Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09336/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 September 2018	**On 9 October 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

LS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:	Mr A Metzer QC and Ms S Saifolahi, Counsel, instructed by Sterling & Law Associates LLP
For the respondent:	Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal concerns the circumstances in which a third country national who is a family member of a British citizen may be able to establish a derivative right of residence under Article 45 TFEU when the British citizen is living in the UK but travels to another Member State as part of his employment.

The legal framework

2. Article 20 of the Treaty on the Functioning of the European Union (TFEU) provides, in material part,

> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
> …

3. Article 21(1) provides,

> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

4. Art 45 reads,

> 1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
> (b) to move freely within the territory of Member States for this purpose;
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
>
> 4. The provisions of this article shall not apply to employment in the public service.

The Citizens Directive (Directive 2004/38/EC)

5. Article 2 of the Citizens Directive is headed 'Definitions. It states,

> For the purposes of this Directive:

> 1) "Union citizen" means any person having the nationality of a Member State;
>
> 2) "Family member" means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
>
> 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

6. Article 3(1) of the Citizens Directive is headed "Beneficiaries". It reads,

> This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

S & G (C-457/12) (S v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v C)

7. **S & G** is a decision of the Grand Chamber of the CJEU, dated 12 March 2014.

8. The son-in-law of **S**, a Ukrainian national, is a citizen of the Netherlands. He worked for an employer based in the Netherlands but spent 30% of his weekly time preparing for and making business trips to Belgium and travelled to Belgium at least once a week. **S** sought a residence document on the basis that she took care of her grandson, the child of her son-in-law.

9. **G**, a Peruvian national, married a national of the Netherlands who worked for a company established in Belgium and who travelled daily between the Netherlands and Belgium for his work. **G** and her husband had a daughter and **G** was also the mother of a son who has been received into her and her husband's family. **G** sought a residence document as confirmation of her right to reside in the Netherlands.

10. The Netherlands courts referred several questions to the CJEU concerning whether **S** and **G** were entitled to derivative rights of residence under Union law.

11. In determining the issues raised by the Netherlands courts the CJEU considered whether the Citizens Directive and Articles 20 TFEU, 21(1) TFEU and 45 TFEU had to be interpreted as precluding a refusal by a Member State to grant a right of residence to a third-country national who is a family member of a Union citizen within the meaning of Article 2(2) of the Citizens Directive where that citizen is a national of and resides in that Member State but regularly travels to another Member State in the course of their professional activities.

12. Having regard to its decision in **O and B v Minister voor Immigratie, Integratie en Asiel (Directive 2004/38/EC – Article 21(1) TFEU) Case C-456/12**, delivered the same day, the CJEU concluded, in reliance on Art 3 of the Citizens Directive, that the Directive does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.

13. The CJEU turned to consider Art 45 TFEU. It found that both the son-in-law of **S** and the husband of **G** fell within the scope of Art 45 because they were Union citizens who, under employment contracts, worked in a Member State other than that of their place of residence.

14. The CJEU next considered whether a right of residence could be invoked on the basis of Art 45. The reasoning of the Grand Chamber is contained in paragraphs 40 to 43 of the decision.

> 40 Admittedly, the Court's interpretation of Article 56 TFEU in *Carpenter* is transposable to Article 45 TFEU. The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third-country national who is a family member of the worker – a Union citizen – in the Member State of which the latter is a national.
>
> 41 However, the purpose and justification of such a derived right of residence is based on the fact that a refusal to allow it would be such as to interfere with the exercise of fundamental freedoms guaranteed by the FEU Treaty (see, to that effect, C-40/11 *Iida* [2012] ECR, paragraph 68; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and Case C-86/12 *Alokpa and Others* [2013] ECR, paragraph 22).
>
> 42 It is therefore for the referring court to determine whether, in each of the situations at issue in the main proceedings, the grant of a derived right of residence to the third-country national in question who is a family member of a Union citizen is necessary to guarantee the citizen's effective exercise of the fundamental freedom guaranteed by Article 45 TFEU.
>
> 43 In that regard, the fact noted by the referring court that the third-country national in question takes care of the Union citizens' child may, as is apparent from the judgment

> in *Carpenter*, be a relevant factor to be taken into account by the referring court when examining whether the refusal to grant a right of residence to that third-country national may discourage the Union citizen from effectively exercising his rights under Article 45 TFEU. However, it must be noted that, although in the judgment in *Carpenter* the fact that the child in question was being taken care of by the third-country national who is a family member of a Union citizen was considered to be decisive, that child was, in that case, taken care of by the Union citizen's spouse. The mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the Union citizen's spouse is not therefore sufficient in itself to constitute such a dissuasive effect.

