



IAC-AH-SAR-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/22961/2014

**THE IMMIGRATION ACTS**

**Heard at Centre City Tower, Birmingham  
On 7<sup>th</sup> October 2015**

**Decision & Reasons Promulgated  
On 4<sup>th</sup> November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MRS RAJPREET KAUR  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Stephen Vokes (Counsel)

For the Respondent: Mr David Mills (HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Pacey, promulgated on 25<sup>th</sup> March 2015, following a hearing at Birmingham, Sheldon Court on 16<sup>th</sup> March 2015. In the determination, the judge allowed the appeal of Mrs Rajpreet Kaur, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## The Appellant's Claim

2. The Appellant's claim is that she is the primary carer of Meher Singh Bal, her son, who is a British son, and whose date of birth is 26<sup>th</sup> August 2011, and she herself came to the UK on 14<sup>th</sup> January 2005, as the fiancée of a man whom she did not marry, because she subsequently married Mr Surjit Singh, Meher's father, on 3<sup>rd</sup> August 2011, after her initial appeal had expired on 18<sup>th</sup> January 2008. Her divorce from her first husband was made absolute on 5<sup>th</sup> March 2008. However, given that she is an overstayer now, as she would have to leave the UK, but for the fact that if she were to leave then Meher Singh Bal, her son, would also have to leave, because Mr Surjit Singh, his father, could not care for him. Mr Singh has a permanent right of residence in the UK. Reliance was also placed upon the Appellant's Article 8 rights and on Section 55 of the 2009 Act in relation to the best interests of the child, Meher Singh Bal.

## The Judge's Findings

3. The judge observed how at the hearing the Appellant reaffirmed that she was Meher's primary carer and that her husband did not share in the responsibility of Meher (see paragraph 13). The judge correctly identifies the issues before her. These were twofold. First, whether in accordance with Regulation 15A(4A), it could be said that the Appellant was "the primary carer of a British citizen"; and secondly, whether it could be said that Meher Singh would be unable to reside in the UK or another EEA state if the Appellant, her mother with primary care, was required to leave (see paragraph 4A(c)).
4. The judge noted the evidence that Mr Singh worked on a self-employed basis and spent a large part of the week working away to provide for the family (see paragraph 22). The judge concluded that,
 

"I note that Mr Singh works away from home for a considerable part of the week and so Meher would have to be left 24 hours in the day in the care of someone who is not his parent. Moreover, Mr Singh's work takes him both to London and the West Midlands so it would not be possible for him to relocate to be nearer his work and hence able to be with Meher each day, or at least each evening as would be the case if his work were in just one city" (paragraph 25).
5. On this basis, the judge concluded that the Appellant was the primary carer of the child Meher Singh (see paragraphs 27 to 28).
6. The judge then went on to consider the provision in Regulation 15(4A)(c) as to whether it could be said that, "the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave". Here the judge held that the word "unable" has to mean something more than that "would find it difficult". She went on to say that,
 

"If a literal interpretation were used then it would be possible to argue that Meher could stay in the UK even if both parents left (which of course is not envisaged) because he could be fostered or adopted or looked after by the state. This is clearly not the intention of the sub-paragraph. Interpreting the word adopting a common sense

approach, Meher could not reasonably remain in the UK without his mother” (see paragraph 29).

### **Grounds of Application**

7. The grounds of application state that the judge wrongly construed the provisions in Section 15A of the Regulation because the word used there is “unable to reside in the UK” and views of the gloss that it would not be reasonable to do so was wrongly imported into the statutory language so as to alter the meaning of the provision. On 3<sup>rd</sup> July 2015, permission to appeal was granted on this basis.

