



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: IA/43479/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9<sup>th</sup> December 2015**

**Decision & Reasons Promulgated  
On 5<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**Y C**

**~~{ANONYMITY DIRECTION NOT MADE}~~**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: The Appellant appeared in person

For the Respondent: Mr K Norton, a Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing her appeal against a decision of the Secretary of State for the Home Department (the 'Secretary of State') taken on 24 October 2014 to refuse her application for a Derivative Residence Card.

**Background Facts**

2. The claimant is a citizen of China who was born on 13 October 1989. She applied for a Derivative Residence Card as the primary carer of her daughter, [XM], a dependent British Citizen who was born on 14 June 2014. The basis of the application was that [XM] would be unable to remain in the UK if the appellant was required to leave the UK.
3. That application was refused because the respondent was not satisfied that [XM] would be unable to remain in the UK. Insufficient evidence, in the view of the respondent, had been provided as to why [XM]'s father, [CM] ('Mr CM'), could not care for her if the appellant left the UK.

### **The Appeal to the First-tier Tribunal**

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 11 May 2015, First-tier Tribunal Judge Gibbs dismissed the appellant's appeal. The First-tier Tribunal considered Regulation 15A(4A)(c) of the Immigration (European Economic Area) Regulations 2006 (the 'EEA Regulations') holding that it must be satisfied that the appellant's daughter would be unable to reside in the UK or another European Economic Area Member State if the appellant were required to leave. The Tribunal found that Mr CM is willing to provide a level of support for [XM] in that he attended to register her birth, assisted her application for a British passport and also provided documents in support of the appellant in her appeal. The First-tier Tribunal was not satisfied that [XM] would be forced to leave the UK if the appellant was removed.

### **The Appeal to the Upper Tribunal**

5. The appellant sought permission to appeal to the Upper Tribunal. On 9<sup>th</sup> July 2015 First-tier Tribunal Judge Pooler refused permission to appeal. On 28 August 2015 Upper Tribunal Judge McGeachy granted permission to appeal. Thus, the appeal came before me.

### **Summary of the Submissions**

6. The grounds of appeal assert that the First-tier Tribunal's decision is perverse and is not a decision that was properly open to the judge to make. Further, the grounds assert that the judge misdirected himself (*sic*) in failing to appreciate the practical consequences. They are; that Mr CM, by refusing to take care [of] [XM], would result in her being forced to leave the UK thereby being denied her rights as a European citizen. There is no authority or organisation that could compel Mr CM to care for [XM].
7. It is submitted that neither the respondent nor the Tribunal considered s55 of the Borders, Citizenship and Immigration Act 2009 ('s55') or otherwise took into account the best interests of the child. It was also submitted that there is no category of immigration decision to which Article 8 of the European Convention on Human Rights ('ECHR'), s55 or

the duty under s6 Human Rights Act 1998 does not apply. The failure to consider Article 8 or to consider and apply any of the mandatory provisions of s117B of the Nationality and Immigration Act 2002 (the '2002 Act') renders the decision flawed and unsustainable.

8. The appellant provided a further witness statement dated 30 November 2015. This statement concentrated on the failure of the respondent and the First-tier Tribunal judge to take s55 into consideration or to consider at all what the best interests of her daughter, [XM], were. Further reasons were put forward as to why Mr CM agreed to help with the registration of [XM]'s birth, passport application, provision of documents and a witness statement.
9. The appellant also made oral submissions at the hearing. She submitted that the best interests of [XM] are to be with her not with Mr CM. Mr CM takes no responsibility, he wanted her to have an abortion and never wanted [XM] to be born. If [XM] goes to China she will have no nationality and cannot go to school. China does not have freedom and is not like the UK.
10. Mr Norton submitted that the case is about a European Economic Area right, the findings of fact in paragraph 10 of the First-tier Tribunal decision are the crucial issue. All the evidence was argued before the First-tier Tribunal. The judge came to a finding that Mr CM would be able to care for the child. The judge took into account his unwillingness to do so and the reasons for that but the judge made the finding that there was no evidence that he could not care for the child. The important factor is that to succeed the child would have to be forced to leave the UK. Unless the judge misunderstood the evidence before her she had to make a decision which was did she believe on the balance of probabilities that the child would be forced to leave the UK? Another judge may come to another decision but to succeed on appeal the test for perversity is that no other judge could have come to the decision.
11. In relation to the Article 8 issue Mr Norton submitted that in accordance with the case of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) ('Amirteymour'), as set out in the headnote, where there is no decision to remove and no s120 notice has been given, the appellant cannot mount a Human Rights challenge. It is clear from the reasons for refusal letter that no application had been made under the Immigration Rules nor had an Article 8 application been received.
12. In relation to the s55 argument Mr Norton submitted that s55 does not have any relevance in a refusal of a derivative right of residence card. The European Economic Area Regulations have to be met. Section 55 cannot trump the Regulations. The duties incumbent under s55 are protected under Human Rights. The First-tier Tribunal had no jurisdiction to consider s55.

