



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

Appeal Number: IA/16127/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 February 2015**

**Decision & Reasons
Promulgated
On 18 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

**MISS KRISTINE SABORDO ANTE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Wilson, Counsel instructed by Blakewells Solicitors

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, Miss Kristine Sabordo Ante, a citizen of the Philippines, applied for a derivative residence card under the Immigration (European Economic Area) Regulations 2006 ("the Regulations") in respect of her daughter, who had been born on 19 August 2013 and is a British citizen. Her application was refused on 18 March 2014 because the Respondent did not accept that the Appellant was the primary carer of her child and

that if she were removed from the United Kingdom this would force her child to leave as well.

2. The Appellant's ensuing appeal was heard on 17 September 2014 in Birmingham by Judge Andrew. Both parties were represented. In a determination of 19, promulgated on 22, September 2014 the judge allowed the appeal under the Regulations, stating that she had not therefore gone on to consider Article 8.
3. Permission to appeal was granted to the Respondent by Judge Saffer on 12 November 2014. Following a hearing on 16 December 2014 I stated on 23 December 2014 my reasons for setting the determination of Judge Andrew aside without preserving any of his findings of fact and citing that the appeal should be re-heard in the Upper Tribunal.
4. This I did on 10 February 2015. The Appellant gave evidence, in chief, in which she adopted her statement of 11 September 2014, and cross-examination. Submissions followed, to which I have had regard. I reserved my determination.

The Legal Issues

5. The decision was made by reference to paragraph 15A of the Regulations. Paragraph 15A(1) states that "P" - in this case the Appellant - is entitled to a derivative right to reside in the UK for as long as he satisfies the relevant criteria of, in this case, paragraph 15A(4A), which are that:
 - “(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.
6. Paragraph 15(7) of the Regulations provides that:
 - “(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.”

7. Guidance on these provisions is contained in **MA and SM (Zambrano: EU children outside EU) Iran** [2013] UKUT 00380 (IAC), as follows:

“41. Hickinbottom J recently had occasion to consider the abovementioned authorities in his decision in *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)*; summarising the learning to be derived from them, which we respectfully agree with and adopt, in the following terms:

...

(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; although (a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the relevant ascendant relative, and hence the EU dependant citizen, to leave, and (b) such actions as removal or prevention of work may result in an interference with some other rights, such as the right to respect for family life under article 8 of the European Convention on Human Rights.

56. ...The mere fact that the Sponsor cannot be as economically active as he would wish, because of his care responsibilities to JM and FM, is not sufficient to support a conclusion that JM and FM would be denied the genuine enjoyment of their EU citizenship rights, nor would this be the case even if the Sponsor were required to stop working altogether. 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).”

8. The onus of proof lies upon the Appellant. The standard of proof is that of the balance of probabilities.

The Scope of the Appeal

9. The evidence of the Appellant and of her then partner, Mr Sergio Jr. Sierda Perez at the hearing of the appeal by Judge Andrew was that at the date of the decision on 18 March 2014 they were living together as a couple, albeit that Mr Perez' work obliged him to be away for long periods. This was the factual background to the determination of Judge Andrew.
10. At the error of law hearing the Appellant submitted evidence to the effect that she and Mr Perez had separated in November 2014. In my determination I stated at paragraph 10 that it would be for consideration when the appeal came to be re-heard whether this postdecision evidence should be admitted. In preparation for the re-hearing the Appellant submitted further evidence to the effect that she was now in a new relationship with a partner who cared with her for her child.
11. At the outset of the hearing Ms Wilson sought to introduce both tranches of subsequent evidence, which Mr Kandola opposed. I determined that in an appeal under the Regulations the position had to be determined at the date of the decision on 18 March 2014. Regulation 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 lent support to that view by envisaging the need for explanation for the submission of evidence which had not been before the First-tier Tribunal.
12. Related to this was the issue of Article 8 of the 1950 Convention, being the qualified right of the parties to respect for their private and family life. Mr Kandola submitted that the decision and the Reasons for Refusal Letter had not addressed Article 8 and had invited a separate application on that basis. I observed that whilst the grounds of appeal referred to Article 8, Judge Andrew had at paragraph 15 of the determination specifically not considered it. Ms Wilson said that she was content for Article 8 not to be considered in the present appeal, leaving the opportunity for an application on that basis.
13. The two tranches of subsequent evidence are capable of going to Article 8. Since that is not in issue, I declined to receive this evidence.

