IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11071/2014
IA/11072/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 June 2015	**On 16 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS IPK (FIRST CLAIMANT)
MASTER CCK (SECOND CLAIMANT)
(ANONYMITY DIRECTION MADE)

Claimants

Representation:
For the Appellant: Mr S Whitwell (Home Office Presenting Officer)
For the Claimants: Mr S Sharma (instructed by Paul John & Co Solicitors)

RESUMED HEARING DECISION AND REASONS

1. This matter comes before me as a resumed hearing following a decision on 20 May 2015 that there was a material error of law made by the First-tier Tribunal (FTT). As this matter involves minors an anonymity order has been made.

Summary

2. The first and second Claimants entered the UK in August 2013 as visitors to see their husband/father sponsor, a British citizen. The first Claimant had another child V, born in the UK, a British citizen by birth and as a result of his father having British citizenship. The Claimants applied for a variation of leave, which was refused and removal decisions made. They appealed under section 82(1) of the Nationality Immigration & Asylum Act 2002 on Article 8 grounds with reference to Appendix FM and paragraph 276ADE and outside of the Rules. The First-tier Tribunal heard the appeal on human rights grounds, and although not raised in the grounds of appeal, the **Zambrano** principle was relied on. At the time of the refusal decision the Claimant was pregnant. The child V was born on 26th April 2014. It was argued before the FTT that the removal of the first Claimant, who was breastfeeding V, would result in him having to leave the UK thereby denying his rights as a British citizen, contrary to EU Law, despite the presence of his British citizen father. The First-tier Tribunal accepted this argument and allowed the first Claimant's appeal on immigration grounds under EU law and further allowed the second Claimant's appeal under Article 8 ECHR outside of the Rules. It was conceded by the Claimants that they could not meet the Immigration rules under Appendix FM as either a parent or partner.

Error of Law Decision

3. In a decision and reasons dated 20 May 2015 the Upper Tribunal found that the First-tier Tribunal did not engage with the second limb of Regulation 15A.

> "No finding of fact was made by the FTT that the first claimant was the primary carer of the British citizen child who was a babe in arms and being breastfed at the time of the hearing, but this finding was inferred. This is not challenged. Following the line adopted in the case law cited above, in particular with reference to **Hines v Lambeth**, I find that the First-tier Tribunal failed to consider whether there were other arrangements that could be made for the care of the baby, for example by his father to care for the child thus resulting in an ability to remain in the UK in the event of removal of his mother" [28].

4. Directions were made for the resumed hearing. At the start of this hearing I confirmed that the scope of the hearing was to consider Regulation 15A in relation to the first Claimant and the care of the child V and Article 8 outside of the Rules in respect of the first and second Claimants. It was acknowledged by both representatives that there were in fact five children of the family; three children entered the UK as visitors accompanied by their father on 15.11.2013. Those children had no immigration status and were overstayers, their visas ran out in June 2015 and no applications had been made to regularise their stay. Those children were not parties to the appeal.

Evidence of the Claimant

5. The first Claimant relied on her witness statement. She was the primary carer for her child V. If she were to leave the UK her husband would be forced to leave his job in

order to look after V. In that event he would have to claim State benefits. She carried out all the daily activities for V; changing nappies, bathing him etc. Her husband did not know how to look after the child. She looked after all the other children too. If she had to return even for a period of 60 days it would not be possible for V to remain with her husband and so she would take him to Nigeria with her.

6. In cross-examination she confirmed that her husband had no other extended family in the UK other than his second wife and their two children. Her husband provided money and food for the family. She was a full-time housewife/mother. Her husband was self-employed as a care worker for an agency, Apex. He worked four to six hours on shifts and the shifts were variable. She clarified that he was no longer self-employed and his company had closed down. If she returned to Nigeria she would make an application for entry clearance as a spouse. It was put to her that as a responsible parent she would return to Nigeria with her son V. She agreed. She had a stepsister living in the east of Nigeria. When previously living in Nigeria her late mother provided food and finance for her and the children, and her husband paid the rental (together with a contribution from her mother) for their flat in Lagos. She explained that their eldest child, E, was at school in the UK. No application had been made notwithstanding that his visa expired on 27 July 2012. She had been advised by her solicitors to wait until her appeal was finished. She confirmed that all four children were currently in receipt of UK State education and that she had given birth in the UK at an NHS hospital. The family did not receive any State benefits. She would not be able to return to Nigeria for a short period in order to make an application as she did not know how long it would take, she could not manage in Nigeria and it would be difficult to care for V in Nigeria. She had not discussed with her solicitors whether or not a spousal application would be successful.

