Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37472/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MS THUY AN LUONG
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms M Mac, of Mac & Co Solicitors

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 5 October 2016 of First-tier Tribunal Judge I Howard. The decision allowed the respondent's application for a residence permit recognising her derived right of residence as the parent of EEA nationals.

© CROWN COPYRIGHT 2017

2. For the purposes of this decision I refer to the Secretary of State as the respondent and to Ms Luong as the appellant, reflecting their positions before the First-tier Tribunal.

3. The background to this matter is that Ms Luong, a citizen of Vietnam born on 7 July 1984, came to the UK as a domestic worker. She was granted leave in that capacity until 13 May 2011. She applied for a derivative residence card on 28 May 2014 but that application was refused on 23 August 2014.

4. The appeal was first heard by First-tier Tribunal Judge Boylan-Kemp, who in a decision promulgated on 27 July 2015 allowed the appeal on Regulation 15A/*Zambrano* grounds.

5. That decision was found to contain an error by Deputy Upper Tribunal Judge Chamberlain in a decision promulgated on 10 February 2016. The error of law decision specifically identified that the findings concerning whether the appellant was the only carer available to the children and whether their British fathers could assist were not sufficient.

6. In paragraphs [8]-[10], Deputy Upper Tribunal Judge Chamberlain found as follows:

> "8. I find that there are insufficient findings to back up the inference at paragraph [24] that the children's fathers would not be able to care for them, and therefore that the children would have to leave the United Kingdom were the Appellant to leave.
>
> 9. In relation to the finding of the Appellant is the primary carer of the children, again I find that inadequate reasons are given for this finding. Ms Mac submitted that the evidence pointed to the fact that the Appellant was the children's primary carer, and that the documents inferred that this was the case. The judge finds that the nursery fee requests are addressed to the Appellant, but there was no evidence before the judge as to any financial input which the Appellant may receive from the children's fathers. The inference is also made that, as the Appellant lives with a different man, the children's fathers are not involved in their care [24]. I find that this is inference does not follow logically.
>
> 10. This is a very short decision in which the findings are confined to only two paragraphs, [23] and [24]. In paragraph [25] the judge concludes that the children's fathers would not be in a suitable position to become the primary carers for the children, but this is not the test set out under Regulation 15A(4A). I was referred to the case of MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380, in particular paragraphs [41(ii)], [4(vi)] and [56]. It was submitted by Ms Fijiwala that there had been no evidence before the judge that the children could not remain with their fathers. Given the submission by Ms Mac that this issue would have been addressed by the oral evidence of the Appellant, who did not attend the hearing in the First-tier Tribunal, I find that this is the case. I find that the decision is inadequately reasoned."

7. It was in those terms, therefore, that the matter was sent back to the First-tier Tribunal to be decided again by First-tier Tribunal Judge Howard.

8. First-tier Tribunal Judge Howard clearly recognised the terms of the remittal, summarising the history of the appeal accurately at [12] and [13]. He identifies in [14] that he was required to decide the issue of whether the appellant was the primary carer of her two British children and whether the two different fathers for those children could provide care if she were to leave the UK. First-tier Tribunal Judge also sets out at [27] the material parts of the ratio of Ruiz Zambrano v Office national de l'emploi (C-34/09).

9. First-tier Tribunal Judge Howard found for the appellant on both those points, indicating that she was both the primary carer of the children and that were she to leave the UK they would also have to do so. He therefore found that Regulation 15A was met.

10. The respondent challenges the decision of First-tier Tribunal Judge Howard on the basis that he did not apply a test of "compulsion" as identified in MA and SM (*Zambrano*: EU children outside EU) Iran [2013] UKUT 00380 (IAC). The grounds cite [41] of that case which, in turn, refers to paragraphs from Jamil Sanneh v Secretary of State for Work and Pensions and The Commissioners for Her Majesty's Revenue and Customs [2013] EWHC 793 (Admin) which also sets out the test being one of whether "an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent". Paragraph 41(iv) of MA and SM identifies that "nothing less than such compulsion" is sufficient to meet the test set down by EEA legislation.

