IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35220/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 August 2015	**On 20 August 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS OLAVINE PETA-GAY CAMPBELL

Respondent

Representation:
For the Appellant: Miss A Holmes, Home Office Presenting Officer
For the Respondent: Mr S Khan, Counsel, instructed by Ashgar & Co, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Amin, promulgated on 23 March 2015, in which she allowed the respondent's appeal against the decision of the Secretary of State not to issue her with a residence card as confirmation of a derived right of residence pursuant to Regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

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2. The respondent arrived in the United Kingdom on 26 May 2000 with a six month visitor's visa. She has not returned to Jamaica since. In 2007 she met her partner, Michael Broomfield, and they began a relationship. On 8 September 2008 she gave birth to the couple's child who is a British citizen. The child has a number of medical problems including obesity, acanthosis, insulin insensitivity and sleep apnoea. He is also diabetic and in addition to the physical difficulties has Special Educational Needs in respect of which there is a Statement of Educational Needs in place. He attends mainstream school but requires a considerable degree of intervention.

3. The child goes to see a psychologist at the Great Ormond Street Hospital every two weeks; he also has other consultant's appointments; he also needs help going to and from school and requires a considerable degree of care at home, particularly at night time. The respondent does not work and is the child's primary carer. Mr Bloomfield works full-time.

4. The Secretary of State's case as set out in the refusal letter and in the submissions made to the First-tier Tribunal is that no evidence had been provided to show as to why Mr Broomfield was not in a position to care for the child if she were to leave from the United Kingdom and that no reason had been offered as to why he could not assume responsibility for him. She concluded that it had not been shown that the respondent's removal from the United Kingdom would force the child to leave the EU. For that reason she concluded that the requirements of Regulation 15A (4A) (a), (c) and Regulation 15A (7)(b)(i) had not been met and thus no derivative residence card was to be issued.

5. On appeal First-tier Tribunal Judge Amin found:-

   (i) that the respondent has primary responsibility for the child which is not shared with the father and that there is no dispute the child suffers from a number of ailments as described [31];

   (ii) that the respondent takes care of the child's daily emotional, physical and medical needs [32] and it is not feasible for the father to do so [33];

   (iii) that the removal of the respondent would have a significant and substantial impact on the child who would not be there to accompany him to hospital appointments, take him to and from school, assist with medication and sleep patterns or provide the strong emotional and caring support that is currently provided [35];

   (iv) that there is no alternative care available to the child as the father would have to leave his job with no one to take over the child if the mother were to be removed [36]; that this would have a dramatic impact on the family life and the child would need to adjust to his father taking care of him in the absence of the mother [36] and that the quality of the child's life would thus be seriously impaired and he would be deprived of emotional support;

   (v) the respondent has shown that she has primary responsibility for the child and therefore qualifies for a derivative residence card.

6. The Secretary of State sought permission to appeal on the grounds that:-

   (i) the judge had erred in her approach to Regulation 15(4A)(c) as to the fact that the father had not had as much involvement with the child's day-to-day care did not mean he would be unable to assume that and that an disinclination or reluctance on the part of the child's father was not enough to satisfy the requirements of the Regulations [2];

   (ii) applying MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380 there is insufficient evidence to show that the child would be unable to remain in the United Kingdom if the respondent were required to leave as he lives with his British citizen father who would be able to assume caring responsibilities [4, 5];

   (iii) the fact that the mother may decide to take the child with her was a separate consideration and did not lead to the conclusion that the child would be forced to leave the UK.

7. On 3 June 2015 First-tier Tribunal Judge Foudy granted permission stating:-

   "(ii) The grounds argue that the judge had erred in his approach to **Zambrano** and his assessment of whether the relevant British child would have to leave the UK if the appeal of his mother failed. The grounds also argue that the judge failed to attach sufficient weight to the public interest factors in reaching his decision.