The Evidence

14. At the hearing the Appellant gave evidence in chief and cross-examination. She adopted her statement which had been before Judge Andrew of 11 September 2014, and was questioned about it and about the statement of Mr Perez of the same date, which had also been before Judge Andrew. Her evidence is essentially this.
15. The Appellant and Mr Perez lived together in London from the early part of 2011. Mr Perez did engineering work as a lineman with High Voltage Electricity. He worked on assignments which generally lasted six months in places which included Halifax, Darlington and Scotland. Generally he came home every other weekend for two or three days. When the Home Office made its decision, in March 2014, their daughter, Haven, was aged 7

months. At that stage Mr Perez was working in Scotland. He had indefinite leave to remain in the UK. As a result Haven was a British citizen. He wrote in his statement that "Together we are all well-settled in the United Kingdom".

16. The Appellant was Haven's primary carer on a day-by-day basis. Mr Perez worked to support them all and was the breadwinner. When he was at home he spent time with Haven, took her to the park and put her to bed.
17. Mr Perez' evidence in his statement was that in the current economic climate it would have been very difficult for him to secure alternative employment. Even were he able to work locally he would not be able to care for Haven during his working hours so that the Appellant would still be her primary carer. For him to leave his job would mean that he and the Appellant would become dependent on the state.
18. The evidence of the Appellant was consistent, internally and with that of Mr Perez. Their evidence was not challenged. The Appellant seemed to me to be a witness of truth. I accept her evidence.

The primary carer for Haven

19. I refer to the provisions summarised at paragraphs 5 and 6 above. An "exempt person" is defined in paragraph 15A(6) of the Regulations as, amongst other people, one who has indefinite leave to remain there. This Mr Perez did. So, since he was an exempt person, the Appellant could not satisfy paragraph 15A(7) of the Regulations by sharing equally with him the responsibility for Haven's care. As Haven's mother, she must therefore show that at the date of the decision she had primary responsibility for Haven's care.
20. From the evidence I find that she did. Mr Perez earned the money to maintain them and spent what time he could with Haven. But, as the mother of a 7 month old infant, the Appellant had primary responsibility for her care.

Would Haven be unable to reside in the UK if the Appellant were required to leave?

21. Devoid of authority, the answer to this question might be yes. Her father was working far from home, and able to care for her only on alternate weekends.
22. However the law has set a higher test, which I have summarised at paragraph 7 above. Nothing less than compulsion suffices. The fact that Mr Perez would not have been able to be as economically active as he wished because of his care responsibilities was not sufficient. The right of residence is a right to reside within the territory of the EU, not a right to any particular quality of life or standard of living, even if one dependent

upon public funds. So I have to find that, even if the implication would have been for Mr Perez to give up his employment and become dependent upon public funds, Haven would not have been unable to reside in the UK if the Appellant had been required to leave. Her father was involved in her care and would have cared for her. As he wrote at paragraph 8 of his statement, "I have a partner whom I love dearly and whom I cannot live without. She is the mother of my child and she is the primary carer for her. Together we are all well-settled in the United Kingdom".

23. In the light of legal authority I find that at the date of the decision the provisions of the Regulations were not satisfied. I accordingly dismiss the appeal.

Notice of Decision

24. The appeal is dismissed under the Immigration (European Economic Area) Regulations 2006.

25. Article 8 of the 1950 Convention does not arise for consideration.

No anonymity direction is made.

Signed

Date **16 February 2015**

Deputy Upper Tribunal Judge J M Lewis