Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10236/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th October 2015	**On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SL
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms. J Isherwood, Home Office Presenting Officer
For the Respondent: Mr Bhebe, Legal Representative

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant's daughter who is a minor. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

2. This is an appeal against a decision and reasons promulgated by First-tier Tribunal Judge Malins on 4th June 2015, in which she allowed an appeal against the refusal by the Secretary of State for the Home Department on 5th February 2014 to issue a "Derivative Residence Card" under Regulation 18A of the Immigration (European Economic Area) Regulations 2006.

3. The appellant is the Secretary of State for the Home Department and the respondent to this appeal is SL. However for ease of reference, in the course of this determination I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this determination, refer to "SL" as the appellant and the Secretary of State as the respondent.

Background

4. The appellant is a national of Jamaica who was born on 17th May 1977 and arrived in the UK on 27th February 2002, aged 24. She was granted six months leave to enter as a visitor. The appellant then made various applications for leave to remain in the UK, all of which were refused. On 4th June 2013, she made an application for a Derivative Residence Card. That application was refused on 5th February 2014 and gave rise to the appeal before First-tier Tribunal Judge Malins.

5. The application for a Derivative Residence Card was made upon the basis that the appellant is the primary carer of a British citizen, namely her daughter "K", born on 26th June 2011. K was born at a hospital in the UK and the appellant is named on her birth certificate as her mother. K's father is "PK", a British Citizen.

The decision of First-tier Tribunal Judge Malins

6. At paragraphs [2] to [6] of her decision, First-tier Tribunal Judge Malins sets out the appellant's immigration history and the evidence before her. Her findings of fact are set out at paragraph [9] of the decision:

> "a. I find that the appellant has been present in the UK for now, thirteen years, during twelve and a half of which, she has been present illegally;
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> b. however, notwithstanding the above, the UK state has embraced the appellant in that she is almost wholly funded by benefits – apart from small earnings from two domestic jobs (£20 and £30 per week respectively), she receives full housing benefit together with working tax credits and most significantly, child benefit and child tax credits;
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> c. during her time in the UK, the appellant has given birth to a child whose Jamaican father must now be a UK citizen, as the child herself, has a UK passport. It is this situation, which is the foundation of the appellant's application for a Residence Card;
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> d. that the appellant does not live with her child's father and it appears that she has never done so;
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> e. that the appellant lives with her child in a rented flat: there is a letter in the evidence to this effect from the landlord;

f. that the appellant's child has been attending a state primary school, […..Lewisham], since September 2014 and that the correspondence relating to the place she has, was addressed by the school administrator and the head teacher, to the appellant alone;

g. that in the light of (b), (d), (e) and (f) above, I find as a fact, that the appellant is the sole carer of her UK citizen daughter K;

h. that the appellant's connections with the UK are in fact, despite her lack of immigration status, deep. Apart from having been here for so many years, her mother and four siblings are all here. This would appear to be a case where a Jamaican family emigrated to the UK to settle, leaving one child behind (the appellant), failing to apply for settlement for her, because she was 18 years of age. The position is far from clear, as the appellant's representatives omitted any immigration / wider family information, from the appellant's witness statement;

i. That the respondent has been aware that the appellant was an overstayer, since her failed student application for leave to remain 12 years ago but has never sought to remove her. The respondent's failure to acknowledge the deep ties, which her inaction have allowed to develop – including financial dependence on the state – seems perverse. The respondent's assumption that the child's father can care full-time for a child not yet five years of age – despite his being married to another woman, and the father of another family – is, I find, unsustainable.

7. At paragraph 10 of her decision, the Judge finds that the respondent's decision to refuse the application was incorrect in law. She refers to the decision of the Upper Tribunal in **Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC)** and concludes as follows:

> "... It follows from all that I have stated and found above, that in my judgement, the appellant does have a Derived Right to a Residence Card under EU law, as she is the sole carer of a UK citizen (of necessity, also an EU citizen) who is in full time education and could not therefore be expected to leave the UK in order to continue living with and receiving, the care of her mother who is her sole carer.
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> I would also add, although there is in the circumstances, no need to make a specific finding on the issue, that the appeal should be allowed under Article 8 of the ECHR (family life) and section 55 of the Borders, Citizenship and Immigration Act 2009"

The grounds of appeal

8. The respondent contends that that the judge has made a material error of law in her determination. The respondent advances three grounds.

