



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/09708/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court  
On 9<sup>th</sup> January 2015

Determination Promulgated  
On 19<sup>th</sup> January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS MANDEEP KAUR SIDHU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ruparelia (LR)  
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ghani, promulgated on 14<sup>th</sup> August 2014, following a hearing at Birmingham Sheldon Court on 29<sup>th</sup> July 2014. In the determination, the judge dismissed the appeal of Mrs

Mandeep Kaur Sidhu. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a female, a citizen of India, who was born on 7<sup>th</sup> January 1982. She appeals against the decision of the Respondent Secretary of State dated 13<sup>th</sup> February 2014, refusing her application for a derivative residence card on the basis of Regulation 15A(7) of the Immigration (European Economic Area) Regulations 2006. She relies upon the case of **Ruiz Zambrano**. Her case is that she is the primary carer under Regulation 15A(7) of the Immigration (European Economic Area) Regulations 2006, and she relies upon the well-established case of **Ruiz Zambrano (C-34/09)**. Her daughter, on whom she exercises primary care, is Pratibha Sarin, and she is a British citizen, having acquired her British nationality from her father, Sanjay Sarin, who is married to the Appellant. Sanjay Sarin is employed but does not earn enough to meet the £18,600 financial threshold, such as would enable the Appellant, who is not a British citizen, to remain in the UK with her husband and child. Therefore, the Appellant relies upon Regulation 15A(7).

### **The Appellant's Claim**

3. The Appellant's claim is that she entered the UK in September 2009 as a student. She met Sanjay Sarin a year later in 2010. They started a relationship. They began living together in 2012. On 12<sup>th</sup> January 2013, a daughter was born to them, Pratibha Sarin, and this was in Leicester. She, the Appellant, became her primary carer, as her mother. The child's father, Sanjay Sarin, could not be a primary carer because he was out at work. Since Sanjay Sarin does not earn the requisite amount to enable the Appellant to succeed as a spouse under the Immigration Rules, the Appellant will have to return to India. She would have to consider making an application from India. Her husband, Sanjay Sarin, would then have to give up his job, in order to look after their daughter, Pratibha Sarin and he would then become dependent on public funds. He cannot leave the United Kingdom to go to India because he is settled here.

### **The Judge's Findings**

4. The judge held that the Appellant could not meet the requirements for a derivative right of residence under the case of **Ruiz Zambrano** because the Appellant shared equally the responsibility for her child with her partner who was an exempt person because he was a British national. The judge held that Mrs Sarin's mother lived with the Appellant and,

“There is no reason why the child cannot remain in the UK and the grandmother could look after the child if the Appellant had to return in order to make a proper application as a spouse. Furthermore, Mr Sarin works at different times and therefore that would give him time to be with the child.”  
(Paragraph 9)

5. The judge went on to consider Article 8, but held that as the Appellant could not meet the financial threshold requirement for a spouse of £18,600 under the Rules, to enable her to succeed under Article 8 would be to circumvent the Immigration Rules (paragraph 10). The judge also considered the “best interests of the child” under
6. Section 55 of the BCIA 2009 and held that as a young child the best interests of Pratibha Sarin was to be with her mother but that, “there would be a temporary separation between the father and the child and such temporary separation will not make the decision disproportionate” (paragraph 11).
7. In considering the issue of “proportionality” the judge held that,  

“The current case law seems to suggest that only if there may be arguably good grounds for granting leave to remain outside the Immigration Rules [is] it necessary for Article 8 purposes to go on to consider that there are compelling circumstances not sufficiently recognised under them. The Appellant has her own family in India. Apart from the child who is of course very young, no other compelling circumstances have been put forward ...” (Paragraph 11)

The appeal was dismissed.

### **Grounds of Application**

8. The grounds of application state that the determination was flawed in this analysis of Article 8 and the question of how proportionality was to be examined.
9. On 22<sup>nd</sup> September 2014, permission to appeal was granted robustly on the basis that the judge had failed to have regard to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which now codified through statute the relevant principles of Article 8.