### **The Hearing**

8. At the hearing before me, Mr Mills, appearing on behalf of the Respondent Secretary of State, submitted that in the case of **Harrison [2012] EWCA Civ 1736**, the Court of Appeal had already made it clear that the reference to “unable to reside” was a reference to a person being “compelled” to leave the UK on account of the removal of his or her parent. It simply was not possible to say that the test was one of whether it was reasonable to expect the child to relocate with the parent. The judge had plainly erred in this respect. The threshold is an extremely high one. In the circumstances, there was no reason why the father would be unable to look after the child by working less hours, or by bringing in outside help. Second, there was no Article 8 decision made in relation to the Appellant, as there was no removal directions issued, and so it remained open to the Appellant to argue Article 8 when the right time came. Furthermore, Section 55 also was inapplicable at this stage because the mother was not being separated from the child, given that there was no removal directions issued.
9. For his part, Mr Vokes submitted that this case involved the application of the “**Zambrano** principle” which had been affirmed in **Derici [2011] EUECJ C-256/11**, which confirmed that Regulation 15A has to be considered as a whole and that there must be a person capable of being a primary carer for a British child, if the intention is to remove the present primary carer, and this was a fact-based exercise. The test in **Derici** was whether the EU citizen has to leave the territory of the member state and the European Union as a whole.
10. In this case one had a 3 year old child, who had lived entirely with the primary carer, who was the mother, and if the mother was to be removed, then there was no finding at all that the father was in a position to look after the child. However, he would have to accept that the judge had erred in using the language of “reasonable” in relation to wording that simply referred to “unable to reside” and this had to be accepted as a misdirection by the judge.
11. The important question, submitted Mr Vokes, was whether the error was a material one. It would not be a material error because of findings already made by the judge at paragraph 25, where it had been clearly stated that if the mother was removed then 24 hour care would be sought for the Appellant child, and given that the father worked long hours, and worked away from home in London and the West Midlands,

he could not even be with the child in the evenings. In these circumstances, the child would be “unable to reside” in the UK or EU state if the mother was removed.

12. In reply, Mr Mills submitted that there did not have to be a finding that the father was in a position to look after the child because it would be assumed that he would be unless there was evidence to the contrary. Secondly, paragraph 67 of **Harrison** makes it quite clear that, “it is not a right to any particular quality of life ...” that the provisions are addressed to. The question is whether the EU citizen will be compelled to leave. There is no reason to assume that this will be the case even if the mother was removed because the father would be in this country.

### **Error of Law**

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law such that I should set aside the decision (see Section 12(1) of TCEA 2007) and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows. First, Section 15A refers to “unable to reside in the UK”, and whereas it is correct that the wording is not something such as “would find it difficult”, as the judge found (see paragraph 29), to import a standard of “reasonability” which immigration practitioners find in the context of Article 8 balancing exercise analyses, is to alter the meaning and emphasis of Section 15A(4A) in a manner that effectively dilutes that provision.
14. Second, this is clear from the Court of Appeal judgment in **Harrison**, which refers to the hardship being such as to require that the EU citizen is “compelled” to leave the country where he or she resides.
15. I do not accept Mr Vokes’ submission that this is an error, but not a material one, because it amounts to a formulation of a different legal test, to one which actually is applicable in this present case. This is, in fact, a classic example of a misdirection in law.

### **Remaking the Decision**

16. I have remade the decision on the basis of the findings of the original judge, and the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons.
17. First, the case of **Derici** makes it quite clear that there are two limbs to Regulation 15A(4A). The first is that there is “the primary carer of a British citizen”. The judge here was clear in a finding which cannot be faulted on the evidence before her. She concluded that Meher, being a 3 year old child, was being looked after entirely by her mother, the Appellant. The father, Surjit Singh, was self-employed “and had no set hours of work. His work took him to London, Coventry and the Birmingham area” (paragraph 14). This evidence, given before the judge was accepted by the judge (see paragraph 25) and the judge concluded emphatically to this effect (see paragraph 28).

18. Given these findings, the second question is whether “the relevant British citizen will be unable to reside in the UK or another EEA state if P were required to leave”. The child, Meher Singh Bal, is barely 4 years of age, has lived entirely with his mother, in circumstances where there is an absent father, and the findings of the judge were that the primary care given to the child came from the mother alone.
19. The father, Surjit Singh, was not even around in the evenings because he worked away from home so much. In the circumstances, if the Appellant were to be removed to India, then on a balance of probabilities, the British citizen child here “would be unable to reside in the UK” because he would be compelled to go with his mother to India until such time as the mother could return back to this country again. In the circumstances, the second limb is also satisfied and the appeal must be allowed.

**Notice of Decision**

20. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the First-tier Tribunal judge. I remake the decision as follows. This appeal is allowed.
21. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

2<sup>nd</sup> November 2015