9. First, the judge misdirected herself as to the law following the decision in **Zambrano –v- Office National de l'emploie [2011] All ER (EC) 491**. The respondent submits that the Judge failed to properly apply the principle of law that arises. Taking the appellant's case at its highest, the appellant has not demonstrated why her daughter will be compelled to leave the UK because if she were left in the care of her father, she would not be left without the resources necessary for her to live within the European Union. In effect, the Judge fails to address the test of whether the adverse decision would require the child to leave the territory of the Union. Furthermore, it

was not open to the Judge on the evidence to find that the appellant is the sole carer of her daughter.

10. Second, the Judge has failed to give reasons or adequate reasons, for the finding that due to being married to another woman, and being a father to other children, the child's father would be unable to care for his daughter on a full-time basis.

11. Third, the Judge made perverse or irrational findings on a material matter. The respondent submits that the Judge appears to place the blame for the appellant's illegal stay in the UK, of nearly 13 years, on the respondent and suggests that the UK has embraced the appellant who is almost wholly supported financially by the state. The respondent submits that the appellant was aware that she had no legal right to remain in the UK, and as such should have returned to Jamaica 12 years ago. The support given to the appellant by the authorities arises because she is the mother of a British citizen.

12. At the hearing before me, Ms Isherwood adopted the grounds of appeal and submitted that the decision of the First-tier Tribunal discloses a material error of law capable of affecting the outcome of the decision. She submits that on the evidence, the Judge's finding that the appellant is the sole carer of her daughter is one that was not properly open to her. She submits that in any event, the Judge has not considered the crucial question of whether the removal of the appellant would mean that her daughter could not remain in the UK. She submits that there was no evidence before the Tribunal that PK, the child's father, was either unwilling or unable to look after his daughter. She submits that that crucial issue has neither been addressed in the evidence before the Tribunal nor in the decision of the judge.

13. In reply, Mr Bhebhe on behalf of the appellant submits that the focus of the appeal should be upon the best interests of the child and that it is not in her interest for her mother to be removed from the UK. He submits that the child's father, PK cannot make suitable arrangements for the child day-to-day care.

14. Mr Bhebhe submits that the Judge has properly summarised the evidence before her in her decision, and the decision should be read as a whole. He conceded that the Judge does not appear to have sufficiently considered the crucial question as to whether the removal of the appellant would mean that her daughter could not remain in the UK. He submits that PK could not take care of his daughter if the appellant were required to leave the UK, because PK's wife would not allow the appellant's daughter to live with him.

Error of Law

15. It is appropriate to deal first with the respondents challenge to the finding by the Judge at paragraph [10] that the appellant is the sole carer of her daughter. I remind myself that in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**, the Court of Appeal held that before the Tribunal can set aside a decision of a Judge on the grounds of error of law, it has to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. A finding

might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

16. In order to qualify for a right to reside in the UK under the "Zambrano principle", the test is not whether the appellant is the sole carer of her daughter, but whether she is the primary carer. For reasons that will become clear below, whether the appellant is the "sole carer" or "primary carer" is academic in this case and the use of the phrase "sole carer" in the decision is unfortunate. In my judgment it was open to the Judge to find that the appellant is the primary carer of K, for the reasons set out at paragraphs 9, (d), (e) and (f) of the decision. If this were the sole ground of appeal, that ground would not disclose a material error of law capable of affecting the outcome of the appeal.

17. The Court of Justice of the European Union decided in **Ruiz Zambrano –v- Office National de l'emploie [2011] All ER (EC)** ("Zambrano") that a Member State could not take measures to refuse the right of residence of a third country national who cared for an EU national child in a Member State, if that refusal would deprive the child of the genuine enjoyment of the substance of his EU citizenship rights by having to move out of the EU (the effective citizenship principle).