## **Discussion**

- 13.** In considering whether there was a material error of law in the First-tier Tribunal's decision there are four discrete issues to be determined. These are i) is the First-tier Tribunal's decision that the child would not be forced to leave the UK if her mother were to be removed perverse, ii) did the Tribunal judge misdirect herself by failing to appreciate the practical consequences of her reasoning, iii) was it a material error of law for the Tribunal to fail to consider Article 8 of the ECHR and iv) was there a material error of law in the Tribunal's failure to consider s55.

### **Perverse Decision**

- 14.** As I explained to the appellant at the hearing to succeed on an argument that the First-tier Tribunal's decision was perverse the appellant must overcome a high hurdle. In Edwards - v - Bairstow [1956] AC 14 at page 29, Viscount Simonds stated that a finding of fact should be set aside if it appeared that it had been made "*without any evidence or upon a view of the facts which could not reasonably be entertained*". Lord Radcliffe, at page 36, said that a finding of fact would be an error of law where the facts found were "*such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*" or, in a formulation which he said he preferred, "*the true and only reasonable conclusion contradicts the determination*".
- 15.** In R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 the court set out:
- "11. ... It is well known that "perversity" represents a very high hurdle. In Miftari v SSHD [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter."
- 16.** The First-tier Tribunal judge set out at paragraph 7 of the decision the evidence that was taken into account. There is nothing in the grounds of appeal to suggest that the judge failed to take any relevant evidence into account or took irrelevant matters into account. The grounds concentrate on the practical consequences of [XM]'s father's unwillingness to care for her.
- 17.** The Tribunal records at paragraph 7:

“The appellant’s evidence is that ... Mr CM did not and does not want the baby and that the only time that he has seen his daughter is when he went to register the birth with the appellant. Although he assisted the appellant in obtaining their daughter’s British passport and provide evidence for the appeal hearing he does not provide any financial support for his daughter. His evidence is that his wife will not accept the child and therefore he cannot care for her as this would destroy his marriage.”

**18.** The judge found, at paragraph 8, that:

“... the evidence before me indicates that Mr CM is willing to provide a level of support for his child in that he attended to register the birth, assisted her application for a British passport and also provided personal documents (in the form of his marriage certificate and bank statements) to assist the appellant in her appeal”

**19.** It is clear from the record of proceedings that the appellant was cross examined with regard to the level and willingness of Mr CM to assist her and her daughter. I note that the appellant was specifically asked why he was willing to provide such assistance. The appellant did not suggest, as she now does in her witness statement of 30 November 2015, that Mr CM was compelled to assist her because she threatened to take [XM] to his home.

**20.** The First-tier Tribunal judge had the benefit of hearing at first hand the evidence of the appellant and the answers given in cross examination. Having considered all the evidence both written and oral the judge found that Mr CM is willing to provide a level of support for his daughter. At paragraph 10 the judge, having considered the relevant case-law, recorded and found that:

“... I understand why the child’s father would not want to have to ask his wife to care for a child that he has fathered during an extra-marital affair, there was no evidence before me that Mr CM could not care for his child. What I find I am faced with is Mr CM’s unwillingness , or his choice, not to care for his daughter...This is not in my view however evidence that the child would be forced to leave the UK if her mother were removed.”

**21.** As I set out above perversity represents a very high hurdle for the appellant to overcome. As is often cited, an appellate Tribunal should not readily interfere with findings of fact made by First-tier Tribunals. Such an appeal ought only to succeed where an overwhelming case is made out that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. I am satisfied that the findings and conclusions of the judge were comfortably open to her, having regard to the documentary evidence and the oral evidence. The findings of fact were not unsupported by the evidence. The decision reached lay within the bounds of the standard of rationality.

