



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/13903/2014

THE IMMIGRATION ACTS

Heard at Field House, London  
On the 9<sup>th</sup> September 2015

Decision & Reasons Promulgated  
On the 6<sup>th</sup> October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MISS H  
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Yeo (Counsel)

For the Respondent: Ms Brocklesby-Weller (Home Office Presenting Officer)

DECISION AND REASONS

Details of the Appellant

1. The Appellant is a national of Jamaica who was born on the 2<sup>nd</sup> November 1987.

Background

2. On the 9<sup>th</sup> July 2015, the Appellant's appeal to the Upper Tribunal against the decision of First-Tier Tribunal Judge Obhi which had been promulgated on the 19<sup>th</sup> September 2014 was heard by myself and Upper Tribunal Judge Kopieczek. In our decision dated the

12<sup>th</sup> July 2015, we decided that the decision of First-Tier Tribunal Judge Obhi did contain material errors of law and was set-aside and that the decision should be remade by the Upper Tribunal at a hearing before either myself or Upper Tribunal Judge Kopieczek.

3. As was stated in our previous decision, the Appellant initially came to the United Kingdom on the 17<sup>th</sup> December 2001 as a dependent of her mother. On the 8<sup>th</sup> May 2003 the Appellant was a dependent on her mother's application for further to Leave to Remain as a student which was granted until the 10<sup>th</sup> October 2003. On the 7<sup>th</sup> October 2003 the Appellant made an application as a dependent child (on a legacy application basis) which was refused on the 11<sup>th</sup> December 2003. Thereafter, on the 10<sup>th</sup> September 2012 the Appellant submitted an application for a Derivative Residence card on the basis that she is the primary carer of a British citizen who is resident in the United Kingdom. That application was refused by the Respondent on the 29<sup>th</sup> November 2013.
4. The appeal against that decision was originally heard by First-Tier Tribunal Judge Obhi on the 4<sup>th</sup> September 2013 with her decision being promulgated on the 19<sup>th</sup> September 2014.
5. The matter then came before myself and Upper Tribunal Judge Kopieczek on the 9<sup>th</sup> July 2015 and in our decision dated the 12<sup>th</sup> July 2015, although we set the decision of First-Tier Tribunal Judge Obhi aside, a concession was made before the Upper Tribunal by Mr Mills acting on behalf of the Respondent that the Appellant is Miss C's primary carer, such that it was appropriate for us to remake the other findings in respect of the other issues in the case. It was on that basis that the appeal came before me on the 9<sup>th</sup> September 2015.
6. Given the concession made by Mr Mills on the previous occasion, it was agreed with the parties that the primary issue for me to determine was whether or not Miss C, as the relevant British citizen would be unable to reside in the UK or in another EEA state, if the Appellant, her primary carer, were required to leave for the purposes of Regulation 15 A (4A) (c) of the Immigration (EEA) Regulations 2006. Mr Yeo further wished to argue that Article 8 was engaged in this case and sought to argue that the case of

Amirteymour and Others (EEA Appeals; Human Rights) [2015] UKUT 00466 (IAC), was wrongly decided and that there was a deemed human rights claim such as to mean that human rights were judiciable before the Tribunal. He argued that although the decision was extremely influential, it was not binding upon me and that as there was a deemed human rights claim, Article 8 should be considered.

7. However, as was stated in the previous decision on myself and Upper Tribunal Judge Kopieczek, given that the Appellant had applied for a Derivative Residence card, that issue should be determined first, and it is only if the Appellant is unsuccessful in respect of that issue that it is only then necessary to consider whether or not Article 8 is in fact engaged. The fact that she might gain status as a result of finding on the basis of Article 8 where she would not on her application for a Derivative Residence card, as previously argued before us, does not mean that consideration of the Article 8 issue takes precedence. The Appellant had applied on the basis of the Immigration (EEA) Regulations 2006 and had not actually applied on the basis of Article 8.
8. I first heard oral evidence in this case from the Appellant to confirm that the contents of her witness statement dated the 24<sup>th</sup> August 2015 had been signed by herself and were true and accurate and she adopted the same as her evidence in chief.
9. In cross examination the Appellant told me that Miss C's father had last seen her on the day before her birthday on the 26<sup>th</sup> April 2015 and had taken her to McDonald's. She told me that since then she had spoken to Miss C's father on an occasion at the end of June when Miss C was ill and in hospital because of asthma, but that he did not attend at the hospital. She was asked whether or not the father had produced any further written statements and the Appellant told me that he did not want to get involved and that he said that he was to be kept out of it and did not want, and had no intention of becoming Miss C's full-time dad. The Appellant was asked why it was in such circumstances that he had written a letter back in August 2012 saying that his relationship with his daughter was very important to him and that he was happy for the relevant Department to contact him, and the Appellant said that he had only wanted to be with her and that when their relationship ended, there was a downturn in the interest he showed their

