



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/45603/2014

THE IMMIGRATION ACTS

Heard at Stoke
On 13 April 2016

Determination Promulgated
On 19 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SADIA PARVEEN

Respondent

Representation:

For the Appellant: Mr A McVeety, Home Office Presenting Officer
For the Respondent: Mr S Ell, instructed by Bukhari Chambers Solicitors

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.
2. The appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 29 October 2014 to refuse her application for a derivative residence card as confirmation of a right of residence under the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). First-tier Tribunal Judge Lloyd-Smith allowed the appeal in a decision promulgated on 3 March 2015. The Secretary of State appeals with permission to this Tribunal.

3. The relevant provision of the 2006 Regulations for the purposes of this appeal are as follows;

“Derivative right of residence

15A. (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.*

...

(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.*

...”

4. The background to this appeal, based on the evidence before the First-tier Tribunal Judge, is that the appellant's child was born on [] 2009 and is a British citizen because his father is a British citizen. The appellant and her husband separated before the birth of their son and divorced in 2013 and he has had no contact since then. The appellant and her son live with the appellant's brother, his wife and five children. They eat together and the appellant occasionally helps with the care of her brother’s children. The appellant has another brother and a sister in the UK both of whom also have children. The child attends primary school. In the Reasons for Refusal letter the Secretary of State said that the appellant's son could be looked after by the appellant's brother and would not therefore have to leave the UK if the appellant left.
5. The appellant's brother said in his witness statement that he is willing to support the appellant but the appellant said in oral evidence that it would be different if she weren’t there and that they would be unwilling to care for her son if she were returned to Pakistan. The appellant said that if she were required to leave the UK she would take her son with her. In his oral evidence the appellant's brother said that he believed that a mother should look after her child, that he has five children of his own to look after and that his wife would not be happy to have an additional child to look after but that, if his sister was no longer around and if he was forced to, they would care for the child.
6. The First-tier Tribunal Judge accepted that the appellant has primary responsibility for her son’s care. In considering whether the appellant's son would be unable to reside in the UK if the appellant were required to leave the Judge considered the best interests of the child. He took into account the fact that the child is making good progress in school and that the appellant would take him with her if she were required to leave the UK. The Judge concluded that it would be in the child’s best

interests to remain in the UK with his mother and allowed the appeal on the basis that the appellant satisfies the requirements of regulation 15A.

7. The Secretary of State contends in the grounds of appeal that the Judge had failed to consider whether the child is 'unable' to live in the UK or another European Economic Area state if his mother is required to leave the UK (regulation 15A (4A) (c)). Reliance is placed on the decision in **MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380** and it is contended that the child in this case would not be compelled to leave the EU if his mother was removed. It is contended that the child lives with the appellant's brother as part of his family and that, should the appellant be required to leave the UK, the child would still remain with the family. It is submitted that it is unclear how the Judge reached the conclusion that the child would be unable to live in the UK in light of his uncle's oral evidence that if they had to they would look after the child.
8. At the hearing before me Mr McVeety submitted that the issue here is compulsion. He submitted that alternate care is available for the appellant's child and the Judge failed to explore that in the decision. Mr Ell submitted that the evidence before the Judge was set out in paragraph 7 and 8 of the decision and that this included evidence that the uncle would care for the appellant's son if he was forced to and that this was clearly considered by the Judge. He submitted that the Judge also heard evidence from the appellant that she would take the child with her if she were removed from the UK. He relied on the decision in **Ayinde and Thinjom (Carers - Regulation 15A - Zambrano) [2015] UKUT 00560 (IAC)**.

Error of Law

9. Whilst the Judge identified the central question at the beginning of paragraph 11 I accept that the rest of the decision concentrates on the best interests of the child without specifically addressing the central question identified. I accept that the Judge appears to have emphasised the best interests of the child at paragraphs 11-14. However I consider that it is clearly implicit in the reasoning at paragraphs 13 and 14 that the Judge accepted the oral evidence from the appellant and her brother that she would take the child with her if removed from the UK and that the appellant's brother and his wife would not be happy to have another child to look after but would care for the child if 'forced to'. In this context I consider the guidance from the Tribunal in Ayinde to be relevant. There, Upper Tribunal Judge Jordan said;

"It is beyond the range of proportionate responses that a minor should be required to go into some form of alternative care (be it adoption, foster-care or residential care) in order to enjoy his EU rights were both his parents required to leave" [54].
10. In this case the First-tier Tribunal Judge was looking at what would actually happen if the appellant was required to leave the UK. Her evidence was that she would take the child with her. This was in the context of her brother's evidence that they would only look after the child if forced to and the appellant's evidence that her family were only willing to support her and care for son whilst she was in the UK due to their own family commitments In the light of this evidence I am satisfied that it was open

to the Judge to have found as he did that the appellant's child would be unable to reside in the UK if she were removed. The evidence supported a finding that, as a matter of practicality, the EU citizen would be compelled to leave the UK if his mother is removed.

11. I conclude that there is no material error of law in the decision of the First-tier Tribunal.

Conclusion

12. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
13. The decision of the First-tier Tribunal shall stand.
14. I make no anonymity direction.

Signed

Date: 12 May 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 12 May 2016

Deputy Upper Tribunal Judge Grimes