IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/17849/2014
IA/17767/2014
IA/19981/2014

THE IMMIGRATION ACTS

Heard at Glasgow
On 6th January 2016

Decision & Reasons Promulgated
On 13th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SALMA SHAMEENA VAYIKILERY (FIRST APPELLANT)
A B I (SECOND APPELLANT)
A I (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE IN RESPECT OF SECOND AND THIRD APPELLANTS ONLY)

Respondents

Representation:
For the Appellant: Mr S Staunton, Senior Home Office Presenter
For the Respondents: Ms N Bustani instructed by Paul John & Co Solicitors

DECISION AND REASONS

1. I am referring to the Respondents as the Claimants. They are all citizens of India who applied for residence cards on the basis of a derivative right of residence, the first Claimant being a third party national upon whom a British citizen was dependent in the UK and the second and third

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Claimants as her dependent children. Their applications were refused by the Secretary of State and their subsequent appeal allowed by First-tier Tribunal Judge Taylor under the Immigration (European Economic Area) Regulations 2006 and on human rights grounds. The Secretary of State lodged grounds of application on three grounds.

2. Firstly, it was said that the judge had allowed the appeal on the basis that the first Claimant was the primary carer of a British child and that the child would be required to leave the UK if she were removed. However that was not made out and the first Claimant could not benefit from the **Zambrano** judgment as she was not the primary carer – she was *a* primary carer. The judge had speculated about the Claimant's husband needing to cease employment.

3. Secondly, it appeared that the judge had unlawfully shifted the burden of proof by saying that no evidence had been submitted by the Secretary of State namely that she had not established that the first Claimant's husband had any previous experience in looking after a small child.

4. Thirdly and finally, in terms of Article 8, there was no reason why family life could not continue between the parties in India.

5. Permission to appeal was granted and thus the appeal came before me on the above date.

6. For the Secretary of State Mr Staunton relied on the grounds of application. In particular there was nothing to say that the first Claimant's husband would have to keep on working. The judge had misapplied the burden of proof in paragraph 12 of the decision. There had been no adequate assessment under Article 8.

7. For the Claimants Ms Bustani acknowledged that the judge may have fallen into error in saying (paragraph 12) that the Secretary of State had submitted no evidence that the child's father had any previous experience looking after a small child on a full-time basis and no evidence had been submitted that he would be in a position to make suitable arrangements for the care of the child if the mother was removed from the UK. However that was as far as the criticism went. His findings were crystal clear on which parent was the primary carer. It was important to look at paragraph 12 in its entirety. The judge had explained that the first Claimant was a full-time housewife and that her husband worked extensive hours so that she did not need to work and concentrate on bringing up the children.

8. The judge had set out the position clearly in paragraph 13 of the decision. The judge had found there were only two possible options if the first Claimant was required to leave the United Kingdom. The findings stated there were perfectly reasonable ones and open to the judge and there was no error.

9. Finally the conclusion under Article 8 was perfectly adequate. The child was a British citizen.

10. I reserved my decision.

Conclusions

11. The application made by the Claimants was under paragraph 15A namely the "derivative right of residence" contained in the Immigration (EEA) Regulations 2006. Under (4)(a) of paragraph 15A a person satisfies the criteria if that person is "the primary carer of a British citizen". Under (7) a person is to be regarded as a primary carer if that person is the person who has "*primary responsibility for that person's care*".

12. Accordingly the outcome of the case turns on whether or not the judge was entitled to conclude that the first Claimant was the primary carer of the children.

13. The burden of proving that rests on the Claimants but if the judge thought otherwise by referring to the fact that "the Respondent had submitted no evidence ..." (paragraph 12) then he was clearly mistaken. It may be noteworthy that he did set out the correct burden and standard of proof in paragraph 6 of his decision. However he went on to make clear findings in this regard saying in paragraph 12:-

> "I consider that there is clear and undisputed evidence that the first appellant is the primary carer of the UK child. The father worked full-time as a taxi driver, he worked ten hour shifts and was often working at nights and early mornings. The first appellant was a full-time housewife, her husband worked extensive hours so that she did not need to work and concentrate on the upbringing of the children. No evidence had been submitted of the family having domestic assistance and I have no cause to find otherwise than the first appellant is the primary carer of the UK child."

14. In my view these are perfectly sustainable and adequate reasons why the judge was concluding that the first Claimant was the primary carer of the UK child. The judge went on to note that in the absence of the first Claimant the Sponsor might well have to give up work. In addition he said that in the absence of the first Claimant he was satisfied any alternative arrangements would not be suitable and that the UK child would be unable to remain in the UK without her mother. On the basis of the evidence presented to him this was a perfectly reasonable finding to make. In terms of Article 8 ECHR the judge referred to Section 117B(6) of the 2002 Act which provided that it is not in the public interest to remove a person with the parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. The judge correctly noted that the child was a UK citizen and therefore a qualifying child at 117D of the Act. It is difficult to see how the judge could have made any other finding.

15. In my view there is no material error in law by the judge who gave clear and lucid reasons why he found as he did. It follows that the decision must stand. I am continuing the anonymity order.

Notice of Decision

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

17. I do not set aside the decision.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald