



IAC-FH-NL-V1

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

Appeal Number: IA/27522/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd September 2015**

**Decision & Reasons Promulgated
On 18th September 2015**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RENE CHANG
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr C Lam, Counsel instructed by David Tang & Co

DECISION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Malaysia born on 17th February 1977. Her appeal against the refusal of a derivative residence card under Regulations 15A and 18A of the Immigration (European Economic Area) Regulations 2006 [the Regulations] was allowed by First-tier Tribunal Judge Devittie on 14th April 2015.
2. The Respondent applied for permission to appeal on the grounds that the judge arguably failed to properly apply the Regulations. The Appellant resided with her British citizen son and her Algerian husband who had

indefinite leave to remain and who was the father of the child. In finding that the Appellant was the primary carer of her son the judge failed to consider who had responsibility for her son's care and whether that responsibility was in fact shared given that the Appellant remained in a relationship with the child's father.

3. Secondly it was submitted that the judge's finding that the Appellant's British citizen son would be unable to reside in the United Kingdom if the Appellant was required to leave the UK was flawed because her son would be able to live with his father. The Respondent relied on Harrison (Jamaica) v Secretary of State for the Home Department [2012] EWCA Civ 1736 at paragraph 63 which states:

"If the EU citizen be it child or wife would not in practice be compelled to leave the country if the non-EU family member were refused the right of residence there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the court recognised in Dereci but that is an entirely distinct area of protection."

4. The Respondent argued in the grounds that the evidence disclosed did not suggest that the Appellant's son would be compelled to leave the UK if the Appellant were refused a right of residence. The only reason given as to why it was difficult for the Appellant's husband to assist the Appellant in the care of her son was because he worked long hours.
5. Permission to appeal was granted by First-tier Tribunal Judge Mark Davies on 18th June 2015 on the ground that the judge's decision was inadequate and contained a distinct lack of consideration of the facts and the application of the law to the facts.
6. Ms Brocklesby-Weller submitted that the judge's findings at paragraph 8 were totally inadequate. The judge had failed to direct himself as to whether there was shared responsibility and therefore the Appellant could not be the primary carer.
7. In relation to whether the Appellant's son would be compelled to leave the UK the judge's finding was based solely on the fact that his father was in full-time employment. Ms Brocklesby-Weller relied on MA & SM (Zambrano - EU children outside the EU) Iran [2013] UKUT 00380 (IAC) at paragraph 41(4) where it states:

"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) diminished 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 dependent citizen to leave and (b) such actions as removal or prevention of work may result in an interference with some other right such as the right to respect for family life under Article 8 of the European Convention of Human Rights."

8. She also relied on paragraph 56 which states that:

“There is no suggestion that the Sponsor is not capable of looking after JM and FM. He has tailored his working hours thus far to ensure that they fit in with the need to care for JM, and we have no doubt he would also ensure that FM was similarly cared for. 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).”

9. Ms Brocklesby-Weller therefore submitted that the threshold was one of compulsion. It was not sufficient that there would be a reduced quality of life. In this case the judge did not engage with the principle of MA & SM. He relied purely on the working pattern of the father to show that the child would be compelled to leave the UK. Many single parents work and look after a child. The judge conflated the best interest assessment with fundamentally different concepts. There was no evidence identified by the First-tier Judge that the Appellant’s spouse was unable, but for work, to look after the child. The Zambrano cases were reserved for a lone parent of a British citizen child where the child would be unable to reside in the UK. Paragraph 8 of the decision was devoid of any analysis or management of the issues in this case.
10. Mr Lam submitted that there was a Presenting Officer at the hearing before the First-tier Tribunal and both the Appellant and her spouse gave oral evidence and were cross-examined. The judge’s conclusions at paragraph 8, although brief, were open to him and his finding of fact that the Appellant was the primary carer was one that he was entitled to make given that the evidence was tested in cross-examination and it was not unusual that a young child would be looked after by his mother who was not working.
11. Accordingly, the Appellant satisfied the Regulations in that she was the primary carer of her son and looked after him on a day-to-day basis. It was not the case that the EU Regulations demanded ‘sole responsibility’. It was possible for responsibility to be shared by the father and for the mother still to be the primary carer. The word primary in the EU Regulations encompassed some element of shared responsibility.
12. The judge might well have expressed his conclusions better but the evidence supported his finding that the Appellant was in fact the primary carer and therefore this finding was open to the judge on the evidence before him.
13. In relation to whether the Appellant’s son would be unable to reside in the UK if the Appellant was required to leave, SM and MA could be distinguished on the facts which relied on different regulations. Mr Lam sought to rely on paragraph 42 of SM & MA and the case of Campbell (exclusion: Zambrano) [2013] UKUT 00147 (IAC) which was referred to

