IAC-AH-LEM/KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/13646/2014
IA/15214/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2015	**On 27 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELLEN MIRANDA LOPES
KAMILY MIRANDA LOPES DUTRA
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondents: Mr G Lee, Counsel instructed by Mreale Solicitors

DECISION AND REASONS

1. The respondents are citizens of Brazil. Mrs Ellen Miranda Lopes' date of birth is 1 November 1982 and her daughter Miss Kamily Miranda Lopes Dutra's date of birth is 9 August 1999. I will refer to the adult respondent as the appellant as she was before the First-tier Tribunal and to the child appellant, Ms Dutra, as Kamily.

2. On 22 August 2013 the appellant applied for a derivative residence card pursuant to the Immigration (EEA) Regulations 2006. Her case is that she is entitled to a derivative residence card as the primary carer of a British citizen, her daughter Julie Sanchez Miranda (born on 29 December 2008) pursuant to Regulation 15A of the 2006 Regulations. Kamily's case is that she is entitled to a derivative residence card as the dependant of a primary carer of a British citizen. Their applications were refused by Secretary of State of in a decision of 5 March 2014. There was no removal direction made.

3. Their appeals were allowed by Judge of the First-tier Tribunal FitzGibbon QC in a decision promulgated on 4 November 2014 following a hearing on 24 October 2014. Permission to appeal was granted to the Secretary of State in a decision of First-tier Tribunal Kelly of 29 December 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

4. The matter was dealt with by way of submissions only before the First-tier Tribunal. There were no credibility issues raised. The judge recorded the unchallenged evidence. The appellant married a British citizen, Mr Moscote in August 2013 and their daughter, Julie, is also a British citizen. Mr Moscote works full-time as a cleaner and the appellant stays at home and she looks after both children. She is not permitted to work in the UK. Should the appellant have to leave the UK, Mr Moscote would not be able to take care of the children and continue to work. His earnings are insufficient to pay for childcare.

5. The judge found that there was sufficient evidence to show that Julie was dependent on the appellant and that Mr Moscote would be unable to care for her. He found that Mr Moscote was the sole breadwinner in the family and could not take over the appellant's responsibilities whilst keeping his job.

6. The judge found that the appellant was responsible for Julie's day-to-day care. She is Julie's primary carer and she has primary responsibility for her care. He found that the 2006 Regulations do not require an applicant to be the sole carer. The judge found that the phrase 'primary carer' implies that others may also be carers but to a lesser extent. He allowed the appeal on this basis, but he went on to find in the alternative, that should the appellant not be Julie's primary carer, she shares responsibility with Mr Moscote who is not an exempt person pursuant to Regulation 15A(7)(b)(ii) and the appeal would succeed on that basis.

The Grounds of Appeal and Oral Submissions

7. The grounds of appeal argue that the judge made a material misdirection in relation to the 2006 Regulations. The appellant lives with her husband as a family unit in the same household and it is irrational to conclude that she does not have shared responsibility with her husband despite the fact that he works full-time. The appellant and her husband are Julie's primary carers with a shared responsibility. The judge erred in finding that the appellant's husband was an exempt person

pursuant to Regulation 15A(7)(b)(ii). It is argued that the judge failed to make a finding whether Julie would be unable to reside in the UK or in another EEA state if the appellant were required to leave.

8. Mr Duffy made oral submissions in the context of the grounds of appeal. Mr Lee made submissions in the context of his skeleton argument. He conceded that the judge erred in relation to his conclusion that the appellant's husband was not an exempt person; however, this conclusion was posited on an alternative to his principal conclusion that the appellant was the primary carer for her daughter. The judge did not fail to consider whether the appellant's daughter would have to leave the UK and reference is made to [9] of the determination.

9. Mr Lee in his skeleton raises Article 8 with particular reference to paragraph 117A(6) and submits that irrespective of the appellant's position under the EEA Regulations the appeal would be bound to succeed pursuant to Article 8 following Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC). The respondent cannot assert that it would be reasonable to expect the appellant's child to leave the UK.

10. Mr Lee urged me to determine the appeal under Article 8. Mr Duffy stated that the respondent's position is that the appellant can make an application under Appendix FM and he urged me not determine the Article 8 ground of appeal or to adjourn pending the outcome of a decision of the UT relating to the issue.

Error of Law

11. Whether or not appellant is the primary carer is not dispositive of the appeal. It must be established that Julie would be unable to remain in the UK if the appellant is required to leave (Regulation 15A (2) (b)(iii)). I do not accept Mr Lee's submission that the judge dealt with this at [9] of the decision. In my view there is no such finding. The judge did not apply his mind to this requirement of the regulations. If I am wrong about that it was not open to the judge to reach a conclusion that Julie would be unable to remain in the UK. The judge made an error of law. It is my view that Julie would be able to reside in the UK because her father is a British citizen. I accept there may be some practical difficulties that the family would have to face, but the reality is she would not be forced to leave the UK. The error is material and I set aside the decision to allow the appeal under the 2006 Regulations and remake the decision dismissing the appeal. There is no reason for me to make findings in relation to the primary carer issue. There is no reason to go behind the findings made by the judge which are not the subject of challenge by Secretary of State.

