Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42063/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th May 2016	**On 27th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

CHERISE ANNALISE HOWELL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Emma King, Counsel instructed by Irving & Co Solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge M R Oliver sitting at Richmond on 24 July 2014) whereby the Tribunal dismissed under the Regulations 2006 the

appellant's appeal against the decision of the Secretary of State to refuse to issue her with a derivative residence card as confirmation of her right to reside in the United Kingdom as the primary carer of a British national child, [SC], born on [ ] 2008. The First-tier Tribunal did not make an anonymity direction, and I do not consider that an anonymity direction is required for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 6 October 2014 First-tier Tribunal Judge P J M Hollingworth granted permission to appeal for the following reasons:

> An arguable error of law has arisen in relation to the findings of the judge set against the conclusions reached by the judge. It is arguable that given the elements which the judge found to be satisfied the conclusion reached would be different. A further arguable error of law arises in the context of the absence of a consideration of whether there be a breach of Article 8.

Relevant Background

3. The appellant is a national of Jamaica, whose date of birth is 12 September 1978. On 25 October 2012 she applied for a third time for the issue of a derivative residence card. On 4 October 2013 the respondent gave her reasons for refusing the application. There was insufficient evidence to show that the British citizen child would be unable to remain in the United Kingdom if she was forced to leave. She had not provided evidence as to why the child's father was not in a position to care for the child if she was forced to leave the country. It was also noted that she provided letters of support from family members in the United Kingdom. There was no evidence to suggest that they could not care for the child in substitution for her. It should be noted that any unwillingness to assume care responsibility was not by itself sufficient for the claimed primary carer to assert that another direct relative or guardian was unable to care for the British citizen child.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. Both parties were legally represented before Judge Oliver. The judge received oral evidence from the appellant and from her sister, Patrice Howell. The bundle of documents compiled by the appellant's solicitors included letters from the child's father.

5. The appellant's evidence was that the child's father took no part in her life. The child lived with her, and it was she who took her to school and to the doctor. They lived with her twin sister and her children. The father of the child was married to another woman, who knew nothing about the child. The twin sister's elder daughter was confined to a wheelchair, and her sister did not know how she would manage both her own two children and [SC] if the appellant had to return to Jamaica.

6. In cross-examination, she said she did not know whether her daughter's father was still living with his wife and two children. At the time of the relationship he was, but at that time she had not known that he was married. The relationship he had with her had lasted about a year. She now had another child, but she was no longer with that child's father, and she did not know the father's immigration status. She had come to the United Kingdom from Jamaica in the year 2000, leaving behind a son, who was only aged 8 months. She explained that her brother had told her that coming to England would make a better life for her. She had hoped to bring him here. She had not thought to report [SC]'s father to social services in order to get child maintenance support from him.

7. In her evidence, Patrice Howell said she had come to the United Kingdom in 1999, and currently had discretionary leave to remain for three years. She had applied to extend that leave. The appellant had been living with her since her arrival in the year 2000. Her own two children were British citizens. She did not live with either of their fathers. She was not in a relationship with one of the fathers, but she was with the other father. [SC] at times called her mum as well as the appellant. In cross-examination, she explained that when she took her elder daughter to hospital, the appellant looked after her other children. She described her older daughter's condition as MS.

8. In a subsequent decision, the judge set out his findings at paragraphs [11] onwards. He found that the appellant was the primary carer of [SC] and that if the appellant was required to leave the United Kingdom he concluded that [SC] would in practice be unable to remain. He went on to explain why he reached this conclusion.

9. In paragraph [12] he found that [SC]'s father, [RC], had ILR and that [SC] had a British passport. He had heard seriously conflicted evidence as to the involvement of [SC]'s father in her life. In her statement, the appellant stated he saw his daughter about twice every three months and was unreliable in marking her birthday. In oral evidence, the appellant had given the date of the last contact as being a non-appearance by him on [SC]'s birthday before last, which would have been April 2013. The judge said he somehow had to reconcile this with two letters from [SC]'s father, both undated, in which he stated he was fully involved in her life and went to visit her three times a week and picked her up from school:

> I find considerable reason to doubt whether the evidence I received was reliable.

10. At paragraph [13], he said that the position he found himself was best approached in the manner expressed in **Sanneh, R (on the application of) v Secretary of State for Work and Pensions and other [2013] EWHC 793 (Admin)**. This was a judgment of Hickinbottom J and the passage cited by Judge Oliver is at paragraph [101]:

> In fact, as cases such as **Dereci** and **Harrison** make clear, **Sambrano** is not to be construed as Mr Knafler contends. Those cases properly

> emphasise that the determinative question in right to reside cases based on Articles 20 and 21 of the TFEU is whether, as a matter of fact, an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent. That does not envisage an irrebutable assumption, but rather a context specific and evidence driven investigation of whether there would or might be such compulsion.