18. In **Sanneh v Secretary of State for Work and Pensions [2013] EWHC 793 (Admin)**, Hickinbottom J considered a claim by a Gambian national who had overstayed in the United Kingdom, but had a child who was, through her father, a British national. The court held that the claimant had rightly been refused interim payments of income support, child tax credit and child benefit pending the determination of appeals concerning her entitlement to them. That refusal did not engage EU law by depriving the child of her right, as an EU citizen, to remain in the UK since, despite the mother's tight financial situation, she and the child were not compelled to leave: they had been provided with accommodation and a small income from the local authority. In reaching his decision, Hickinbottom J summarised the learning to be derived from various decisions handed down since the decision of the CJEU in **Zambrano**:

> 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.

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.

19. In light of the authorities, I accept the submission made on behalf of the respondent that the crucial question in this appeal is whether the removal of the appellant would mean that her daughter could not remain in the UK. The appellant's daughter is a British citizen and must have the freedom to enjoy the right to reside in the UK, genuinely and in practice. That freedom may be jeopardised if, although legally entitled to reside in the UK, she is compelled to leave because her mother, upon whom she is dependent, is compelled to leave.

20. In my judgment, Mr. Bhebhe was right to concede that the Judge did not adequately address whether the removal of the appellant would mean that her daughter could not remain in the UK. At paragraph [6] of her decision the Judge sets out the evidence of the appellant. The evidence of the appellant herself was that although

she had never had a subsisting relationship with PK, he has always been very supportive and "PK has always wanted K to know him and have a close relationship even though he cannot live with K. He has also made it a point that K knows her half sisters. PK takes K at least one day a week, over the weekend. K then meets and plays with her half sisters – PK's children. PK also contributes voluntarily about £50 per week towards K's upkeep ...". In her findings and conclusions, the Judge fails to address whether PK, who has the right of residence in the EU, can and will in practice, care for K.

21. It was for the Judge to determine, as a question of fact, on the evidence before her, whether K would be compelled to leave the EU to follow the appellant who is her primary carer. As the authorities make clear, nothing less than compulsion to leave the UK, will suffice. The Judge failed to determine whether K would be compelled to leave the UK if her mother, who is her primary carer, is removed. The decision therefore to allow the appeal against the refusal of the Derivative Right of Residence discloses a material error of law and is set aside.

22. The decision of the Judge as to Article 8 is far from clear. At paragraph [10] she simply states:

> "I would also add, although there is in the circumstances, no need to make a specific finding on the issue, that the appeal should be allowed under Article 8 of the ECHR (family life) and Section 55 of the Borders, Citizenship and Immigration Act 2009"

23. The decision of the Judge as to Article 8 is devoid of any reasons at all. That is despite the fact Article 8 is an entirely distinct area of protection ordinarily requiring an examination of the right to family life under Article 8.

24. In any event, in **Amirteymour and others (EEA appeals; human rights) [2015] UKUT 466 (IAC)**, the Upper Tribunal held 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. Insofar as the Judge allowed the appeal on Article 8 grounds, she erred in law and the decision is set aside.

Re-making the decision

25. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

26. At the hearing before me, Mr Bhebhe provided me with a copy of the appellants witness statement and skeleton argument that had previously been before the First-tier Tribunal.

Derivative Right of Residence

27. In the respondent's decision of 5th February 2014, the respondent states:

> "You are applying on the basis that you are the primary carer of K, British citizen child. In support of your application you submitted: ….
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> There is, however, insufficient evidence to show that the British Citizen child, K would be unable to remain in the United Kingdom or EEA if you were forced to leave. You have not provided evidence as to why the child's father PK is not in a position to o care for the British citizen child if you were forced to leave the United Kingdom.
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> …
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> It should be noted that any unwillingness to assume care responsibility is not, by itself, sufficient for the claimed primary carer to assert that another direct relative or guardian is unable to care for the British citizen. Notwithstanding the information regarding PK's employment or his commitments, it is his choice to undertake such employment/commitments and it does not negate his responsibilities for the child.
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> Furthermore, to be considered the primary carer we would expect you to provide evidence to show that the child lives with you or spends the majority of her time with you, that you make the day to day decisions in regard to the child's health, education etc and that you are financially responsible for the child. Moreover, you have not provided sufficient documentary evidence to demonstrate you are the primary carer. You have only submitted a letter of support from your GP and your child's personal health record, this does not suffice the evidence needed to show that you are the child's primary carer.
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> In making this assessment, the burden of proof remains on the applicant and the standard of proof is the balance of probabilities. This means the onus is on you, as the applicant, to demonstrate that you the- primary carer of a British citizen and that your removal would force the British citizen to leave the United Kingdom or EEA.
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> Based upon these factors the Secretary of State does not consider that you satisfy the requirements of the criteria for Derivative Right of Residence and it has been decided to refuse to issue a Derivative Residence Card…."