therein. Again this was an entry clearance case but the Tribunal concluded in relation to the application of Zambrano principles that:

“30. We see no reason why Zambrano principles cannot have application in entry clearance cases: in both in-country and out of country cases the Member State must ensure that any refusal does not lead, for the Union citizens concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union: Dereci & Others (European citizenship) [2011] EUECJ C-256/11, 15 November 2011, paragraph 74. Indeed the ruling of the Grand Chamber of the Court of Justice in this case encompassed not just the cases of those applicants who were already living in the host Member State (Austria) but Mrs Stevic who resided in Serbia (see paragraphs 26, 35, 74).”

14. Mr Lam submitted that the Appellant’s son should be able, at the age of three years old, to remain with his mother. This amounted to the basic enjoyment of a substantive right as a British citizen. Just being able to remain with his mother was a basic substantive right conferred on the Appellant’s son by virtue of his status as a citizen of the Union. In practice, without his mother, the child would have to leave the UK because it was impossible for the father in this case to replace the Appellant given that the child had been with the Appellant since birth and his father was in full-time employment.
15. The genuine enjoyment of the substance of an EU right was fact sensitive and in order to enjoy the basic rights as a Union citizen the Appellant’s son should be able to remain with his mother. Mr Lam referred to a First-tier Tribunal case which appeared in the Respondent’s bundle and which was before the First-tier Tribunal Judge. There was evidence at the hearing and testimony in cross-examination sufficient to show that the Appellant was the primary carer. There was therefore sufficient evidence to show that her son would be unable to enjoy his substantive rights as an EU citizen if his mother was required to leave the UK.
16. There was some discussion on how to proceed in the event of an error being found given that the judge’s conclusions in relation to Regulation 15(4)(a)(iii) were arguably inadequate i.e. the second point of challenge for the Respondent.
17. Mr Lam submitted that even if there was an error of law in paragraph 8 in relation to whether the Appellant’s son would have to leave the UK the error was not material because the Appellant succeeded under the Regulations in any event. Mr Lam invited me to remake the decision in the Appellant’s favour.

Discussion and Conclusions

18. The Respondent refused the application on the basis that the Appellant failed to produce a valid national passport. Mr Lam confirmed that the Presenting Officer before the First-tier Tribunal had indeed conceded this point and that there was relevant evidence before the Respondent as to the Appellant’s identity. This point was not raised in the grounds of appeal

and therefore I proceed on the basis that the Respondent conceded the fact that the Appellant could satisfy Regulation 18A(1)(a) of the EEA Regulations.

19. The grounds of appeal challenge the judge's findings at paragraph 8 of the decision in which he states:

"It is not contested that the Appellant and her spouse who is lawfully settled in the UK have a son who is 3 years old. It is common ground that the child lives with both his parents in a family unit, that the child's father is in full-time self-employment and that the child is a British citizen. It seems to me therefore that I am bound to find that the Appellant is the primary carer of her 3 year old son. That is her natural role as a mother and the evidence in this case does not point to the fact that she has not been performing that role. I am further satisfied that the Appellant's son would be unable to reside in the UK if she was required to leave. He would have no one to care for him and he would be bound to join her if she were compelled to return to her country of origin."