11. At paragraph [14], the judge said he bore in mind that the background facts in this appeal were highly unattractive from the public interest aspect. The appellant had spent many years in the United Kingdom in breach of immigration law. She had virtually abandoned her 18-month-old child in order to pursue a better economic life in the UK. Her evidence was the involvement of the father of the child she had borne in the United Kingdom had been less than reliable. Her twin sister until recently never had leave to remain and had worked in breach of immigration law. One of the twin sister's children regrettably suffered what appeared to be a serious disorder, "the cost to the public purse of this must of course be met, but it adds to a cost to the public purse of the overall dependency, which would not have occurred if Immigration Rules had been respected".

12. However, the judge continued in paragraph [15], he found that refusal of the appeal would in reality lead to the removal of [SC]. It was better for her brought up in the United Kingdom, the only country where she had ever lived. She had now lived here for over six years. He found that in the circumstances it was undoubtedly in her best interests under Section 55 of the Borders, Citizenship and Immigration Act 2009 to remain in the United Kingdom with her mother:

> I am satisfied the mother is effectively the sole carer and that the father will be unable to fulfil this role in her absence.

13. At paragraph [16] the judge said:

> I therefore find that if unable to reside means only by application of law, then the appeal must be dismissed; if it means in practice, then the decision on the appeal is more questionable. I find that it means the former and that the interests of [SC] would be protected by the need for a further decision on whether the appellant is to be removed.

The Grounds of Appeal to the Upper Tribunal

14. It is only necessary to refer to ground 1 of the application for permission to appeal settled by Counsel. It was submitted the judge had misdirected himself in holding that it was necessary for there to be a removal decision in order for Regulation 15A to be engaged. A person's right to reside under EU law could not be deemed only to arise once removal action was taken against that person. By the judge's own findings, the appellant satisfied Regulation 15A and she was therefore entitled to a derivative residence card.

The Rule 24 Response and Attempted Cross-Appeal

15. Mr John Parkinson apparently settled the Rule 24 response opposing the appeal, although the Rule 24 response is not on file. However, according to an application for permission to cross-appeal dated 30 November 2014, which was settled by Michael Shiliday, Senior Home Office Presenting Officer, Mr Parkinson said in the Rule 24 response that he was unable to respond in detail as the IAC in Newport had omitted to provide a copy of the determination with the grounds. However he observed from the Secretary of State's refusal letter and the Presenting Officer's attendance note that the appellant's own evidence appeared to indicate that the child's father was able to provide care for the child.

16. On 20 November 2014 the Secretary of State applied out of time to cross-appeal. The grounds for seeking to cross-appeal are on file. It is only necessary to refer to ground 1. Ground 1 was that the judge had erred at paragraph [15] of his decision in finding that in reality the British citizen child would be compelled to leave the UK if the appellant was removed, as in making this finding the judge had not actually reconciled the conflicting evidence before him referred to in paragraph [12] of his decision.

17. On 21 November 2014 Judge Drabu heard the Secretary of State's application for permission to cross-appeal at Field House. In his written submissions resisting the application, Mr Kirk of Counsel submitted it was unclear to what extent there was a conflict between [RC]'s letters and the evidence of the appellant, given that the letters were written prior to the submission of the appellant's first application on 15 December 2011. But even if there was a conflict between [RC]'s letters and the appellant's evidence, that conflict was immaterial because in the letters [RC] clearly confirmed that the appellant was [SC]'s primary carer and expressly stated that [SC] could not live with him. But even if the judge had failed to reconcile the conflict of [RC]'s precise level of involvement in [SC]'s life, that failure could not have any bearing on the judge's finding that [RC] would not care for [SC] in the appellant's absence.

18. After hearing from both Mr Kirk and Mr Shiliday, Judge Drabu dismissed the Secretary of State's application for permission. However, he did so as a First-tier Tribunal Judge, thus giving the Secretary of State the opportunity to make a renewed application for permission to appeal to the Upper Tribunal.

19. Judge Drabu's written decision is dated 4 December 2014, and it is said to have been promulgated on 20 February 2015. In his decision he said that he had informed Mr Shiliday that his application for permission to cross-appeal was refused for timeliness and also that the grounds advanced did not raise arguable grounds to establish a material error of law. He said that Mr Shiliday had informed him that he would let the Tribunal know within three days whether the respondent had plans to appeal to the Upper Tribunal against the decision to refuse the application. He said that to date he had not heard from him.

20. In fact, Mr Shiliday had applied in-time for permission to appeal to the Upper Tribunal from Judge Drabu's decision. This is apparent from other documents on file, including the document settled by Mr Shiliday on 30 November 2014 and a memorandum from the First-tier Permission Applications Unit in Loughborough dated 16 January 2015.

21. Insofar as it is material, I find that due to administrative error and confusion the renewed application for permission to cross-appeal was never processed.