11. The grounds go on to state that:

> "It is plain that it is a very demanding test. In this case the Judge summarises the A's mother's evidence about the children's two fathers at para. 22 but in a way that makes it fairly difficult to understand what was said."

12. The grounds go on to state that "there is simply no lawful finding that the fathers of the children would not seek to care for the A if the A's mother was required to leave the UK/EU".

13. Mr Lindsay elaborated on the written grounds at the hearing, pointing out that in paragraph [25] of the decision the judge says this:

> "In the context of this appeal the sole test is whether I am satisfied on the balance of probabilities that removal of the appellant would lead to the departure from the EU of the children."

14. Mr Lindsay argued that this showed that the judge had applied the wrong test, a lower test than that of "compulsion". He also maintained the respondent's position was that the evidence could not support a finding

that the fathers would not be in a position to assist the appellant's children to remain in the UK were she required to leave.

15. I did not find the respondent's ground as to the judge applying the wrong test to be made out. Firstly, as above, First-tier Tribunal Judge Howard clearly understood the task before him. In paragraphs [15] to [19] he found that the appellant is the primary carer of both of her children. The grounds of challenge now do not suggest that that finding was in error. Indeed, at [20] Judge Howard identifies that the fact of the appellant being the children's primary carer as required by Regulation 15A(7) "is not in dispute".

16. At [21] the judge identifies the remaining question he had to address as follows:

> "The remaining issue is whether they would be unable to reside in the UK or another EU state if the appellant were required to leave."

17. At [26] Judge Howard states as follows:

> "The history is that set out above and based upon that history, which includes a history of significant movement around the UK, I am satisfied it is more likely than not that in the event the appellant is required to leave the EU so it is the children will be required to accompany them as both their histories has them living exclusively with their mother and I have seen nothing from which I can properly conclude that is a situation that will change."

18. I am satisfied that First-tier Tribunal Judge Howard applied the correct test of compulsion where in paragraphs [21] and [26] his consideration shows his understanding that the test was whether the children would be "unable" to live in the UK without their mother being present or would be "required to accompany" her if she were to leave.

19. I also did not find that it was arguable that the judge erred in concluding that the children's fathers are not in a position to provide a level of support that would enable the children to remain in the UK or another EU state were the appellant required to leave. The judge finds as follows at [19]:

> "The evidence I have ties both children to the various homes of their mother. The documents span the period from their respective births. The addresses are geographically diverse, including Essex, Dorset and Wiltshire. It is clear from the movements of mother and children, when taken in conjunction with the other documentary evidence and the appellant's testimony, that they all live together and to that extent the appellant is the primary carer of both children."

20. At [22] to [25] the judge states as follows:

> "22. Their fathers are the only other potential primary carers. The only evidence as to their respective ability to care for their daughter came

> from the appellant. She told me that Jessica's father cares for his children to a previous partner and that Sophie's father no lives with his own family now.
>
> 23. What becomes apparent from this evidence is that each child's father is living in a domestic family situation that involves the care of children.
>
> 24. Each father living in such circumstances it remains the situation that the girls remain with their mother. This is a telling piece of evidence.
>
> 25. In the context of this appeal the sole test is whether I am satisfied on the balance of probabilities that removal of the appellant would lead to the departure from the EU of the children."

21. The judge's findings at [26], set out above, find that the children have only ever lived with the appellant and that there would be no change to that those circumstances.

22. The evidence given by the appellant to the First-tier Tribunal Judge appears to be entirely consistent with that in her witness statement at paragraphs [2] to [7]. The judge took into account the material evidence on the situation of the children and the likelihood of their being cared for by their fathers so as to enable them to remain in the UK. He identified at [19] that they appeared to have lived only with their mother from birth. He identified at [24] that he found it "telling" that they lived with their mother only even though their fathers appeared to be prepared to care for other children and that was a judgment open to the First-tier Tribunal. In addition, the judge had the benefit of oral evidence from the appellant.

23. It is my conclusion that First-tier Tribunal Judge Howard reached a decision open to him on the material before him as to the children here being compelled to leave the UK were their mother required to leave because their fathers are not available to offer them support that would able the children to remain in the UK or another EEA state.

24. Therefore, I do not find an error in the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: Date: 27 July 2017

Upper Tribunal Judge Pitt