15. In its conclusion at paragraph 44 the Grand Chamber held,

> In the light of the foregoing, Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

Practical principles extracted from S & G

16. An analysis of **S & G** bears the following observations.

17. In assessing whether a third country family member of a Union citizen has established a derived right of residence the Tribunal must first be satisfied that the third country national is a family member, within the definition of the Citizens Directive, and that the Union citizen is exercising Treaty rights. Any Union citizen who regularly travels, in the course of his or her professional activities, to a Member State other that the Member State in which he or she resides will fall within the scope of Art 45. It is for an appellant to prove, on the balance of probabilities, that the Union citizen is in fact exercising free movement rights, and the Tribunal will be assisted by reliable evidence such as verifiable letters from the Union citizen's employer detailing the nature and extent of the employee's business travel to other Member States, and ticket and booking receipts relating to that travel.

18. The CJEU recognised that the absence of adequate provision for the childcare of the child of a Union citizen may be a factor capable of discouraging that Union citizen from effectively exercising his or her free movement rights. The CJEU also made it clear that the desirability of having a third country family member of the Union citizen or his or her spouse is not sufficient in itself to constitute a dissuasive effect on the exercise of Art 45 rights. In each case the Tribunal will therefore need to undertake a wide evaluative assessment of the particular childcare needs in light of all relevant circumstances including the age and health of the child, the stage of the child's education, and the reasonable availability of adequate childcare from other family members, including the

Union citizen's spouse or partner, or from other professional or informal providers. The appellant will need to demonstrate, by the provision of reliable evidence, that genuine and reasonable steps have been taken or investigated to obtain alternative childcare provision. Sources of alternative childcare may include, *inter alia*, other friends or family, the child's nursery or school (including breakfast or after school clubs), child-minders, the use of one or more au pairs, the employment of one or more live-in nannies, or a combination of the above.

19. It is necessary for an appellant to establish a causal link between the absence of adequate childcare and the interference with the effective exercise by a Union citizen of his or her free movement rights. In so doing the Tribunal will need to determine the reasons for and extent of any interference with the Union citizen's Art 45 rights. Any interference must be real such that the Tribunal is satisfied that the Union citizen will in fact be discouraged from the effective exercise of his or her rights as a direct consequence of the childcare issues.

20. In determining whether alternative professional child care is reasonably available the Tribunal will need to bear in mind the Treaty rights of other family members and the requirements of the Working Time Regulations 1998.

Facts of this appeal

21. The appellant is a national of Russia who was born in 1950. She entered the UK in February 2015 as a visitor. Her daughter, IB, is a dual British/Russian citizen who naturalised as a British citizen in August 2007. She is married to MB, a dual British/Russian citizen who naturalised as a British citizen in July 2007. They have a British citizen child, AB, born in February 2015. The appellant is AB's grandmother. AB is currently 3½ years old.

22. Having entered as a visitor the appellant intended to return to Russia in April 2015 but the strain of childcare was proving too much for IB as her husband was required to travel frequently to Europe for business purposes and the appellant remained to help look after AB. IB started looking for a nanny in the spring of 2015 in anticipation of returning to her work in July 2015 but could not find a suitable candidate who would be able to work 10+ hours a day. She and her husband consequently asked the appellant to continue looking after their child for a little longer. No suitable alternative childcare could however be found.

23. On 27 August 2015 the appellant applied for a residence card as the dependent direct relative of the spouse of a British citizen who regularly travelled to another EEA Member State in the course of his professional activities. The appellant's help and support were said to be essential for the family as IB completed her maternity leave in July 2015 and was now working full time. Both IB and MB worked long hours when they were in the UK, and, in addition to MB's frequent trips to Europe, IB was also required to travel within and

outside Europe for prolonged periods. Were it not for the appellant's presence, MB would be unable to exercise his free movement rights. The appellant placed particular reliance on the decision of the CJEU in **S & G** and the earlier European Court of Justice (ECJ) decision in **Carpenter v Secretary of State for the Home Department** (C-60/00) to support her claimed right of residence under Art 45 TFEU.

24. The respondent refused the application on 24 January 2016. On 5 February 2016 a fresh application was submitted. In a decision dated 1 August 2016 the respondent considered this application under the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). As MB had not lived in any of the EEA states in which he worked, the respondent was not satisfied that he had transferred the centre of his life to another Member State, as required under Reg 9 of the 2006 Regulations. Nor was the respondent satisfied that the appellant provided evidence to confirm her financial dependency on her son-in-law. The respondent refused to issue a residence card.

25. The decision of 1 August 2016 attracted a right of appeal under the 2006 Regulations. It was conceded by the appellant's representative at the First-tier Tribunal hearing that she did not meet the requirements of Reg 9 of the 2006 Regulations. The appeal was advanced on the basis that the appellant had a derived right of residence flowing directly from Art 45 TFEU because her presence in the UK enabled her son-in-law to exercise his Treaty rights as a worker and that if she was unable to reside this would effectively discourage her son-in-law from exercising his Treaty rights under Art 45.