Misdirection

- 22.** The grounds assert that the judge misdirected himself (*sic*) in failing to appreciate the practical consequences of his (*sic*) reasoning. The practical consequences are said to be that the refusal of Mr CM to take care of his daughter would result in the child remaining with the appellant and the child would be forced to leave the UK should the appellant leave. Alternatively, the child will end up in the care of the Local Authority.
- 23.** Regulation 15A(4A) of the EEA Regulations, which was inserted with effect from 8th November 2012 by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012/2560, provides for a derivative right of residence for primary carers of British citizens as follows:-
- ‘(1) A person (‘P’) who is not an exempt person and who satisfies the criteria in paragraph (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 satisfies the relevant criteria. ...
- (4A) P satisfies the criteria in this paragraph if—
- (a) P 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.’
- 24.** Regulation 15A(4A) was inserted to comply with the interpretation of the Court of Justice of the European Union (“CJEU”) of Article 20 of the Treaty on the Functioning of the European Union (“TFEU”) in the case C-34/09 Ruiz Zambrano v Office National de l'emploi [2011] ECR I-1177 (“Zambrano”) where the Grand Chamber of the CJEU held that 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).
- 25.** In Hines v Lambeth London Borough Council [2014] EWCA Civ 660 at paragraph 23 the court held:
- “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.”

- 26.** At paragraph 19 the court, referring to the case of Harrison v. Secretary of State for the Home Department [2012] EWCA Civ 1736 (“Harrison”) set out:

“... Elias LJ’s starting point in that case was that the Zambrano principle did not extend to cover anything short of the situation where the EU citizen is forced to leave the territory of the EU (paragraph 63). Elias LJ then dismissed the notion that the CJEU in Zambrano was leaving open the possibility that the doctrine might apply “more widely and loosely” (paragraph Judgment Approved by the court for handing down. *Hines v. Lambeth* 64). In paragraph 66, Elias LJ makes clear that *Dereci v. Bundesministerium für Inneres* (Case C-256/11) [2012] 1 CMLR 45 (paragraphs 67-72) demonstrated that the reduction of the enjoyment of family life by the family members who remain when non-EU citizens leave was not sufficient to engage EU law. At paragraph 67, Elias LJ explained the matter as follows:-

“... I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU right is in general forbidden by EU law in precisely the same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished ...”

- 27.** At paragraph 8 the court effectively summarised that the court in Harrison:

“... held at paragraph 63 that the *Zambrano* principle did not cover anything short of a situation where the EU citizen is forced to leave the territory of the EU.”

- 28.** In the case of Jamil Sanneh v (1) Secretary of State for work and pensions and (2) The Commissioners for Her Majesty’s Revenue and Customs [2013] EWHC 793 (Admin) (‘Sanneh’) the court having considered the Zambrano case and subsequent authorities derived a number of propositions from those cases at paragraph 19:

“... ”

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.

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; ...”

- 29.** In MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC) the Upper Tribunal when applying the EU law principles as summarised in Sanneh held at paragraph 56:

“The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living (see Dereci at paragraph 68, and Harrison at paragraph 67).”

- 30.** The above cases repeat and amplify that there is no right to a particular quality of life or standard of living and nothing short of actual compulsion or being forced to leave the UK as a result of the removal or refusal of entry of the carer will engage the Zambrano principles as enacted in the EEA Regulations.
- 31.** The judge correctly set out the relevant test referring to the case of Hines v London Borough of Lambeth [2014] EWCA Civ 660 where it was stated (relying on the case of Harrison (Jamaica) v Secretary of State [2012] EWCA Civ 18736) that the relevant test is whether the exercise of an EU right of residence remains possible as a matter of substance. It is not a right to any particular quality of life or particular standard of living, the test in all cases is whether the adverse decision would require the child to leave the territory of the Union. If in practice the extent of the quality or standard of life will be seriously impaired by excluding the appellant that is likely in practice to infringe the right of residence because it will effectively compel the EU citizen to give up residence and travel with the appellant.
- 32.** The test as set out in the case-law is one of compulsion – would [XM] be compelled to leave the UK? The appellant asserts that no-one can force Mr CM to care for [XM]. That he refuses to care for her and that his circumstances are so compelling that he feels unable and unwilling to care for her as it would destroy his own family. The result would be that [XM] would be forced to leave the UK as a practical consequence. The judge had that evidence available to her in the form of a witness statement provided by Mr CM and heard the oral evidence of the appellant and heard submissions on these matters. The judge found that Mr CM was unwilling, or was choosing, not to care for his child (paragraph 10) but also found that he was willing to provide a level of support for her (at paragraph 7) and found (paragraph 10) that there was no evidence that he could not care for her.
- 33.** I consider that this case is very much at the borderlines. The judge, on the basis of her finding of fact that there was no evidence that Mr CM could not care for [XM] (rather he was unwilling to do so), concluded that [XM] would not be forced to leave the UK. Whilst I may have reached a different conclusion based on the facts the decision reached by the judge discloses no material misdirection. She clearly had in mind the correct legal test.