Evidence of LK

7. The witness is the husband of the first Claimant and father of C, the second Claimant. If the Claimant were to return to Nigeria even for a period of 60 days he would not be able to look after V as he worked. And if he did not work he would have no income. He would be able to look after the other children but not V. In cross- examination he agreed that he has seven children. He was not good at changing nappies and had never bathed the children. His income was £7,000 per annum. He did not claim any benefits. He held a personal bank account which had not been produced in evidence. He was employed for an agency as a care worker looking after elderly and sick people. He was on a "zero hours" contract. If he refused work, the agency would offer it to someone else. It would not be possible for him to restructure his hours as he was dependent on work that was offered to him. He confirmed that after his mother-in-law died in Nigeria he returned to Nigeria to fetch three of his children. He behaved as a responsible parent seeking to look after his children.

8. His wife was the primary carer for V and he would not be able to look after him. He shared parental responsibility of the children; he helped them with their homework and he was always there for V. In answer to a question from the Tribunal, what do

you do with V? The witness stated that he played with him and took him out. He confirmed that V was now 1 year and 3 weeks old and he was eating mixed food and no longer being breastfed.

Submissions

9. Mr Whitwell relied on the two reasons for refusal letters. He submitted that even considering Regulation 15A from a practical perspective, the child would not compelled to leave the UK. He has a British father who is employed and who would be able to vary his hours notwithstanding the zero hours employment contract. No evidence of the true financial position for the father was adduced. It was inconceivable that he was able to support seven children on an income of £7,000 per annum. The Secretary of State's position was that in practice it would be possible for the parents to make arrangements for V such that he would not be compelled to leave the UK. In the event that he did so it would be a choice made by his parents.

10. As regards Article 8 it was accepted that the Claimants were not able to meet the Immigration Rules. There was no compelling reason for looking outside of the Rules. There was family life in the UK, however, the three older children were overstayers. It could not be ignored that they may be returned to Nigeria. The mother and children entered on visit visas and sought to switch category whilst in the UK. They utilised public funds for education and NHS care. Those factors needed to be properly evaluated. It was in the child's best interests that V remained with his mother but this was a choice. The family previously lived in Nigeria with the sponsor providing financial support. There was no hardship nor was it disproportionate in the event that the first Claimant returned to Nigeria for a short period whilst making an application for entry clearance. The current time period for an application to be decided was 60 days.

11. Mr Sharma relied on **AQ (Nigeria) & others [2015] EWCA Civ 250** and submitted that in practice if the Claimant were returned to Nigeria the child would remain in the UK. The alternative care arrangements were not feasible. The sponsor would have to leave his job and or would not be able to earn as a result of his zero hours contract. With a child aged 1 year and 3 weeks old, the full-time care of the mother was needed. There were five children of varying ages and with an annual income below £7,000, it was realistic that even with additional child care the father would not be able to care for the family. If separated the mother would be apart from the children.

12. EX.1 can apply to the child V because it is unreasonable for a British citizen to relocate. That must be put into the context of concessions made by the Secretary of State. Reliance was placed on **Sanade & others (British children-Zambrano-Dereci) [2012] UKUT 00084** to the extent that it was not reasonable to expect the child to leave the UK. It was submitted that where the primary carer is denied the **Zambrano** right of residence, it was not arguable that the family could relocate outside of the European Union.

13. The remaining issue under Article 8 was proportionality. It could not be proportionate that either the Claimant and V were separated or for the Claimant to be removed to Nigeria and separated from her family. Ultimately there would be an enforced separation and the result in practice would be that all of the children would return to Nigeria with their mother. The father would work and support them from the UK.

14. Reliance was also placed on **R (on the application of Chen) v SSHD (Appendix FM Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**. It was acknowledged that the Claimant could not demonstrate that she met the Immigration Rules and therefore there was no **Chikwamba** point.

15. V was a qualifying child and this was the significant factor.

16. In response Mr Whitwell emphasised the practical approach in **Sanade**. A distinction is to be drawn between the British citizen having to leave the UK whereas in this instance the Claimant stated that she would take the child with her.