26. In a decision promulgated on 11 December 2017 the First-tier Tribunal allowed the appeal. The judge found that the appellant was dependent on her son-in-law and that the appellant and her family were credible witnesses. The judge found that the appellant was AB's carer and MB's effective exercise of his Article 45 rights was possible only because the appellant provides the necessary childcare to enable him to do so.

27. The respondent obtained permission to appeal the FtJ's decision on the basis that the decision contained inadequate reasoning. It was submitted that the appellant only provided additional assistance with child care and had not assumed full parental responsibility, and that little regard was given to the possible existence of alternative childcare arrangements. Nor had the judge taken into account the principle that rights of residents are not extended to suit the preference of a family, a point most recently articulated in **Patel v Secretary of State for the Home Department** [2017] EWCA Civ 2028. The Grounds did not however challenge the FtJ's finding that the appellant was dependent on her son-in-law.

28. In an error of law decision promulgated on 27 July 2018 I found the FtJ failed to provide adequate reasoning for his conclusions and failed to adequately engage

with the actual terms of the decision in **S v G**. I adjourned the hearing to enable further evidence to be provided.

29. At the remade hearing there was no dispute that MB is a worker who falls within the terms of Art 45, or that the appellant is his 'family member'. I had before me a large bundle of documents prepared for the First-tier Tribunal hearing running to 416 pages. The bundle included, *inter alia*, statements from the appellant, MB and IB, several letters from MB's employer (where MB is a Managing Partner), details of MB's travel history, a current Care Plan in respect of AB, text exchanges between IB and babysitters/nannies, posts made by IB on the childcare.co.uk website, invoices from a Montessori school, and financial details relating to both MB and IB. I received further statements from the appellant, MB and IB, and further evidence of the childcare needs and the efforts undertaken to obtain alternative childcare. I heard oral evidence from the appellant and MB (IB adopted her statements and was tendered as a witness but was not asked any questions), and I recorded submissions from both representatives, which I have carefully considered. I reserved my decision.

Findings and reasoning

30. I was assisted by Mr Tarlow who indicated that the evidence produced on behalf of the appellant was not controversial. Mr Tarlow did not take issue with the credibility of any of the witnesses and did not challenge the authenticity of any of the documents. Mr Tarlow accepted that both MB and IB would be away from their home for long periods of time. There was consequently no factual dispute between the parties. In these circumstances it is not necessary to set out in any detail the evidence relied on by the appellant, and I refer to that evidence only so far as it is necessary for my application of the relevant legal principles.

31. It is accepted by both parties that MB is a worker who falls within the terms of Art 45 TFEU, and that the appellant is his 'family member' as defined in Art 2 of the Citizens Directive (and reflected in Regulation 7 of the Immigration (European Economic Area) Regulations 2006, although the Immigration (European Economic Area) Regulations 2016 do not materially differ). Both MB and IB provided detailed professional documents and financial statements relating to their respective employers, and wage slips, bank account statements and tax documents confirming their employment.

32. The unchallenged letters issued by MB's employer confirm that he is required to undertake frequent European travel, often at short notice. Specific details of his past and planned future travel were provided, which were supported by ticket and booking receipts identifying MB by name, as well as by spreadsheets produced by MB's employer.

33. The unchallenged documentary evidence confirms that IB's work duties require regular and at times long distance international travel, and that regularly

travelling to client premises is an essential component of her work. Her employer's letters confirm that IB is likely to be required to travel regularly to the EU in 2018, And this may take up to 50% of her working time. It is anticipated that IB's employment may require intensive EU travel in the future. She has previously travelled to other Member States as part of her employment duties. She also spends a significant number of weekends working or travelling for work purposes. I find, and it was not challenged, that both MB and IB frequently have to travel at short notice for several days at a time, and that there have been occasions when both of them are travelling at the same time.

34. At present the appellant is caring for AB. The provision of childcare is a matter of fact, as is the ultimate determination whether the absence of that childcare does have a dissuasive effect on the exercise of free movement rights under Art 45. There is therefore no requirement that the appellant has full parental responsibility for AB, or that she is a legal guardian of AB, although this may, on the particular facts of a case, be relevant.

