IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49136/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 February 2016	**On 21 March 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ANA ROSA LOPEZ SILVA
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr R Soloman, Counsel, instructed by Shanthi & Co, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Samimi, promulgated on 21 July 2015 in which she allowed the appeal of Ms Ana Rosa Lopez Silva (to whom I refer as the claimant) against the decision of the Secretary of State to refuse her leave to remain in the United

Kingdom. The appeal had been brought under Section 82(1) of the Nationality, Immigration and Asylum Appeal Act 2002 ("the 2002 Act") and the judge allowed the appeal on European law and on human rights grounds.

2. The claimant is a citizen of Nicaragua who entered the United Kingdom as a visitor on 11 December 2007. She has remained here ever since having met her partner, Jose Amadeo Gonzalez-Payan, also a Nicaraguan national, in this country. They met in 2009 and they have a daughter born on 5 August 2011. Mr Gonzalez-Payan has permanent right of residence under the EEA Regulations as the result of a previous marriage. On 25 March 2015 the couple's daughter was registered as a British citizen pursuant to Section 1(3) of the British Nationality Act 1981.

3. The Secretary of State's case is set out in the refusal letter dated 18 November 2014. In summary, the respondent considered that the claimant did not meet the requirements of Appendix FM under the partner route, concluding that EX.1 did not apply as the child was only 3 years of age, was not a British citizen and that it would be reasonable to expect her to leave the United Kingdom. It was also considered that there would be no insurmountable obstacles to the claimant and her husband continuing their relationship in Nicaragua. Similarly it was concluded that the claimant did not meet the requirements of leave to remain under Appendix FM, parent route, again as she has overstayed and did not meet the requirements of Appendix EX.1 nor did she have sole parental responsibility for the child. It was considered also that having had regard to Section 55 of the UK Borders Act 2009 and paragraph 353B of the Immigration Rules, that there were no exceptional circumstances such that the claimant should be granted leave to remain in the United Kingdom.

4. The appeal before the First-tier Tribunal had been adjourned on 15 June 2015 to permit the respondent to reconsider the appellant's case in light of the EEA Regulations, point to be raised. That, however, did not occur and on 25 June 2015 the judge proceeded to determine the appeal.

5. The judge found that:-

   (i) the claimant's daughter is wholly dependent on her mother for almost every aspect of her life and that the direct consequence of the decision to remove the claimant would be to deprive the ability of the daughter (a British citizen) to live in the United Kingdom [12];

   (ii) the possibility of the claimant's daughter living with her father was neither practical nor realistic [12];

   (iii) the claimant's child would be compelled to leave the United Kingdom in order to accompany her mother to Nicaragua;

   (iv) it was not proportionate in the interest of immigration control to require the claimant to leave in order to make an application for entry clearance from

abroad [16] given that the appellant was fully maintained and accommodated by her husband;

(v) in the circumstances of the case there are factors that would justify the respondent's exercise of discretion outside the Rules and that there are compelling factors which justify the exercise of discretion outside the Rules [18];

(vi) having had regard to Section 117B of the 2002 Act [19] that the claimant's removal would be disproportionate to the respondent's interest of immigration control [20].

6. The judge then allowed the appeal under Article 8 "to the extent that the matter should be referred back to the respondent for the exercise of her discretion in the appellant's favour". The judge did however expressly allow the appeal under the EEA Regulations and Article 8.

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

(i) the judge had misdirected herself with respect to Regulation 15A of the EEA Regulations in that she had failed properly to apply the requirement that the relevant British citizen would be unable to reside in the United Kingdom [4], [5] and that as the claimant is clearly not the primary carer with sole responsibility as this is shared with the husband [7] it had not been demonstrated that the child would be compelled to remain in the United Kingdom if the claimant was required to leave [8], there being no evidence to suggest the father was unable to assume caring responsibilities, the reliance on the father's work commitments being insufficient [10];

(ii) having accepted that the claimant could not satisfy the requirements of the Immigration Rules the judge's findings under Article 8 are flawed as the refusal would not result in unjustifiably harsh circumstances, the judge having failed to give adequate reasons why that is so and, in remitting the matter to the Secretary of State, the judge erred materially in law [12], [13].

8. On 11 December 2015 Upper Tribunal Judge Kekic granted permission on all grounds.

Submissions

9. Mr Walker submitted that the judge had misapplied the relevant case law, in particular the guidance given in MA and SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 00380 (IAC) and Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089. He submitted that there had been no proper evidence to show that the applicant was a sole carer. He submitted further that the high threshold identified had not been met.

10. Mr Solomon submitted that the judge had given proper reasons for concluding that the claimant was the primary carer and also for concluding that the child would in

effect be compelled to leave the European Union. He submitted that, having had regard to the principles set out in Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 00028 (IAC), applying the principles in Edwards v Bairstow [1956] AC 14 as well as Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC) it could not be said that the judge's decision was in this case perverse or irrational. There was he submitted no indication that the judge left out of the account any material evidence, or took into account extraneous matter or that there was any other basis on which the decision could be set aside.

11. Mr Solomon did accept that the judge's decision to remit the matter back to the Secretary of State was inapt given the clear finding that there would be a breach of Article 8 flowing from removal.

12. I indicated that, for reasons which I set out below, the decision of the First-tier Tribunal did involve the making of an error of law insofar as it relates to allowing the appeal under the EEA Regulations but that I was not satisfied that the decision allowing the appeal pursuant to Article 8 did involve the making of an error of law. I asked for submissions as to how in these circumstances the decision should be remade. Mr Sullivan was content for me in the circumstances to formally dismiss the appeal under the EEA Regulations.

