IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18264/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th July 2015	**On 14th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J C D
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms F Beach, Counsel instructed by Selvarajah & Co

DECISION AND REASONS

1. The appellant is a citizen of the Philippines born on 5th October 1984 and she applied for leave to remain in the United Kingdom on 23rd December 2013 on the basis of her family and private life. The Secretary of State decided on 2nd April 2014 to refuse further leave to remain and remove the appellant.

2. The history of the appellant is that she had entered the United Kingdom as a student and subsequently entered a relationship with AN in January 2014. She then became pregnant and her child was due on 8th April 2015.

3. In a decision dated 9th February 2015 Judge of the First-tier Tribunal Farmer allowed JCD's appeal under Article 8 finding that removal of the appellant would be an interference with her private and family life. However, he took into account the rights of an unborn child which are not generally recognised further to **I X v United Kingdom (1980) 19 DR 244**. The child was born on 23rd March 2015.

4. That decision was therefore found to have an error of law (because the rights of an unborn child were taken into account) and set aside.

5. At the hearing before me it was submitted that the appellant should be entitled to the benefit of Regulation 15A of the EEA Regulations:

> "**Derivative right of residence**
>
> 15A. (1) A person (P) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) 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.
>
> ….
>
> (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.

….

(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 or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A."

6. **Sanade (British children - Zambrano - Dereci) [2011] UKUT 00048** confirms that where a child is a British citizen, which clearly this child must be as there was no challenge to the paternity of the child, it is not possible to require the child to relocate out of the European Union or to submit that it would be reasonable for them to do so. It was this case which prompted the introduction of Regulation 15A and in the particular circumstances of this case as it is now being argued I accept that the appellant can succeed on EEA grounds.

7. The evidence of the appellant and her partner was that the appellant was the primary carer of their son born on 23rd March 2015. There is no specific definition of 'primary carer' save for that given above in the Regulations. The birth of the child is clearly a matter which is now a relevant factor. Oral evidence was given to the effect that the child was being breastfed, the father continues to work full-time and had already taken his two weeks' paternity leave. I accept that as the father is working full-time he would be in jeopardy of losing his job which he stated he had worked very hard

to establish. There was no evidence that other members of his family could step in and take care of the child in the United Kingdom. I take into account Section 55 to the effect that the best interests of the child should be considered and that at such a young age the best interests for the child would be to remain with the mother and father.

8. I am, however, not persuaded that the mother does not further to Regulation 7(a) *(ii)* share *'equally the responsibility for that person's care with one other person who is not an exempt person'*.

9. The husband is indeed an exempt person. Although he may be working he has legal *responsibility* for the child and cannot be said that the appellant's spouse does not at any time assist with the child's care bearing in mind they are living together. Nor can it be said that the father does share primary ***responsibility*** for the child's care. For the purposes of the EEA Regulations, it is open to him to make arrangements for the child care. The best interests of the child may be relevant but for the purposes of EU law I am not persuaded that the child would have to leave the European Union. I am aided in this interpretation by **Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)** [2013] UKUT 00089 (IAC) which confirms that with respect to Union principles a violation of Article 20 of TFEU only arises where a refusal decision would lead to a situation where a Union citizen child would ***have*** to leave the territory of the Union; a denial of economic benefits or failure to keep the family together does **not** deprive the citizen of the enjoyment of the Article 20 right. The mere fact that there has been an interference with family life does not entail that there has been such a deprivation.

10. As such further to Regulation 15A(7) I do not accept that the appellant has primary responsibility for her child's care and can derive assistance from the EEA Regulations.

11. The appellant could not succeed under the Immigration Rules in relation to the partner route because of the circumstances of her marriage to a Filipino national. (ELTRP.1.9). A previous relationship must have broken down permanently. Nor has she lived with her partner for two years prior to the application. There were said to be difficulties in respect of the annulment and divorce of marriage in the Philippines. I note Mr Melvin's submissions to the effect that there was no expert's opinion or firm opinion in relation to the law in the Philippines regarding marriage annulment and divorce but the country background material produced did make numerous references to the difficulties, delays and cost of annulment and divorce bearing in mind that the Philippines is a Catholic country.

12. Nor can the appellant make an application under the parent route because she cannot comply with E-LTRPT.2.3 of Appendix FM as she lives with and is the partner of the other parent who is a British citizen.

13. On that basis should the matter be considered outside the Immigration Rules? Should the appellant be expected to return to make a formal application for entry clearance? The case of **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation –**

proportionality) (IJR) [2015] UKUT 189 (IAC)gives guidance in relation to such an application:

> "(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.
>
> (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only 'comparatively rarely' be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das) v SSHD [2011] EWHC 2070 (Admin)).
>
> (iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made) will be successful. Accordingly, her silence on this issue does not mean that it is accepted that the requirements for entry clearance to be granted are satisfied.
>
> (iv) In cases where the Immigration Rules (the 'IRs') do not fully address an Article 8 claim so that it is necessary (pursuant to R (Nagre)) to consider the claim outside the IRs, a failure by the decision maker to consider Article 8 outside the IRs will only render the decision unlawful if the claimant in fact shows that there has been (or, in a permission application, arguably has been) a substantive breach of his or her rights under Article 8."

14. As decided in **MM (Lebanon) [2014] EWCA Civ 985**,

> "... if the relevant group of Immigration Rules is not such a complete code then the proportionality test will be more at large, albeit guided by the **Huang** tests and UK and Strasbourg law."