Discussion and Decision

Rule 15A

17. In considering Regulation 15A the matter can be dealt with shortly. Although the emphasis for the resumed hearing focused on the second limb of Regulation 15A, the decision following the error of law hearing (and which was not challenged) found that no finding of fact had been made that the first claimant was the "primary carer" for the British citizen child within the definition under Regulation 15. There were no findings and no adequate reasons made in support of the decision under **Zambrano** principles. The First-tier Tribunal took a practical and pragmatic approach in reaching a decision under the **Zambrano** principle. However in considering the same it omitted to evaluate the evidence so far as the sponsor is concerned. The First-tier Tribunal omitted to consider Regulation 15A(7)(b)(2). The sponsor as a British citizen is an exempt person and therefore the claimant cannot be regarded as a primary carer sharing responsibility for that person's care with one other person. I find the child, now aged 1 year, is cared for by both parents who have joint parental responsibility for him. I find that his mother the claimant cares for him on a day-to-day basis whilst the sponsor is at work and provides financial support. The claimant as the mother of a young child will inevitably take the primary role and responsibility for his care in practice. I did not accept the sponsor's evidence that he was unable to look after the baby on a day-to-day basis as he had no experience of changing nappies or bathing the child. As the father of seven children this was totally implausible. In any event in evidence he confirmed and I find that he spends as much time as he can playing with the child and looking after him when he returns from work.

Caselaw

18. In **Hines v Lambeth [2014] EWCA Civ 660** Elias LJ considered the meaning of "effectively compelled",

> "24. I do not however think 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 normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK. Apart from anything else, he would, even if he did leave, still only have the care of one of his previously two joint carers."

19. In **Hines v Lambeth** it was acknowledged that the welfare of the child was not the paramount consideration and although less than desirable the child might be able to be looked after by someone other than the current primary carer (having regard to his age and other circumstances and dependency on another person). It would only be if no adequate arrangements could be made that the child would effectively have to leave. In **Ahmed (Amos; Zambrano; Regulation 15A(3)(c) 2006 EEA Regs) [2013] UKUT 89 (IAC)** the Tribunal concluded that the test in all cases is whether the adverse decision would require the child to leave the territory of the Union. Essentially it is whether the child is dependent on the person being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise in the UK or elsewhere of residence. In circumstances where as in this instance the child has a father who is a British citizen, it cannot be said that the mother's removal would effectively deprive the child of his right to reside and enjoyment of EU rights. It cannot be said that the effect of the removal of the claimant would be that the child would have to leave the territory of the EU altogether.

20. Although in **Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 0048 (IAC)** the Tribunal held that case C-34/09 **Ruiz Zambrano**, **Bailey: [2011] EUECJ C-34/09** now made clear,

> "... that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

However, that case and **SSHD v AQ (Nigeria) & others** both deal with issues arsing in deportation proceedings. The headnote [6] in **Sanade** is also relevant emphasising the critical question was whether the child is dependent on the parent being removed for the exercise of his Union right of residence. There has been some further discussion on this point in **F and Another v SSHD [2013] EWCA Civ 76** emphasising that where no EEA nationals acquire rights under Article 20 TFEU only if their expulsion from the territory of the EU would have the necessary consequence that a dependent EU child would be required to leave the territory – effectively, the constructive expulsion of the EU child would Article 20 TFEU be engaged. **McCarthy v SSHD (Case C-434/09)**, judgment 5 May 2011 and **Dereci** held that

nothing short of the constructive expulsion of the EU citizen will suffice and the rupture of family life will not engage Article 20 TFEU.

I find that the Claimant could not be regarded as the primary carer firstly because her husband is exempt as a British citizen, however even if she were the primary carer, as held in **Hines v Lambeth** the transfer of a child from one responsible parent to another would not seriously impair his quality and standard of life that he would be forced to leave the UK. There are alternative arrangements that could be made for the care of V in the UK by his father choosing to alter his work arrangements or giving up work and claiming social security benefits or paying for child care. V is now over one year and no longer breast fed. Accordingly, I am satisfied that EU law is not engaged because V would not be compelled to leave.

Article 8

21. I now consider if there are compelling circumstances outside of the Rules to justify any grant of discretionary leave under Article 8. The Claimants entered the UK as visitors and thereafter the sponsor returned to Nigeria to bring his three other children into the UK by way of visit visas following the death of their grandmother. I am satisfied that there was no intention to return by the children nor the first Claimant to Nigeria. They have been unable to meet the requirements for entry clearance under the Immigration Rules. It was conceded by their representatives at the FTT that they were unable to meet the Rules for private and family life. I find that at present the first Claimant would not meet the spousal rules on financial grounds. The sponsor's earnings are significantly lower than the required amount which would have an impact on resources and public funds including education. I take into account and have regard to the statutory provisions under S117 2002 Act as amended as regard public interest factors. The rules deal with entry of partners and children. I find that V as a British citizen is a qualifying child. In order to meet Ex 1 and Ex 2, which as stated above is not free standing, it must be shown that it would be unreasonable to expect the child to return to Nigeria or that there are insurmountable obstacles to family life continuing with that partner. On the basis of the evidence and my findings below, neither are established.