### **Submissions**

10. At the hearing before me on 9<sup>th</sup> January 2015, Mr Ruparelia submitted two additional documents before me. First, there was a letter from the University Hospitals of Leicester NHS Trust dated 10<sup>th</sup> December 2014 confirming that Mr Sanjay Sarin had been admitted with chest pain and ST elevation in the inferior and posterior leads. He had since been discharged home with routine advice. He worked as an HGV driver and has been advised to inform the DVLA that he will not be allowed to drive until he has had his ETT (requested). Mr Ruparelia submitted that this showed that the Appellant’s husband, Mr Sanjay Sarin, was not now able to work.
11. Second, he submitted a skeleton argument with respect to Article 8 and EX1, together with a reference to Section 117B of the Immigration Act 2014. Otherwise, he submitted that he would rely upon the Grounds of Appeal and the manner in which the permission had been granted by the Tribunal on 22<sup>nd</sup> September 2014.
12. For his part, Mr Smart relied upon the Rule 24 response dated 1<sup>st</sup> October 2014. It is said that the grounds complain that the judge adopted the wrong test of “compelling

circumstances” rather than “arguably good grounds”, but this was entirely wrong because the test in Nagre and Gulshan was clear that only if there are arguably good grounds for granting leave should one consider freestanding Article 8 jurisprudence on the basis that there are compelling circumstances not sufficiently recognised under the Immigration Rules. It was true that the judge did not set out the whole test but he was aware of the relevant cases. At paragraph 11 the judge found that the temporary separation between the father and the child whilst the mother applied for entry clearance, and although the judge did not explicitly consider EX1, it is clear that the judge did not consider it unreasonable for the child to leave the UK.

13. Mr Smart submitted that there was here a refusal of a derivative residence card. The right to a derivative residence card was not recognised. The refusal letter was clear (see page 3 of 5) that,

“Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR. ... Additionally, it is pointed out that a decision not to issue a derivative residence card does not require you to leave the United Kingdom if you can otherwise demonstrate that you have a right to reside under the Regulations.”

14. Mr Smart submitted that this is as far as it went. The consideration of the claim did not go into a consideration of Article 8. It stopped at a consideration of a derivative residence card. To this, the Appellant was not entitled. The application was for a derivative residence card. It was rejected. It ended there.
15. There was no need to consider matters relating to the child, especially in circumstances that both the grandmother and the father of the child could look after Pratibha Sarin. There was also no need for the judge to go into EX1 because the application was not under the Immigration Rules.
16. In reply, Mr Ruparelia submitted that the application for leave to remain must be considered as a whole. He relied upon Omotunde (Nigeria) [2011] UKUT 00247, which also concerned the application of the Ruiz Zambrano principles, but where the Tribunal held that the assessment questions set out in Razgar [2004] UKHL 27 should be tailored, placing the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance, rather than as part of the identification of the legitimate aim. Furthermore, Section 117B of the 2014 Act had not been considered.

### **Error of Law**

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. The fundamental reason for this is, as the grant of permission on 22<sup>nd</sup> September 2014 stipulates, the failure of the judge to consider Section 117B of the Immigration Act 2014 (and not the NIAA 2002 as the grant suggests). The judge had held (at paragraph 9) that there was no reason why the Appellant’s British child

“cannot remain in the UK and the grandmother could look after the child if the Appellant had to return in order to make a proper application as a spouse”. However, Section 117B(6) makes it clear, that there is an additional requirement of whether “it would not be reasonable to expect the child to leave the United Kingdom”.

18. The judge had already accepted that it would not be reasonable to expect the child to leave the United Kingdom (because the judge found that the child could remain in the UK with the grandmother whilst the Appellant made her application from abroad), so if the principle in Section 117B(6) had been applied, it is arguable that a different outcome to the appeal would have been achieved.
19. Second, the case law has moved on from Nagre and from Gulshan and it is clear now that there is no “threshold requirement” which has to be met before a consideration of Article 8 rights under the Immigration Rules can be abandoned in favour of freestanding Article 8 jurisprudence. The matter has to be looked at as a composite whole, especially in cases where the Rules are not a complete code. In particular, matters will now have to be assessed on the basis of cases such as Ganesabalan [2014] EWHC 2712 and Oludoyi [2014] UKUT 00539.

### 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 original judge. I remake the decision as follows.
21. This appeal is to be remitted back to a First-tier Tribunal Judge at Birmingham Sheldon Court other than Judge Ghani to be determined de novo on the basis of the application of both Section 117B of the 2014 Act and on the basis of the latest jurisprudence with respect to Article 8 identified above. A careful assessment will have to be undertaken on the basis of the evidence. This matter is appropriate for remittal under Section 7.2 of the Upper Tribunal Practice Statement. The appeal is allowed to that extent.
22. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

15<sup>th</sup> January 2015