility for his children further to Regulation 15A of the EEA Regulations and cannot succeed on that basis. The best interests of his children are that they remain with both parents in the United Kingdom, the decision by the Secretary of State does not affect that and the status quo is maintained. The appellant has yet to make a valid application on the basis of his family life and it is open to him to do so.

34. The First-tier Tribunal made an error of law and the decision is set aside. I remake the decision and for the reasons given dismiss the appeal.

35. <u>Notice of Decision</u>

Appeal dismissed

<u>Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008</u>

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. The direction is made as minors are involved.

Signed Date 6th October 2015

Deputy Upper Tribunal Judge Rimington

<u>TO THE RESPONDENT</u>
<u>FEE AWARD</u>

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 6th October 2015

Deputy Upper Tribunal Judge Rimington