28. First-tier Tribunal Judge Malins accepted the evidence of the appellant as set out in her witness statement. As I have set out previously, in my judgement it was open to the Judge to find that the appellant is the primary carer of K. The Judge found that the appellant does not live with K's father and has never done so. She found that the appellant and her daughter live in a rented flat and that correspondence from the school that K attends, is addressed to the appellant alone. I have no reason to interfere with those findings. Furthermore, the evidence of the appellant in her witness statement is that the appellant makes all the day to day decisions on K's welfare and well-being, including what she eats, wears, and which school she

attends. The evidence of the appellant was not challenged before the First-tier Tribunal or before me.

29. K lives with the appellant and clearly spends the majority of her time with the appellant. PK has his daughter at least one day a week, over the weekend and makes a voluntary £50 per week contribution towards K's upkeep. I find that the appellant makes the day-to-day decisions regarding K's health and education, and that on the whole, it is the appellant that is financially responsible for K, albeit with a voluntary contribution from her father. I find that the appellant is the primary carer of K.

30. Whilst the appellant is the primary carer of K, that is not the end of the matter because I must determine, as a question of fact on the evidence before me, whether K would be compelled to leave the EU to follow the appellant who is her primary carer. To that end, the evidence before me is limited. The appellant states in her witness statement that was before the First-tier Tribunal:

> "5. I wish to make it clear to the court that I never had a subsisting relationship with PK. He has a family and children. So it was very clear from the time I decide to go through with pregnancy that I would not expect PK to be the primary carer of K. He however has always been supportive.
>
> 6. PK has always wanted K to know him and have a close relationship even though he cannot live with K. He has also made it a point that K knows her half sisters. PK takes K at least one day a week, over the weekend. K then meets and plays with her half sisters – PK's children. PK also contributes voluntarily about £50 per week towards K's upkeep. He gives this in cash when he comes to pick K up.
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> 7. I live with K. I make all the day to day decisions on K's welfare and well-being concerning what she eats, wears and which school she attends. I have however told the school that PK is K's father in case he has to pick her up from school or attend future events…"

31. The onus is upon the appellant to establish, on a balance of probabilities, that she is entitled to a Derivative Right of Residence. I am not satisfied that the appellant has, on the evidence before me, established K would be compelled to leave the EU to follow the appellant, who is her primary carer. K's father, PK continues to play a role in his daughter's life. There is no evidence before me that PK cannot and will not, in practice, care for K.

32. PK may not at present be the primary carer of K, but even on the appellant's own account he has always been supportive. PK has always wanted K to know him, have a close relationship, and has also made it a point that K knows her half sisters. PK takes K at least one day a week, over the weekend and PK also contributes voluntarily, towards K's upkeep. The school attended by K, is aware that PK is K's father in case he has to pick her up from school or attend future events. There is no evidence before me that PK could not, and would not, in practice be willing to become the primary carer of K should the need arise.

33. I reject the claim by the appellant that K will be compelled to leave the UK in the event that the appellant is required to leave the UK. It follows that the appellant does not meet the criteria for a Derivative Right of Residence and I dismiss her appeal in that respect.

34. As I have set out previously, 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.

Notice of Decision

35. The decision of the First-tier Tribunal discloses and error of law and is set aside. I remake the decision, dismissing the appeal by SL against the refusal by the SSHD to issue a 'Derivative Residence Card' to her.

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal by the SSHD and in remaking the decision, have dismissed the appeal by SL and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Mandalia