   (iii) it is not clear what factors weighed in the judge's mind when he decided that there were exceptional features in the appellant's case to justify allowing the appeal. This lack of reasoning is an arguable error of law."

Submissions

8. Miss Holmes submitted that the judge had erred in allowing the appeal given that the father was clearly capable of looking after the child and thus was distinguishable from the fathers in MA and SM. She drew particular attention to paragraph 73.

9. Mr Khan submitted that the judge had not erred in law and had been entitled to reach a finding of fact that the mother in this case was the primary carer. He sought to rely in particular on the decision of the Court of Appeal in Hines v London Borough of Lambeth [2014] EWCA Civ 660, particularly at [23]. He submitted that in the circumstances the judge had been entitled to conclude that the mother was a primary carer and had concluded given the impact on the child that his quality of life was so impaired that he was effectively being forced and compelled to leave the United Kingdom. He submitted she was entitled to take into account the impact on the child given the decision in Hines. Mr Khan submitted further that this case could be distinguished from those in which the support was purely financial and thus did not fall within the exceptions referred to in Hines at [24].

10. In reply, Miss Holmes submitted that there was insufficient evidence to show that the relevant high threshold had been met.

11. Mr Khan accepted that were I to find an error of law then the correct course of action would be to re-make the appeal by dismissing it, there being no alternative action.

12. I reserved my decision.

The law

14. Regulations 15A of the EEA Regulations provides, so far as is relevant to the facts of this case:

> 15A. Derivative Right of Residence
>
> A person ("P") who is not an exempt person and who satisfies the criteria in (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 satisfied the relevant criteria.
>
> (4) …
>
> (4A) P satisfies the criteria in this paragraph if –
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> P is the primary carer of a British citizen ("the relevant British citizen");
>
> The relevant British Citizen is residing in the United Kingdom; and,
>
> The relevant British citizen would be unable to reside in the UK or in another EEA state of P were required to leave.
>
> (5) …
>
> (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 has made a decision under
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> (a) regulation 19(3)(b), 20(1) or 20A(1); or
>
> (b) regulation 21B(2), where that decision was taken in the preceding twelve months.

15. Regulation 15A(4A) was inserted to comply with the CJEU's ruling in Ruiz Zambrano v ONEM [2012] EUECJ C-34-09 where CJEU held:

> i) Article 20 of the TFEU "precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the European Union" (paragraph 42); and
>
> ii) A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside has such an effect (paragraph 43), because "[i]t must be assumed that such a refusal would lead to a situation where those children, citizens of the European Union, would have to leave the territory of the European Union in order to accompany their parents".

16. The CJEU considered the matter again in Murat Dereci [2011] CJEU C-256/11 the Court clarifying that denial of the genuine enjoyment of the substance of EU citizenship rights corresponded to the situation 'in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole', a situation described as exceptional. The Court did not expand on what circumstances might oblige an EU citizen to leave the territory of the European Union, though it held [68] that:

> "... the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union' for residence rights to be granted was insufficient in itself to conclude that denial of residence would cause such departure ..."

17. The scope of the principle in Zambrano was considered in detail by the Court of Appeal in Harrison v SSHD [2012] EWCA Civ 1736 where Elias LJ (with whom Ward and Pitchford LJJ agreed) held [63] that the Zambrano principle would not apply except where the EU citizen is effectively forced to leave the territory of the EU.

18. I am assisted by Hickinbottom J's distillation in R (ota Sanneh) v DWP and HMRC [2013] EWHC 793 (Admin) of the relevant principles extracted from the cases referred to above. He summarised the principles as follows [19]:-

> 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.