daughter. She told me that she was not sure as to whether or not he had since spoken to his wife about the existence of a daughter but that he did want to keep their daughter's existence a secret. She told me that since September 2014 her aunt no longer supported her and that she was supported by children's services. She said the reason for that was that her aunt's own daughter had split from her husband and she had taken in her daughter and two grandchildren. She said that her sister had now acquired some status in the UK and had been given permission to stay for 2 ½ years, but she was not given indefinite Leave to Remain. Her mother still had not been given any status in the UK. She said that her sister lived 80 miles away in Wolverhampton. Her sister did not help with the Appellant's finances. The Appellant told me that her solicitors had not told her to get any letters of support from her sister or mother in the UK. There was no re-examination

10. In answer my questions in clarification the Appellant told me that her sister had her own child who was 1 year old and that Miss C did see her aunt about once a fortnight. There were no questions arising out of my questions

#### Submissions

11. In her closing submissions on behalf of the Respondent, Miss Brocklesby-Weller argued that in respect of the issue as to whether or not the relevant British citizen child would be unable to reside in the UK or another EEA state if the Appellant were required to leave, that it was a high threshold that had not been made out in the evidence presented. She argued that there was little evidence to show that the family set up had changed in terms of support being given financially by the aunt and that the timing of that financial change was convenient, given that it had occurred in September 2014, at the time of the original appeal hearing. She argued that although the other members of the family, including the great aunt and great uncles, did not have any contact or residence orders, such orders could be applied for after the Appellant had left the country, if Miss C were to remain.
12. She argued that Miss C's father did have parental responsibility as his name was on the

birth certificate and that Miss C would not be compelled to leave and that it would be a matter of choice that she would be taken by her mother rather than being a matter of compulsion. She argued that we only had the Appellant's oral evidence regarding the contact or lack of contact from the Appellant's father, but that she asked me to bear in mind that the Appellant had what she described as a "very poor" immigration history as she had overstayed since 2003.

13. Miss Brocklesby-Weller argued that Miss C's father had not totally abandoned the child and was still willing to engage in a relationship with his child and had been informed of Miss C's illness and had seen her on the day before her birthday and that it was surprising that we had not got further information from the Appellant's father or heard from him, given that he had previously been willing to cooperate. She argued that it was speculation as to whether or not Miss C's father had told his wife about the relationship and the existence of Miss C and that he had been willing to put his name on the birth certificate.
14. In respect of Article 8, Ms Brocklesby-Weller asked me to follow the Upper Tribunal decision of the President of the Upper Tribunal Mr Justice McCloskey, the Vice-President of the Tribunal and Upper Tribunal Judge Rintoul in the case of Aminteymour and argued that it was always open to the Appellant to make an Article 8 application on the basis that she was the mother of a British national child, should she wish to do so. She argued that there had been no section 120 notice in the present case and that Article 8 was therefore not engaged as a result of the refusal to issue a Derivative Residence card under the immigration (EEA) Regulations 2006.
15. In his closing submissions on behalf the Appellant, Mr Yeo asked me to accept the evidence of the Appellant. He argued that it was unfair to say that the Appellant had a very poor immigration history, as she had been brought to the UK as a child and that she had no choice in the matter and although she had thereafter overstayed, it was unfair to say she had a poor immigration history. He argued that Miss C's father had no real role in her life and that the Appellant had been upfront and honest regarding the limited contact that he had. He argued that the Home Office had been invited to contact

him, in a sensitive way, but that they have not done so and that someone who had shown very little interest in wanting to care for Miss C should not be in a position to be forced to do so.

16. Mr Yeo relied upon the Court of Appeal case of Harrison (Jamaica) v Secretary of State for the Home Department [2012] EWCA Civ 1736, in which Lord Justice Elias at [67] had stated that "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 the quality of life is diminished". However, at paragraph 67, Lord Justice Elias went on to state that "of course, to the extent that the quality of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the Zambrano doctrine would apply and the EU citizen's rights would have to be protected".
17. He argued that therefore if as a matter of reality Miss C would be compelled to leave then Regulation 15 A (4A) (c) would be satisfied. He argued that a very young child should not be separated from her primary and in reality only carer. He argued that if the father of Miss C had been in a position where he had overnight contact and there had been a high degree of contact, then the position may have been different, but bare contact with occasional trips to McDonald's was not enough.
18. He further argued that as there was a deemed human rights claim as a result of the decision reached, human rights were engaged and were judicial before the Tribunal and that therefore I should not follow the recent Upper Tribunal decision in Aminteymour.
19. Both Miss Brocklesby-Weller and Mr Yeo agreed that given the errors of law found in First-Tier Tribunal Judge Obhi's decision regarding her assessment as to who was the primary carer of Miss C and her confused findings regarding the role played by Miss C's father, that it was appropriate for me to make completely fresh findings on the role of Miss C's father and the level of contact that he had and as to whether or not in such

circumstances the relevant British citizen child Miss C would be unable to reside in the UK or in another EEA state if the Appellant were required to leave.