Article 8

12. The appellant and her daughter did not make an application to remain under the Immigration rules and or Article 8. There is no decision to remove the appellant. Article 8 was raised in the grounds of appeal before the FtT, but this ground of

appeal was not determined. As the law now stands it is incumbent on me to determine the appeal under Article 8 (JM v SSHD [2006] EWCA Civ 1402).

13. Mr Lee submitted that the appeal should be allowed under Article 8 because it would not be reasonable to expect Julie to leave the UK, with reference to section 117A(6)(b) of the 2002 Act. The problem with this submission is that the secretary of state does not expect Julie to leave the UK, but envisages her remaining here with her father who, like her, is a British citizen.

14. The appellant's case in relation to Article 8 was not developed any further than the submission under section 117A relating to Julie. The appellant has not made an application for leave. In order to satisfy the Immigration Rules (without consideration of EX.1) the appellant's husband would have to establish that he earns £22,400 per annum whilst his earnings are £14,453. In addition the appellant has overstayed in breach of immigration laws. As regards EX.1, the evidence does not establish that there are insurmountable obstacles to family life outside the UK. However, in my view, it would not be reasonable to expect Julie or Kamily (who is now aged 15 and who has been here since she was aged 5) to leave the UK. As noted above there is no expectation that Julie would leave, but it is expected that Kamily should leave and the reasonableness of this would need to be considered.

15. Regrettably the focus of the appellant's case was Julie and the 2006 Regulations. There was no evidence before the FtT or the UT relating to Kamily's best interests. It is, in my view, obvious on the facts that it is unreasonable and contrary to her best interests to expect her to return to Brazil in the light of her age and because she has been here for nearly ten years. Furthermore she is still in compulsory education. There has been lengthy residence here during a significant period of her life, considering her age when she came here. It is obvious that she will have developed social and educational ties. It is clear having considered and applied the guidance in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 and Zoumbas v SSHD [2013] UKSC 74 that it would be in Kamily's best interest to remain here with her family. The facts in this case do not bear analogy to those in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874. On this basis the appellant's appeal should succeed under EX.1 and Kamily's appeal should succeed under A276ADE of the Rules. If I am right about this, it follows that it would be disproportionate to remove the appellant appeal because it would not be reasonable to expect Kamily to leave the UK (section 117B (6)(b) of the 2002 Act). There would be no merit in any argument that she could stay and her mother could return to Brazil. Mr Moscote is not Kamily's biological father.

16. In any event, I will go onto consider both the appellant and Kamily's appeals under Article 8 outside the rules through the prism of section 117B of the 2002 Act. The issue is one of proportionality. It is in the best interests of the children to remain with both of their parents as a family unit. Julie is a British citizen. Citizenship is not a trump card, but it is a strong indication that her best interests would be to remain in the UK so that she could enjoy the rights of citizenship. She has started school

here. Her father is a British citizen. In my view, it is in her best interests to remain in the UK with both parents and her sibling.

17. There are factors that are against the appellant. The maintenance of immigration control is in the public interest and I attach little weight to private life established when status is precarious or to a relationship formed with a qualifying partner when her unlawfully. The appellant formed a family life with her husband when they both knew that she was here unlawfully. However, notwithstanding this there are two children of the family both of whom are qualifying children. It is not proportionate or reasonable to expect the family to re-locate to Brazil. Mr Moscote is from Colombia. The children cannot be held responsible for the choices made by their parents and it is in their best interests to remain in the UK with their family. There is no suggestion that the family is not self-supporting or that there are language difficulties. The scales in this case tip in favour of the appellant and Julie. A removal decision would not be a fair balance between the right to respect for private life of the appellant and her family and the economic well-being of the country through the maintenance of immigration control. In the light of the unchallenged evidence and positive findings of the FtT in relation to the family, it would not be proportionate to expect the appellant and Kamily to return to Brazil to make applications for entry clearance (with or without the rest of the family) because of the disruption that would ensue (notwithstanding that the appellant has breached immigration laws). The family is wholly dependent on Mr Moscote's income and the children are both at school.

18. I decided to determine the appeal under Article 8 as opposed to adjourning pending the outcome of a forthcoming decision by the UT (there has to date been no hearing and it is unclear when a decision will be promulgated) because I am bound to follow the law as it stands, in the light of the strength of the appellant's case and having considered the overriding objective at Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Notice of Decision

The appeal is dismissed under the 2006 Regulations.

The appeal is allowed under Article 8.

No anonymity direction is made.

Signed Joanna McWilliam Date 26 February 2015
Deputy Upper Tribunal Judge McWilliam

No fee is paid or payable and therefore there can be no fee award.

Signed Joanna McWilliam Date 26 February 2015
Deputy Upper Tribunal Judge McWilliam