19. The applicable principles where, as here, there is another relative who may be able to care for the child, are further elaborated in Hines v Lambeth [2014] EWCA Civ 660 where Vos LJ held [21], [23]-[24]:

> 20. Accordingly, in my judgment, the judge was right, applying Harrison, to conclude as he did in paragraph 21 of his judgment that the claimant was only entitled to accommodation if Brandon would be effectively compelled to leave the United Kingdom if she left. He was also right to point out that what amounts to circumstances of compulsion may differ from case to case. As Elias LJ said: "to the extent that the quality or standard of life [of the EU citizen] will be seriously impaired by excluding the non EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national". It is for this reason that the welfare of the child in this case comes into play, again as the judge held.
>
> 21. …
>
> 23. I have no doubt that the test applicable under regulation 15A (4A)(c) is clear and can be given effect without contravening EU law. The reviewer has to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as

> a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child.
>
> 24. There was much discussion in argument as to the kind of alternative care that might be required in order to avoid the conclusion that the child would be forced to leave. It would be undesirable, I think, for the court to lay down any guidelines in this regard, but it was, as I have said, common ground that an available adoption or foster care placement would not be adequate for this purpose. That is because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. 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.

21. It is not disputed that a British child cannot be compelled by law to leave the United Kingdom, (other than by way of extradition proceedings or pursuant to a court order that he be returned to a parent abroad under the Hague Conventions). The question is thus whether he would effectively have to leave the EU if his mother is refused a right of residence. This is, as was noted in Harrison, a highly-fact sensitive matter.

22. The EEA Regulations require two questions of fact to be answered:

    (1) Is the applicant the primary carer of a British citizen; and,

    (2) If so, would the relevant British citizen be unable to reside in the UK or in another EEA state if the applicant were required to leave?

23. If the answer to the first question is yes, it does not necessarily follow that the answer to the second question must be yes. That is because there may be another person able to provide care, and as the case law establishes, the threshold of establishing compulsion is high – see Harrison at [66]-[70]. It is not the same test as showing a breach of article 8.

24. It is not disputed that the child in this case has significant medical, emotional and educational needs. While he is in mainstream education, it is only with significant additional assistance. It is evident that he has problems at night given breathing difficulties. In this case the judge made a finding of fact: that the mother is a primary carer – that is not the same as sole carer. I am satisfied that she was entitled on the evidence before her to reach such a conclusion, given the continuous nature of the care given. It is also a question which is distinct from whether the father could also *become* a joint carer; that is an issue for the second question identified at [22] above. It is not doubted that the mother is a direct relative of the child and whilst the father is here and is an exempt person.

25. While it may be argued that the judge does not properly consider regulation (7A) (b) in the context of the case law, it is clear that she addressed at [32] onwards the nature of how responsibility is shared. Given that the father, mother and child live as a family unit which is dependant financially on the father's earnings, it cannot in reality be said that he does not share responsibility for the child. The judge does, however, give adequate and sustainable reasons for concluding that sharing of responsibility is not equal.

26. The next question then is whether the child would be compelled to leave the UK (and thus the EEA) were his mother to leave. The judge concluded [36]–[37] that that would be so, relying on Hines and a finding that there would be serious impairment to the child's quality of life.

27. While it is clear from Harrison that economic difficulties are not a sufficient consideration, it is clear also from Hines that a serious impairment of the child's welfare may be sufficient, albeit rarely where there are two parents in the picture as here. A conclusion that there is such an impairment is inevitably fact-sensitive and a finding of fact to be reached by the First-tier Tribunal. Here, the judge found that even were the father to take over responsibility, which he could, there would nonetheless be such a serious impairment that he would be compelled to leave.

28. The challenge to that specific conclusion is on the basis that the father could care for the child as though that were the sole criterion. That, however, as both MA & SM and Hines make clear is not always the case. Here, there is a finding of an impairment which is not simply related to financial criteria. While the judge's conclusion is undoubtedly generous, and may well be one I would not have reached, it is not irrational, and is justified by the evidence she heard. It was entirely a fact-specific finding.

29. Accordingly, for these reasons, I find that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Summary of conclusions

1 The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 20 August 2015

Upper Tribunal Judge Rintoul