



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

Appeal Number: IA/18420/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Sheldon Court
On 16th January 2015**

**Determination
Promulgated
On 30th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MS KULSUMBANU USMAN AHMED MUSA PATEL
(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 S J Pacey, promulgated on 18th November 2014, following a hearing at Nottingham on 4th August 2014. In the determination, the judge allowed the appeal of Ms Kulsumbanu Usman Ahmed Musa Patel. The Respondent

Secretary of State 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 16th January 1979. She made an application for a derivative card on 9th January 2014, and she now appeals against the refusal of her application on 9th April 2014.

The Appellant's Claim

3. The Appellant's claim is that she is the primary carer of a British citizen, her son, Mr Mustaqeem Patel, who was born on 20th December 2006. She has said that there was another person in the UK who could or does assume caring responsibility for her son, and this was the child's father, but he works full-time and could not look after his son, given his work responsibilities. The Appellant's husband is British and he was born on 2nd September 1978.

The Judge's Findings

4. The judge had regard to the refusal letter, which stated that **Zambrano**, did not establish that a third country national (the Appellant) would have a right to reside as a "family member". The Appellant's husband was a British citizen. The Appellant could not be regarded as sharing equally with him the responsibility for her son. The husband of the Appellant voluntarily undertook employment. There was no reason why he could not continue to care for the child if the Appellant was forced to leave the United Kingdom. Consideration was given to Section 55 of the BCIA 2009.
5. The judge concluded that the Appellant's child was under 18 and was a British citizen living in the UK. There was no evidence of poor immigration history or of criminality. The Appellant was faced with a scenario where she would either have to leave the country (in due course) taking her son with her, or being separated from her husband and her son from his father, or the son would have to remain with his father, separating the husband from the wife and mother from child. The United Kingdom was the only country that the son had known. He was now almost 8 years of age. If the Appellant failed in her appeal she could not remain in the United Kingdom. The judge concluded that it would not be reasonable to expect the son to relocate with the Appellant as it would "effectively deprive him of the genuine enjoyment of the substance of the rights attaching to the status of an EU citizen". The judge concluded that the Appellant would succeed under EX1(A).

Grounds of Application

6. The grounds of application state that the judge erred in making no findings in relation to the main issue, namely, whether the child would be required to leave the UK. The judge also erred in allowing the appeal under EX1(A)

because she considered EX1 in isolation and failed to consider any other requirements. On 30th September 2014 permission to appeal was granted.

Submissions

7. At the hearing before me on 16th January 2015, Mr Smart, appearing on behalf of the Respondent, relied upon the Grounds of Appeal. He stated that the judge looked at the case of **Sabir [2014] UKUT 63** at paragraph 9 of the determination. The judge said that this case was a reminder that EX1 was not a freestanding provision. However, she went on to reason that

“the reasoning in **Sabir** addressed a scenario in which the parties could not satisfy the substantive requirements for limited leave to remain as a partner. That is not the scenario in this appeal before me. That being so, I have considered the relevant provisions of EX1” (see paragraph 9).

Mr Smart submitted that this conclusion was wrong.

8. For his part, Mr Ruparelia submitted that he relied on the skeleton argument. Mr Ruparelia submitted that the judge had an overriding duty to safeguard the best interests of the child under Section 55 of the BCIA 2009. The judge also had to consider Article 8 as part of the decision-making process. It was being argued now by the Home Office Presenting Officer that, since a removal decision had not been made, there was no need to consider Article 8. However, this was wrong in the light of **Ahmed (Amos; Zambrano; Reg 15A(3C)) 2006 EEA Regs [2013] UKUT 00089**). With respect to the case of **Sabir [2014] UKUT 63**, it was said there that EX1 was not a freestanding provision. It has to be considered as a component part of the leave granting rule. The court here was assessing EX1 on the basis of a subsisting parental relationship between the Appellant and the child. In **Sabir** what was being considered was the relationship of the Appellant and the partner.
9. In reply, Mr Smart submitted that the decision was on an application for a derivative rights status. The decision was not on an application for Article 8 consideration. The refusal letter states that, “since you have not made a valid application ... consideration has not been given ...” to Article 8. The application of EX1 is only for removal cases.

No Error of Law

10. I am satisfied that the making of the decision by the judge does not involve the making of an error on a point of law (see Section 12(1) of TCA 2007) such that I should set aside the decision. The judge was entitled to consider Article 8 and entitled to consider EX1. In **Ahmed [2013] UKUT 00089**, the judge stated (at paragraph 69) that,

“we accept that our decision entails considering the refusal of a residence card as indicative of an intention to remove, but note that

this was also how Mr Deller asks us to regard it in the context of our Article 8 ECHR consideration and it seems to us there is no principled basis for taking a different view in this respect from that taken in respect of human rights law: see **JM (Liberia)**".

Notice of Decision

11. There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

28th January 2015