Article 8 and the mandatory provisions of s117B of the 2002 Act

- 34.** The appellant has appealed against a decision to refuse to issue a Derivate Residence Card under the EEA Regulations. In TY (Sri Lanka) v



The Secretary of State for the Home Department [2015] EWCA Civ 1233 the court of appeal held, at paragraph 35:

“35. It is impossible to say that the Secretary of State's decision to withhold a residence card (a decision which is correct under the EEA Regulations) will or could cause the UK to be in breach of the Refugee Convention or ECHR. The UK will only be in breach of those Conventions if in the future the appellant makes an asylum or human rights claim, which the Secretary of State and/or the tribunals incorrectly reject.

36. In the result therefore I reach a similar decision on the issues before us to the decision reached by the Upper Tribunal in Amirteymour v Secretary of State for the Home Department [2015] UKUT 00466 (IAC) ...”

**35.** In the case of Amirteymour the Upper Tribunal held at paragraph 75:

“For these reasons, we conclude that, where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot in an appeal under the EEA Regulations bring a Human Rights challenge to removal.”

**36.** As set out in paragraph 26 of the decision in Amirteymour those having a right to enter or reside under European Community Law do not require leave to enter or remain in the UK. A decision to refuse a confirmatory document is conceptually different to a decision to refuse or grant leave under the Immigration Rules. At paragraph 31 in Amirteymour the Upper Tribunal held:

“Rights granted under EU law and leave granted under the Rules or Immigration Acts are conceptually and legally distinct. Any assertion of a right to leave to remain or under the Human Rights Act is thus made on a different judicial basis ...”

**37.** Mr Norton referred to a number of paragraphs in the reasons for refusal letter. It was made abundantly clear in that letter that the appellant had not made an application for Article 8 consideration and that if she wished the Secretary of State to consider any Article 8 claims she would have to make a separate application. It was also made clear that no removal decision had been made. No s120 Notice has been served in this case.

**38.** The appellant therefore cannot bring a Human Rights challenge in the circumstances of this case. There was, therefore, no error of law in the First-tier Tribunal decision.

**39.** It follows that there was no requirement for the First-tier Tribunal to consider s117B of the 2002 Act.

#### Section 55

**40.** It was submitted in the grounds of appeal that there is no category of immigration decision to which s55 does not apply. However, by analogy the reasoning in TY and Amirteymour must apply to the duty under s55. What the appellant applied for was confirmation of an EU law right. The

EEA Regulations make specific provisions and set out requirements that must be met in order for an applicant to obtain a confirmatory document. The applicant either has an EU law right or does not. The best interests of the appellant's daughter, howsoever they might be determined, could not entitle the appellant to receive a residency card under the European Economic Area Regulations - see by analogy paragraph 27 of TY.

**41.** In Amirteymour the Upper Tribunal held:

“30. A right of residence under EU law (which includes a derivative right) is thus of a different legal species from a grant of leave. The exercise of the former does not require an act to be taken by the Secretary of State. There is no requirement to obtain a residence document and there are, under law, no penalties for not doing so ...”

**42.** The only issue before the First-tier Tribunal was whether or not the appellant met the requirements of the EEA Regulations. The best interests of the appellant's daughter is not a relevant consideration. There was, therefore, no error of law in the First-tier Tribunal decision.

Other Issues

**43.** The appellant asserted that if [XM] goes to China she will have no nationality and cannot go to school. China does not have freedom and is not like the UK. These are not relevant issues in this appeal. They would potentially be relevant to an asylum or Human Rights claim.

~~**44.** I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.~~

**Decision**

**45.** There was no material error of law in the decision of the First-tier Tribunal. The decision of the Secretary of State stands.

Signed P M Ramshaw

Date 28 December 2015

Deputy Upper Tribunal Judge Ramshaw