The Law

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 –

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

(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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 21. …
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> 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.
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> 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. The question is thus whether he would effectively have to leave the EU if his mother is refused a right of residence.

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.

13. I accept that it was open to the judge to conclude that the claimant was a primary carer, given the child's age and the undisputed fact that her father works full-time. I do not consider that the definition of primary carer requires that person to be the sole care giver.

14. I accept that there is a high threshold to overcome in showing that the child would be compelled to leave the United Kingdom – that is evident from the case law. I bear in mind in particular what was said in Hines at [23] and [24].

15. There is no indication that in this case the judge had regard to the binding authorities of the Court of Appeal and the European Court of Justice referred to above or that she applied them, not least when considering the fact that there is in this case a father who has the right of residence in the United Kingdom. It is remarkable from the judge's decision that there is no indication that the judge properly considered the question of whether the father could look after the child, what difficulties there would be if he did so and the impact that there would be on the child. The finding that the husband would "clearly find it impossible to look after his daughter on his own" is unreasoned and the basis on which that conclusion was reached is not discernible from the summary of the evidence. The fact that the possibility of the daughter living with the father is not practical or not realistic is also not reasoned sufficiently. There is no indication that what was said in MA and SM in particular at [13. (iv)] and certainly the reference to ZH (Tanzania) and the balancing is directly contrary to the approach commended by the Court of Appeal in Harrison and Hines.

16. For these reasons, I am satisfied that the decision of the First-tier Tribunal Judge did involve the making of an error of law in respect of the decision to allow the appeal pursuant to the EEA Regulations.

17. In remaking the appeal on this ground, I consider that while it may be difficult for the father to look after his child, it has not been shown he is incapable of doing so. While it may impinge on his ability to work, that is a financial matter, and insufficient evidence has been provided to show that he or the child would be destitute. There is insufficient evidence that the child would not be cared for, or that the child's welfare would be so impaired by being looked after by her father, that she would be compelled to leave the United Kingdom to be with her father.

18. Turning to Article 8, Mr Walker's submissions on this matter were limited and he accepted that the main thrust of the case was the challenge to the EEA Regulations. He accepted that there is in reality no challenge to the judge's findings that removal would be disproportionate or that this was a situation to which section 117B (6) of the 2002 Act applied. I observe in passing that it is not entirely clear why it was conceded that EX.1 did not apply in this case, given that finding. Certainly, the refusal letter in which it is concluded that it does not is framed in terms that the child is not a British citizen which of course she now is.

19. Having had regard to the decision in Treebhawon and others (section 117B (6) [2015] UKUT 674, I consider that in this case the judge had fairly concluded, having

directed herself properly as to the law, that the claimant has a genuine and subsisting parental relationship with her child, which is not in dispute, and concluded that it would not be reasonable to expect the child to leave the United Kingdom. The test of whether it is reasonable or not for a child to leave the United Kingdom is not the same as the test in respect of meeting Regulation 15A (4A) of the EEA Regulations. It is evident from the case law set out above that the threshold is significantly higher and because it was shown that compulsion has to be shown and that the child would be unable to go.

20. The finding that it would be unreasonable to expect the child to go to Nicaragua is not challenged in the grounds of appeal.

21. I consider that when viewed as a whole, the judge's decision does set out adequately the basis on which she reached the conclusion that it would not be reasonable for the child to leave the United Kingdom. The judge also sets out [16] that the claimant speaks English, is fully maintained and accommodated by her husband and has not been a burden on the tax payer and the judge does refer [17] to the unjustifiably harsh circumstances test set out in Iftikhar Ahmed [2014] EWHC 300 **(Admin)**. That test did not of course deal with the circumstances whereas here there are unchallenged findings with regards to the public interest in respect of Section 117B (6) which mirror the test set out in EX.1.

22. Having had regard to Dasgupta and Greenwood, I consider that the challenge here is in fact a rationality challenge. Whilst the decision was clearly generous, it was nonetheless open to the judge to conclude that it would not be reasonable to expect the child to go to live in Nicaragua and she is after all a British citizen and her father has the right of residence in the United Kingdom. The judge directed herself properly as to the law, and it cannot be shown that she did not, in reaching her conclusion under article 8, follow that self-direction.

23. Accordingly, I am not satisfied that the decision in this case involved the making of an error of law and I uphold this part of the decision. I am, however, concerned that the judge appeared to have erred in this case in suggesting that the matter was remitted to the Secretary of State. I do not consider that appropriate and I therefore substitute the decision that the appeal is allowed on Article 8 grounds. I do, however, consider that thought should be given whether in fact the claimant does meet the requirements of EX1 given the finding that it would not be reasonable to expect the child to relocate to Nicaragua.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did involve the making of an error of law insofar as it concluded that the respondent's decision was in breach of the EEA Regulations did involve the making of an error of law and I set it aside. I remake the appeal by dismissing it on that ground.

2. The decision of the First-tier Tribunal that removing the appellant would be in breach of article 8 of the Human Rights Convention did not involve the making of an

error of law, and I uphold that decision, subject to the observation that the matter does not need to be remitted to the respondent, contrary to what the First-tier Tribunal ordered.

Signed Date: 10 March 2016

Upper Tribunal Judge Rintoul