15. In addition, because of the birth of the child, (a compelling factor) and the consideration of the difficulties of return to the Philippines, I find that there are arguable grounds to consider the matter outside the rules. Not all relevant factors had been considered **Singh v SSHD [2015] EWCA Civ 74.**

16. The test to be applied is that of proportionality. As stated in **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**:

> "41. We accept this submission. In view of the strictures contained at para 20 of Huang, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase 'in exceptional circumstances' might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect in all cases where a state wishes to remove a foreign national who relies on family life which he established at a time when he knew it to be 'precarious' (because he had no right to remain in the

UK). The cases were helpfully reviewed by Sales J in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin). The fact that Nagre was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the ECtHR of the phrase 'exceptional circumstances'.

42. At para 40, Sales J referred to a statement in the case law that, in 'precarious' cases, 'it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8'. This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a 'precarious' family life case, it is only in 'exceptional' or 'the most exceptional circumstances' that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase 'exceptional circumstances' is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals",

17. I have applied the five stage test further to **Razgar v SSHD [2004] UKHL 27** and accept that the appellant has established a private and more importantly a family life in the United Kingdom and that the threshold for engagement of that life has been reached.

18. Following guidance **in SS Congo v SSHD** [2015] EWCA Civ 317, it is clear from above that the appellant could not comply with the Immigration Rules. Not least she commenced living with her partner in November 2014 and as she is not married and she states that she cannot be married for the reasons given above until she is able to effect a divorce then she is unable to make an application under the Immigration Rules as a spouse. She cannot comply with the Immigration Rules in relation to the requirements for the appellant under GEN.1.2 to have lived with her partner for two years prior to the application. Nor can she fulfil the requirements for a fiancée visa because she is unlikely to be in a position to marry for a month if not according to the submissions of Ms Beach months. There would therefore be a delay of indeterminate length in the appellant making an application for entry clearance should she be returned. Whilst I note that on the face of it the decision to remove the appellant is in accordance with the law, I take the factors in relation to the Immigration Rules and have given weight to those factors and note that removal is necessary for the protection of rights and freedoms of others and the maintenance of immigration law. I return to a consideration of the public interest below.

19. The best interests of the child must be to remain with both parents and specifically the mother. I have identified in relation to the difficulties in making entry clearance applications from abroad. I must also consider Section 117B of the Nationality, Immigration and Asylum Act and with respect to the appellant's private life I note that she and her partner formed a relationship when they both knew that her status in the UK was precarious, but Section 117B does not 'catch' her family life – or

relationship with her husband unless she was living in the United Kingdom unlawfully. She made her application for leave to remain prior to the expiry of her visa.

20. There was some confusion in the oral evidence given by the appellant and her partner when at first under cross-examination she confirmed that she had not pursued an annulment because of the expense and delay whereas when requestioned about this she stated as she did in her witness statement that she had instructed a lawyer in the UK to take matters forward. Her partner did not seem to be aware of the matter because curiously he stated that there was no input he could give. That said, I do not accept that she would be deliberately holding up an annulment to bolster her claim for leave to remain. It would be in her interests to formalise her relationship with her partner.

21. Although the formalities of the Immigration Rules had not been considered in detail in relation to finance I accept that her partner does have a well-paid job with Credit Suisse and could on the face of it ensure that his family are financially secure and that she would not be a burden on the state. It is also clear that she can speak English.

22. Section 117B(6) confirms that in the case of a person who is not liable to deportation the public interest does not require the person's removal where (a) the person has a genuine and subsisting parental relationship with a qualifying child and (b) it would not be reasonable to expect the child to leave the United Kingdom.

23. It has already been seen that the appellant does have a genuine and subsisting parental relationship with this child who is a qualifying child and it is not reasonable to expect the child to leave the UK. The child here is a British citizen and EEA national and cannot be expected to remove from the United Kingdom further to **Sanade** cited above. That said, I do not accept that this necessarily defeats the Secretary of State's position but nonetheless is a factor that I should take into account when assessing the proportionality balance.

24. It was presented to me that there was a breakdown in the marriage between the appellant and her husband (effectively but not legally an ex-husband) in the Philippines and that the family would be at risk on return and that this was not specifically challenged although Mr Melvin did question the value and the weight to be attributed to the Articles submitted.

25. I do not accept that the child's father would necessarily be arrested on entry to the Philippines. I do accept that any entry clearance application would necessarily be delayed for some time which would not be in the interests of the child or the family bearing in mind the separation which would ensue. The child in question is a British child who has rights to the health system in this country and, even though the appellant herself has family there, clearly the nuclear family would be financially challenged should they remove to the Philippines on a permanent basis. I do not accept that it would be in the best interests of the child for the father to look after the child in the UK because of the age, feeding and his job and I have given above and indeed there was no real challenge by the Secretary of State to the proposition that it

was the mother who was the carer of the child and that it was in the child's best interests to remain with the mother at only 4 months old and have the advantage of the British health care. It is the best interests of the child which are a primary consideration in this matter and the best interests are to remain in the UK with both father and mother in a financially secure environment and home and without temporary or permanent separation from either.

26. I have taken into account **Huang v SSHD [2007] UKHL 11** and on the basis of my reasoning I find that it would be disproportionate to remove the appellant and I therefore dismiss the appeal under Regulation 15A of the EEA Regulations but allow the appeal under Article 8.

Notice of Decision

The appeal is allowed on Article 8 grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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. This direction is in place because of the involvement of a minor.

Signed Date

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the facts as they are now before the Tribunal differ to those first placed before the Secretary of State.

Signed Date

Deputy Upper Tribunal Judge Rimington