22. The sponsor is a British citizen and father of five children within this family unit, only one child is a British citizen. There is family life established in the UK, although at the time the sponsor was granted ILR he established family life with another partner between 2006 and 2009. Family life with the Claimant was resumed in 2012 and their marriage took place in Nigeria in 2013. There would be an interference with the family life in the event of the first and second Claimants being returned to Nigeria. They would be separated from the sponsor and their reunification in the UK would be dependent on the first Claimant's successful application for entry clearance as a spouse or the second Claimant' s application as a child. I am satisfied that such interference would amount to sufficient gravity as to engage Article 8. The question remaining is whether or not the interference is proportionate. On the information produced by the Secretary of State I find that the time frame for an entry clearance decision in Nigeria is 60 days. I conclude that such a short period of

separation would not lead to any significant hardship for the children and the sponsor could be expected to take time off work for that period. The sponsor stated in evidence that in the absence of the first Claimant, he was able to look after all his children except for V.

23. I have regard to the public interest factors in statutory form in Section 117 of the 2002 Act (as amended). I find that neither the first and second Claimant nor the additional four dependent children have any settled immigration status in the UK other than V and his father. In terms of public interest weight is placed on the fact that the family have utilised resources in the UK both in terms of education and National Health care. I did not find it credible that the sponsor would be able to support his seven children and the Claimant on an income of £7,000 per annum without further recourse to public funds. As a British citizen however he is entitled to claim those funds. The children have lived in the UK for a very limited period of time, since 2012 and prior to that they were living in Nigeria and being educated there. All of the children have experience of living in Nigeria where they have lived for the majority of their lives and they have family members living there. V would not suffer any significant hardship given his young age. The sponsor lived for the majority of his life in Nigeria and could choose to return to resume his family life and private life and take up employment opportunities in Nigeria. Furthermore, it cannot be ignored that the sponsor left the Claimant and four children in Nigeria in order to travel to the UK where he lived for a number of years and where he entered into a significant relationship from which he had two children. The evidence was that the parties reconciled in 2012 and married in Nigeria in 2013. In those circumstances it is arguable that a return by the Claimant with her children would be a return to the *status quo* of the family life that existed prior to 2012. In assessing the public interest with the interests of the family, I am satisfied that the public interest considerations in immigration control and for economic reasons, outweigh the individual interests of the children and the first and second Claimants.

24. In considering where the best interests of the children lie, I take into account that all the children under the age of 7 years. Their best interests would be for them to remain with their parents together. Whilst this is a primary consideration it is not the primary consideration. I have weighed their interests as part of my assessment of proportionality. Further, more contrary to the submission made by Mr Sharma, EX 1 is not free standing but is parasitic to other requirements of the rules which the Claimants cannot meet (**Sabir (Appendix FM-Ex1 not free standing) [2014] UKUT 00063 (IAC)**).

25. I have also considered the sponsor's second family unit consisting of two British children D and Va from a previous relationship between 2005 and 2007. There was no evidence before the court other than the sponsor's witness statement [10] in which he stated that relocating to Nigeria would result in his being unable to develop any form of relationship with his children D and Va. He refers to the fact that his contact with the children takes place when he attends church where he can see the children. There is reference to resistance on the part of the mother to him seeing the children. There is no independent evidence to support the existence of any strong family life.

There was no evidence from or on behalf of these children to be considered in reaching a conclusion as to where their best interest lie. I find on the limited evidence available, that in the event of a relocation to Nigeria the relationship with the two children which is restricted, would be limited but not terminated. There is little evidence to show that there is any subsisting or regular meaningful contact with those children or of the impact on the children if the sponsor were to move elsewhere. In the absence of any independent or more detailed information, I find that in light of the fact that the sponsor has now re-established his relationship with his wife and five children, the lack of evidence of any contact or formal access arrangements with the children, I conclude that it would not be disproportionate or unreasonable to expect him to maintain those relationships should he wish to do so from Nigeria by way of Skype and visits to the UK.

Notice of Decision

I dismiss the appeals on immigration grounds.

I dismiss the appeals on human rights grounds.

Anonymity direction is made.

Signed Date 15.7.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

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

Signed Date 15.7.2015

Deputy Upper Tribunal Judge G A Black