My Findings on Credibility and Fact

20. Although the Appellant made no attempts between the refusal of her application as a dependent child on a legacy application based on the 11<sup>th</sup> December 2003 to regularise her position in the UK until the 10<sup>th</sup> September 2012, and therefore for many years had been an over-stayer, which I have clearly borne in mind as being a factor which does count against her credibility, I nevertheless did find the Appellant to be an honest and reliable witness in respect of the relationship that she had with Miss C's father and the level of contact that he has with Miss C.
21. The Appellant is the primary carer for Miss C, as was properly conceded by Mr Mills at the previous hearing on behalf of the Respondent. I further find that Miss C is a British citizen who is residing in the United Kingdom, presently with her mother the Appellant. The only issue that therefore requires determination for the purposes as to whether or not the Appellant in fact meets the criteria for a Derivative Right of Residence under Regulation 15A (4A) of the Immigration (EEA) Regulations 2006, is as to whether or not the relevant British citizen would be unable to reside in the UK or another EEA state if P were required to leave, in other words whether or not Miss C would be unable to reside in the UK or in another EEA state if the Appellant were required to leave.
22. I find that the Appellant has given consistent evidence throughout regarding the limited role that Miss C's father has played in her life and that this is not a case where she has simply said that she has had no contact with him whatsoever since Miss C's birth, but I find has been open and honest regarding the very limited involvement of Miss C's father in her life. I accept and find as a fact having considered the Appellant's new statement dated the 24<sup>th</sup> August 2015, that she did meet Miss C's father back in June 2010 and that it was a casual relationship, but that when she initially mentioned that she had fallen pregnant to the father, his initial response was to ask whether or not she was sure that he was the father and to say that she should have an abortion, but that she continued

with the pregnancy.

23. I also accept and find as a fact having considered the Appellant's evidence including the initial statement provided by her, oral evidence and her latest witness statement that Miss C's father is married and does have his own disabled child and that his wife does not know about the affair that he had with the Appellant or that a child resulted there from. I accept the explanation given by the Appellant as to why the father's name appears on Miss C's birth certificate, namely that she did not know who her own father was and did not want the same to happen to her daughter, and that he agreed to put his name on the birth certificate for that reason, rather than as a result of a full acceptance of his role as Miss C's father. Although this would give him parental responsibility, as of right, that is entirely different from him actually wanting to necessarily play a full role in Miss C's life or being a primary carer or being in a position to accommodate or raise Miss C. The reasons why he had his name put on the birth certificate I accept were for very limited reasons in that he was asked to do so by the Appellant, so that the child would know who her father was, rather than for any other reason.
24. I also do bear in mind the letter from Miss C's father, Mr B dated the 28<sup>th</sup> August 2012 in which he says that the Appellant has full responsibility for their daughter as his career is very demanding and that he works long hours and only gets to see and spend time with Miss C on some weekends or whenever he could. He further stated within that letter that his career is not the only obstacle preventing him from being with and having his daughter on a regular basis and that although his relationship with his daughter is very important he is a married man which prevents him from caring for her on a full-time basis. He says it would be a strain on his marriage to bring Miss C into the marital home as his wife is unaware of her existence. That letter is entirely consistent with the evidence given by the Appellant regarding his limited contact and the reasons therefore.
25. Further, I accept having heard from her and having considered her latest statement, that for a short while after the birth of Miss C, the Appellant's relationship with Mr B did get better and that they did start their relationship again, but it ended when Miss C was about 8 months old when the Appellant realised that Mr B was only showing up because



he wanted the Appellant sexually and that Mr B did not take the breakup very well, leading to the downturn in contact that he has had with her. I accept that Mr B does not financially support Miss C having heard from the Appellant in this regard and that Mr B has in effect only seen his daughter at the time of her last two birthdays. I found the Appellant's evidence that Mr B did not even turn up at the hospital when she phoned him to say that Miss C was in hospital ill with asthma, to be compelling and to have the ring of truth about it. I find that the Appellant has not exaggerated the limited role that Miss C's father has had, and has given an honest and truthful account regarding the limited contact she has had, which is entirely consistent with the fact that he is married and his wife does not know of Miss C's existence.