The Error of Law Hearing

22. At the hearing before me to determine whether an error of law was made out, and if so, how this decision should be remade, Ms King submitted that the decision of the Court of Appeal in **Sanneh [2015] EWCA Civ 49** supported the judge's finding of fact that the child would be practically compelled to leave the country if her mother was forced to leave. The judge's only error was the legal one of imposing a further requirement that the mother should be served with a removal decision. The judge's error on this issue did not contaminate his clear and sustainable finding of fact, and accordingly the decision should be remade in the appellant's favour, without the need for any further hearing.

23. On behalf of the Secretary of State, Mr Kandola submitted that questions of fact and law were intermingled. The judge had not really grappled with the inconsistencies in the evidence, and so there should be a de novo hearing.

Discussion

24. The parties are in agreement that the judge misdirected himself in law in holding that it was necessary for the appellant to be served with a removal decision before she could qualify for the issue of a derivative residence card as the primary carer of a British national. Absent recognition by the Secretary of State that the appellant has a right of residence under Regulation 15A, the appellant's status here is illegal, and thus she is required to leave the country. So the risk of compulsory departure is inherent in the appellant's situation, and the judge was wrong to hold that she did not qualify for a derivative residence card because her removal was not imminent. Accordingly, the decision must be set aside and remade.

25. The more difficult question is how the decision should be remade. On this issue, I do not find it necessary to decide whether the Upper Tribunal should or should not grant the Secretary of State permission to cross-appeal in accordance with ground 1 of the cross-appeal settled by Mr Shiliday. I am satisfied that John Parkinson of the Specialist Appeals Team raised in the Rule 24 response the issue which is canvassed in ground 1 of

the cross-appeal, albeit not in the same terms. Put broadly, it has always been the Secretary of State's case by way of a Rule 24 response that the outcome of the appeal was correct as the child could be cared for by her father in substitution for her mother, and thus the child was not practically compelled to leave the United Kingdom with her mother.

26. There are passages in Judge Oliver's decision in which his line of reasoning could be said to be fully compliant with the required approach, as illuminated by Hickinbottom J in **Sanneh**. But there are other passages in which he strays off line, such as in paragraph [15], where he finds it would be in the child's best interest to remain in the United Kingdom with her mother. That is not in itself a sufficient reason to find that the child would be compelled to leave the country with her mother. As stated in **Harrison (Jamaica)** and **AB (Morocco) v Secretary of State for the Home Department [2012] EWCA Civ 1736** at paragraph 66 (cited by Hickinbottom J at paragraph 17 of his judgment):

> Even if a non-EU national is not relied upon to provide financial support, typically there will be strong emotional and psychological ties within the family and separation will be likely significantly to rupture those ties, thereby diminishing the enjoyment of life for the family members who remain. Yet is plainly not the case, as **Dereci** makes clear and Mr Drabble [Counsel for the appellant] accepts, that this consequence will be sufficient to engage EU law. Furthermore, if Mr Drabble's submission were correct, it would jar with the description of the **Zambrano** principle as applying only in exceptional circumstances, as the court in **Dereci** observed. The principle would regularly be engaged.

27. In the light of the judge's earlier finding that the appellant has been less than reliable on the topic of the involvement of the child's father in her life, I consider that the judge has not given adequate reasons at the end of paragraph [15] for holding that the father would be unable to fulfil the role of sole carer in the mother's absence. It would clearly be undesirable for the child to be parted from her mother, but that is not the test.

28. The line taken by the Secretary of State in the refusal decision is consistent with the Secretary of State's published guidance to caseworkers dated 12 December 2012 quoted by Mr Shiliday, and it is also consistent with the authorities discussed by Hickinbottom J. The guidance provides inter alia as follows:

> 28. An example of when a person may be considered unsuitable to care for a child would be where there are child protection issues which prevent the child being placed with this particular relative/legal guardian – for example as a result of a particular criminal conviction or because of findings in family law proceedings. Another example might be where the person in question would be unable to care for the child due to a physical or mental disability.
>
> 29. A lack of financial resources or an unwillingness to assume care responsibility would not, by itself, be sufficient for the primary carer to assert that another direct relative or guardian is unable to care for a

> British citizen. Case workers are to work from the assumption that where there is another direct relative or legal guardian in the UK, that they can care for the British citizen unless there is sufficient evidence to the contrary.

29. In conclusion, I consider that the judge did not give adequate reasons for finding that there was not another direct relative who could care for the British citizen child in the mother's absence.

Conclusion

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside in its entirety. None of the judge's findings of fact shall be preserved.

Directions

This appeal is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge M R Oliver.

None of the findings of fact of the previous Tribunal shall be preserved.

My time estimate for the fresh hearing is two hours.

No anonymity direction is made.

Signed Date 27 May 2016

Deputy Upper Tribunal Judge Monson