



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27577/2013

THE IMMIGRATION ACTS

Heard at Field House
On 30 April 2014

Determination Promulgated
On 30 May 2014

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

PETLIN STEWART HIBBERT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Radford, Counsel, instructed by HRS Solicitors
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appealed against the respondent's decision on 14 June 2013 to refuse her application for a derivative right of residence on *Zambrano* principles. The refusal letter stated that:

“As you appear to have no alternative basis of stay in the United Kingdom you should now make arrangements to leave ... Please note that your entitlement to remain in the UK has solely been assessed on the basis of the Immigration (European Economic Area) Regulations 2006. If you consider that you are entitled to remain in the UK on the basis of other immigration legislation then please ... submit an appropriate application for consideration. Alternatively, if you consider that you have a right to reside in the United Kingdom as a matter of European law and are in a position to submit the necessary information to support your application for a derivative residence card as recognition of that right, you may wish to submit a further application for consideration.”

2. The only dependant named on the application which the applicant made on 10 February 2012 was her son, born 9 November 2010. He is now 3½ years old. However, between the application and the making of the Secretary of State’s decision the applicant became pregnant again by the same father and in fact gave birth to a daughter four days after the Secretary of State’s decision had been made. Rather than making a further application as suggested in the refusal letter, the applicant appealed and under the heading of “Statement of Additional Grounds” stated “I request consideration of Article 8 of the Human Rights Act 1998”.
3. On 30 January 2014 First-tier Tribunal Judge Rastogi determined the appeal. The following findings of fact were made: that the applicant came to the UK on 27 July 2001 and had been here without leave since 13 June 2005; that she had been living with the children’s father and that he was a man not lacking in commitment to any of his children and that due to the paucity of evidence produced by the appellant the judge was not satisfied that the children’s father had taken no responsibility for his son. There is no finding about his baby daughter.
4. At paragraph 36 of the determination the judge found that it was more likely than not that the appellant was her son’s prime carer but that she had not produced evidence which satisfied the judge that the little boy would be de facto compelled to follow her to Jamaica.
5. At paragraph 38 the determination deals with the baby.

“38. For the avoidance of any doubt, although the application only named the appellant's son as the EU citizen upon whom her application was founded, the findings I make apply to her daughter as well.”

There is no further reasoning in relation to the 6 months old baby girl and the rest of the determination refers only to 3½ year old boy in consideration of the EEA Regulations.

6. There was some dispute about whether it was relevant to deal with Article 8 but given that Article 8 is raised in the grounds of appeal the judge, correctly in my view, also addressed Article 8. At paragraph 61 of the determination she found that both of the children were British citizens and if they were forced to return to Jamaica and grow up there they would lose the benefit of their British and European citizenship

as well as severing their family relationship with their father who is also a British citizen and might not accompany their mother to Jamaica. If the children were to remain in the UK their family life with the applicant, who the judge was satisfied was their prime carer, would be severed.

7. Paragraph 62 of the determination purports then to consider the matter with reference to Appendix FM of the Rules but we now know from the decision in Edghill that that is an incorrect approach. There is no separate consideration in the Article 8 reasoning in relation to the impracticality of separating a 6 months old baby from its mother. Both of these children are British citizens and are entitled to the benefit of their British citizenship and their EEA citizenship while growing up and that, given the youth of the baby girl, means that they must have their mother with them wherever they are and in order to exercise their EEA rights and British citizenship rights that must be in the UK.
8. The appellant's challenge on which permission was granted is to the derivative right to residence decision on reasons grounds and to the judge's decision to refer only to Section 84(1)(c) of the 2002 Act and not 84(1)(g) which on these facts is a distinction without a difference since both deal with Article 8 and the theoretical removal of the appellant to Jamaica which the present decision would entail.
9. I am satisfied that there is a material error of law in this determination in particular the Edghill error in paragraph 62 but also the failure separately to consider the Section 55 rights of the second child who is still under the age of 1 year and in relation to the EEA Regulations and Article 8 also. I therefore proceed to remake the decision having regard to the very helpful submissions of both Miss Radford and Mr Saunders.
10. Beginning with the EEA Regulations point the relevant section of Regulation 15A which is set out in paragraph 10 of the First-tier Tribunal determination at 4A states that

“(4A) P (parent) satisfies the criteria in this paragraph if –

 - (a) is the primary carer of a British citizen (‘the relevant British citizen’)
 - (b) the relevant British citizen is residing in the United Kingdom; and
 - (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave”
11. The question whether the appellant is the primary carer of these children was still in the First-tier Tribunal determination and on the facts at least the second child would be unable to reside in the UK or another EEA state if this appellant were required to leave and to return to Jamaica. Accordingly this appellant is entitled to derivative right of residence on EEA grounds.

12. On the facts there is no need for separate consideration of Section 55, the best interests of these children are to be with their prime carer, in this case their mother.
13. Turning to Article 8, even if the appeal had not succeeded under the EEA Regulations I am satisfied in the light of the findings in particular at paragraph 61 of the determination that if the *Razgar* test had been properly applied with reference to how young the appellant's daughter is, that the judge would have concluded that she would have to return to Jamaica if her mother were to be removed from the UK. That would be a breach of the principles set out in *ZH (Tanzania)* since British citizens are entitled to grow up in the United Kingdom and therefore both on *ZH (Tanzania)* and *Zambrano* principles this appeal succeeds.
14. I allow the appeal on all grounds.

Signed

Date

Upper Tribunal Judge Gleeson