35. I find that the care needs of AB are complex due to nature of her parents' employment. AB attends a nursery full time, but the nursery closes by 6pm. AB has often been sick and unable to attend the nursery for up to a week or two at a time. The appellant provided weekly care plans outlining her care for AB covering several scenarios, including times when both MB and IB are present in the UK, times when either MB or IB are outside the UK, and times when both MB and IB are outside the UK by reason of their employment. Mr Tarlow did not take issue with the reliability of the care plans, which indicate significant child care needs even when both IB and AB were in the UK given their hours of employment and commuting. When MB travels in Europe the daily childcare needs can stretch to 14 hours. When both MB and IB are travelling the childcare needs stretch to several continuous days at a time. I accept, on the particular facts of this case, that MB and his wife essentially require 24/7 childcare during most weeks in light of the short notice and frequent and inflexible nature of their work-related travel requirements.

36. As already indicated, Mr Tarlow did not challenge the credibility of the witnesses. I found, in any event, that the appellant and MB gave their evidence in a detailed and direct manner and without embellishment or hesitation. In his statement MB maintained that, unless suitable childcare provision was in place, either he or his wife would have to give up their jobs. In light of the extensive documentary evidence confirming MB work-related travel to other Member States, and in light of the significant childcare issues involved, I am persuaded that MB would be deterred from exercising his free movement rights as a worker under Art 45 unless there were suitable childcare arrangements for AB.

37. In their additional statements both MB and IB outlined their extensive research for a nanny or au pair as an alternative child carer to the appellant. There was no suggestion by Mr Tarlow that the efforts made by IB and MB to obtain

alternative childcare were not genuine. I find, for the following reasons, that genuine and reasonable steps have been taken to obtain alternative childcare provision.

38. Neither IB nor MB had any other family in the UK, and none of their friends are capable providing for AB's childcare needs. The evidence produced on behalf of the appellant includes text or MMS messages between IB and previous child carers who had been employed and an outline of archived conversations left on the childcare.co.uk website between IB and potential candidates. The text messages indicated the unreliability or unsuitability of some of the past and prospective child carers, or their unavailability for the times or days required. IB also provided broad details of searches she conducted from May 2015 for suitable candidates using two of the largest UK childcare online directories (Sitters.co.uk and Findababysitter.co.uk).

39. I am persuaded, given AB's particular childcare needs, that an au pair would not be a suitable alternative. According to an extract from the Gov.UK website provided by the appellant au pairs are unlikely to be classed as workers or employees and are treated as members of the family with whom they live and who provide them with 'pocket money'. Evidence provided by the appellant stemming from au pair agencies indicate that au pairs can be on duty up to around 30 hours a week which includes evening babysitting, that au pairs are generally unqualified child carers and should not be expected to have sole care for a child all day, and that au pairs cannot perform regular night duties. Given that, on occasions, both MB and IB may be away on business, an au pair, or even a combination of au pairs (which itself would present difficult accommodation issues) would not be available 24 hours a day.

40. I am additionally satisfied that reasonable steps have been taken in exploring the alternative of live-in nannies. Given the significant amount of travel undertaken by both MB and IB, and the possibility that they could both be required to travel at short notice for several days at the same time, and the statutory requirement to give daily rest periods contained in Regulation 10 of the Working Time Regulations 1998, I am satisfied that at least two live-in nannies would be required, and that, in all probability, three would be needed in case one is unable to work on a particular day and bearing in mind night-care requirements and weekend care requirements. The financial and practical consequences in employing 3 live-in nannies would be significant for MB and IB, requiring them to purchase a bigger house and leading to significantly increased mortgage costs, if a mortgage was available, in addition to the wages of the nannies. I am consequently persuaded that the possibility of employing live-in nannies, on the particular and unusual facts of this case, is not reasonably open to AB's parents.

41. Mr Tarlow did not suggest that it would be reasonable for IB to give up her employment in order to look after her daughter. Whether it would be reasonable

to expect one spouse to limit or relinquish their own employment so as to enable the other spouse to continue to exercise their free movement rights will depend on the particular facts of each case. In the present appeal the unchallenged evidence indicates that IB also exercises her free movements rights as a worker pursuant to Art 45 TFEU, although to a lesser degree than MB. She nevertheless also travels in the course of her professional activities to Member States. If she abandoned or limited her employment this would, I find, equally discourage her from exercising her free movement rights as a worker under Art 45. For these reasons I do not find it reasonable for IB to give up or limit her employment.

42. The essential issue that I need to determine is whether the refusal to issue the app ellant a residence card discourages MB from effectively exercising his rights under Art 45 TFEU. For the reasons given above I am satisfied that MB would be unable to effectively exercise his free movement rights, given the very particular childcare needs of AB, unless the appellant is granted a right of residence. This is not a case of MB and IB preferring to have a family member look after their child. I find, but for the issuance of a residence card to the appellant, MB would be discouraged from travelling to other Member States in the course of his employment. I consequently find that the appellant does derive a right to reside in the UK from Art 45.

Notice of Decision

The EEA appeal is allowed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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 contempt of court proceedings.

2 October 2018

Signed Date

Upper Tribunal Judge Blum