26. In such circumstances, given that Mr B does work long hours and his wife does not know about the existence of Miss C and that Miss C was born following an affair that Mr B had, although I do bear in mind that Mr B does have parental responsibility for his daughter, I do not accept that he is in a position to actually be able to raise or accommodate Miss C on a long-term basis in the United Kingdom. He has shown no real interest in his daughter and no desire or willingness to damage his marriage by telling his wife about the existence of a daughter born as a result of an affair outside of wedlock. There is no evidence whatsoever of him being willing to undertake such a role, and the letter that he has written indicates that he is not prepared to do so.

27. Nor do I consider that there are any other relatives of the Appellant who would in reality be able to accommodate and raise Miss C on a long-term basis. The Appellant's own mother still does not have any status in the UK, and although the Appellant's sister now has limited status in the UK, she I accept having heard from the Appellant does have her own child who is one-year-old, and would therefore not be in a position to raise Miss C on a long-term basis. Nor would it be appropriate for Miss C to live with great uncles and great aunts, who she does not really know, which I accept having heard from the Appellant in this regard. It is further highly relevant that the Appellant's daughter was only born on the 27<sup>th</sup> April 2012 and is therefore now just 3 years old. It is clearly in Miss C's best interests, to remain with her mother given her very young age, rather than being placed with other relatives who she barely knows. I do bear in mind

that the duty to safeguard the welfare of children under Section 55 of the Borders, Citizenship and Immigration Act 2009 is a primary consideration, rather than a paramount consideration, but the welfare of a 3-year-old child who has only had the Appellant as her primary carer throughout her life, is a very important factor in this particular case.

28. I further do bear in mind the comments of Lady Hale at [32] in the case of ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 of the intrinsic importance of British citizenship and that it should not be played down and that British citizen children have rights which they will not be able to exercise if they move to another country and that they lose the advantages of growing up and being educated in their own country and in their own culture which they will have lost when they come back as adults.
29. I further bear in mind specifically the comments of Lord Justice Elias in the case of Harrison (Jamaica) v Secretary of State for the Home Department [2012] EWCA Civ 1736, that at [67] that the right of residence is a right to reside in the territory of the EU and is not a right to any particular quality of life or to any particular standard of living and that accordingly there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit the quality of life is diminished. However, he went on to state that "of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such case the Zambrano doctrine would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to the extent that the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of that right".
30. I consider that and find as a fact that in this case, Miss C's quality and standard of life would be seriously impaired by the exclusion of the Appellant, such that it would be in practice likely to infringe the right of residence itself, in that Miss C cannot in my

judgement be left in the care of her father who is unwilling to look after her or in the care of the Appellant's sister or other relatives in the UK for the reasons stated above, such that in effect Miss H's removal to Jamaica would compel Miss C to give up her right of residence and travel with her mother back to Jamaica. I cannot foresee that if the Appellant is removed, that Miss C would be in any position to continue residing in the UK.

31. The fact that she does have relatives here such that residence would be theoretically possible, does not mean that in practice, she will be able to exercise her right of residence, were her mother to be removed. She would in effect be compelled to leave with her mother, given that there is no one in the UK in a position to properly look after her, and it is wholly wrong given her young age at just 3 years old, to suggest that she should in such circumstances be brought up by someone other than a parent. I therefore find that Miss C, being a relevant British citizen child would be unable to reside in the UK or in another EEA state if the Appellant were required to leave. The provisions of Regulations 15A (4A) of the Immigration (EEA) Regulations 2006 are therefore satisfied and the Appellant is entitled to a Derivative right of residence and to the issue of a Residence card under Regulation 17. The appeal is therefore allowed under the Immigration (EEA) Regulations 2006.

32. In such circumstances, I do not need to go on to consider the question as to whether or not Article 8 is engaged in this case, as the Appellant has been successful in her application for a Derivative Residence Card under Regulation 15A.

33. I therefore allow the Appellant's appeal

#### Notice of Decision

I allow the Appellant's appeal under the Immigration (EEA) Regulations 2006;

**Direction regarding anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

In order to preserve the anonymity of the child named in these proceedings, unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of Court.

Signed

Dated 10<sup>th</sup> September 2015

*RF McGinty*

Deputy Upper Tribunal Judge McGinty

**TO THE RESPONDENT**

**FEE AWARD**

The Appellant having been successful in her appeal, the full fee paid by her of £140 should be remitted to her.

Signed

Dated 10<sup>th</sup> September 2015

*RF McGinty*

Deputy Upper Tribunal Judge McGinty