20. It was the Appellant's evidence that it was hard for her husband to assist her with caring for her son because he worked long and irregular hours. The Appellant's husband was a self-employed landscape gardener.

21. Regulation 15A(4A) of the EEA Regulations 2006 states:

"A person (P) who is not an exempt person who satisfies the criteria in paragraph 2344A 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. Sub-paragraph 4(a) states:

'P satisfies the criteria in this paragraph if P is the primary carer of a British citizen, the relevant British citizen is residing in the UK and the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave'."

22. Regulation 15(7) states:

"P is to be regarded as a primary carer of another person if P is a direct relative or legal guardian of that person and P is the person who has primary responsibility for that person's care or shares equally the responsibility for that person's care with another person who is not an exempt person."

23. The judge found that the Appellant was a primary carer on the basis that she was the mother of a British citizen and that was her natural role. The judge also found that the Appellant's son would be unable to reside in the UK if the Appellant was required to leave.

24. I find that the evidence before the judge was sufficient to show that the Appellant was the primary carer, but not sufficient to support the finding that the Appellant's son would be unable to reside in the UK. The child's father had indefinite leave to remain and had been living with his son since birth. Although he was working, he was not incapable of looking after his son and his son would be able to live with him if the Appellant was required to leave.

25. The judge's finding that the Appellant was the primary carer, although brief and inadequately reasoned, was not material because it was clear from the evidence in the Appellant's witness statement, her husband's witness statement and the supporting evidence contained in the Appellant's bundle before the First-tier Tribunal, that the Appellant had day-to-day responsibility for her son and therefore she was as a matter of fact a primary carer. I find that this finding was open to the judge on the evidence before him and there was no error of law in respect of Regulation 15(4A).
26. However, I find that the judge's conclusion that the Appellant's son would be required to leave the UK was inadequately reasoned and was not supported by the evidence before him. The judge merely relied on the fact that father was working. There was insufficient evidence to show that the father could not in practice care for his son and he would be compelled to leave the UK with his mother.
27. The threshold test in respect of Regulation 15A(4A)(c) is a high one and nothing short of compulsion will satisfy that limb of the test. In this case, the Appellant's child would not be required to leave the UK and therefore the genuine enjoyment of his EU citizenship rights would not be diminished even though the his father may be unable to work. This may well engage Article 8, but it was insufficient to satisfy the Regulations.
28. I am of the view that Amirteymour (EEA appeals; human rights) [2015] UKUT 000466 (IAC) applies and therefore the Appellant cannot bring a human rights challenge on an appeal under the Regulations. This does not mean the Appellant cannot succeed under Article 8.
29. Accordingly, I set aside the decision to allow the appeal under the Regulations and re-make it: The Appellant has failed to show that her son would be unable to reside in the UK without her under Regulation 15A(4A)(c). There was insufficient evidence to show that the Appellant's son would be compelled to leave the UK. I accept that his right to family life would be affected by the Appellant's removal and it is open to the Appellant to make an application on that basis.
30. Accordingly the Respondent's appeal to the Upper Tribunal is allowed insofar as the First-tier Tribunal erred in law in allowing the appeal under Regulation 15A(4A)(c). The judge's finding that the Appellant was a primary carer still stands as there was sufficient evidence to enable him to make such a finding. However, there was insufficient evidence to enable him to find that the Appellant's son would be required to leave the UK and accordingly I re-make the decision and dismiss the Appellant's appeal under the Regulations.

Notice of Decision

The Respondent's appeal to the Upper Tribunal is allowed.

The Appellant's appeal is dismissed under the Immigration (EEA) Regulations 2006.

No anonymity direction is made.

Signed

Date 17th September 2015

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have allowed the Respondent's appeal I set aside the fee award of the First-tier Tribunal. I have considered making a fee award and have decided to make a fee award of 50% of any fee which has been paid for the following reason: The finding that the Appellant was a primary carer was upheld.

Signed

Date 17th September 2015

Upper Tribunal Judge Frances