



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/09719/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th July 2018

Determination Promulgated
On 16th July 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

AS
(anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Bokhari, legal representative, Slough Immigration Unit
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and her daughter are granted anonymity throughout these proceedings. No report of these proceedings (in whatever form) shall directly or indirectly identify the appellant or her daughter. Failure to comply with this order could lead to a contempt of court.

1. The appellant sought an EEA Family Permit to accompany her daughter SN to the UK as her primary carer. The child is a British Citizen living with the appellant, her mother in Pakistan. The application was refused on the basis that the ECO was not satisfied she was the primary carer of the child because

the divorce certificate does not show that she was the wife of the child's deceased father or that she was related as claimed to the child.

2. Before the First-tier Tribunal, the respondent accepted the appellant was the wife of the child's deceased father and that she was the mother of the child. The First-tier Tribunal Judge found that the child could come to the UK without her mother and that this would not be a breach of Article 20 TFEU and dismissed the appeal.
3. Permission to appeal was sought and granted because it was arguable that the judge failed to consider whether the refusal to issue the appellant with a derivative residence permit would prevent the child's genuine enjoyment of her EEA rights irrespective of whether the child's uncles had said she could live with them.
4. The First-tier Tribunal judge recorded, in the decision, evidence from the child's great uncle (the appellant's uncle) and uncle (the appellant's brother) as follows:

11. The appellant's uncle confirmed that the appellant currently lived in his house in Rawalpindi in Pakistan with her mother, her aunt (the witness's sister), the aunt's family and two of the appellant's brothers. He maintained that the mother mainly looked after the child but other members of the family helped as well. He maintained that if the mother was refused entry to the UK, the child would not come to the UK on her own. The reason for his saying that was that he felt that neither would be able to leave the other, and that the link between them was too strong. However, the child had no other brothers or sister in Pakistan but had a step sister over here in the UK. The appellant's uncle said that he provided financial help and accommodation for the mother and child in Pakistan and would do so over here. However, he maintained he would not be able to look after [the child] on his own if she was to come to the UK without her mother.

12. ...he had lived in the same household as the appellant and child in Pakistan, until he came to the UK the previous month. ...maintained that he had a good relationship with [the child]....He maintained that his wife in the UK had a close relationship with [the appellant] and the child..He told the Court, "If my sister's appeal fails, it is still intended that [the child] will come here. I can look after her....." He went on to say, however that he didn't think that she would be coming alone, because she spends most of her time with her mother. Finally he said, "I wish they could come here and do something here, so that her mother could look after her, because at the moment her maternal uncle is sending money to look after her.".....If my sister is not allowed to come here [the child] will come to the UK. Yes she can come without her mother."

5. The core findings of the First-tier Tribunal judge are as follows:

25. I find on the evidence that I have heard in this case that this [the child will travel to and reside in the UK even if her mother is not granted leave to do so] may well happen and is able to happen in relation to the child. I find that it is perfectly feasible and possible for [an 8-year-old] girl to travel to the UK without her mother being required to come too. The child's uncle...lived with the child in the same household in Rawalpindi until he came to the UK in August of this year. He maintained in his evidence to this court h that he had a good relationship with the child and that his own wife had a close relationship with both the appellant and the child.

....

27. Whilst one may speculate that the care she is likely to receive from her mother would be preferable in some ways to that she might receive from other relatives, such as her uncle, her aunt etc, I find as a fact that a refusal to admit the appellant to the United

Kingdom would not deprive her of the genuine enjoyment of the substance of the rights associated with her status as an EU citizen. As I have already stated above, the decision in *MA and SM* established that “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.”

6. The First-tier Tribunal Judge fails to provide any reasons why he has taken one part of the uncle’s evidence over the other when that evidence was contradictory: on the one hand the uncle said that the child would not come without her mother and on the other that she would. Furthermore, he failed to give any reason why he did not accept the appellant’s uncle’s evidence that the child would not come without the appellant. On a simple calculation as to how much was said, more was said to conclude that the child would not come without her mother than that she would. But of even greater moment is that the decision of the judge fails totally to take any account of the best interests of the child or who the primary carer of the child is. The starting point, as always, is that the best interest of the child is to be with her parents. This child’s father is dead. She has lived *all* her life with her mother and the undisputed evidence before the First-tier Tribunal Judge was that the mother cared for her. The uncle provided financial support and her and he and the child’s uncle had a relationship with the child. But it cannot conceivably be concluded from that that the relationship was that of a primary carer or even a carer. Caring for a child is far, far more than financial support and being an uncle, no matter whether the uncle lived in the same household or not. To displace the best interest of the child being with her mother, evidence is required. There was none in this case. There was nothing from the mother to say she would permit her daughter to travel to and reside in the UK without her never mind that it would be in her best interest to do so. Furthermore, the judge did not make a finding that the child would come to the UK without her mother but merely said this *may* happen and *could* happen. This is inadequate.
7. In *MA and SM (Zambrano: EU children outside the UK) Iran* [2013] UKUT 00380 (IAC) there was a clear finding that the child in that case would travel to the UK without his mother. That is simply not the case here. The First-tier Tribunal Judge has not only failed to give any or any adequate reasons for finding the child would travel to the UK without her mother but has failed to properly consider the child’s best interests, if at all.
8. The First-tier Tribunal Judge materially erred in law in his findings that led to the decision to dismiss the appeal against the refusal of a derivative residence card. It follows the decision to refuse the Article 8 appeal, in so far as there was one, was materially flawed. I set aside the decision to be remade.

Remaking the decision

9. Both parties agreed that if I set aside the decision of the First-tier Tribunal Judge I could proceed to remake the decision based on the evidence presently before me; there was no need to further evidence.
10. The head note of *MA and SM* reads

(1) In EU law terms there is no reason why the decision in Zambrano could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship.

(2) The above conclusion is fortified by the terms of The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (SI 2012/2560), brought into force on 8 November 2012. Paragraphs 2 and 3 of the Schedule to the Regulations give effect to the CJEU's decision in Zambrano by amending regulations 11 and 15A of the Immigration (European Economic Area) Regulations 2006 in order to confer rights of entry and residence on the primary carer of a British citizen who is joining the British citizen in, or accompanying the British citizen to [regulations 11(5)(e) and 15A(4A)], the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State.

11. Mr Melvin did not seek to distinguish *MA and SM*. He submitted that there was very little evidence of emotional bonds or as to the situation in Pakistan, that the appellant is financially supported by her uncle and is dependent upon him and that the evidence was that the child would come to the UK irrespective of whether the mother came.
12. The evidence before the First-tier Tribunal was not that the child would come to the UK and that that was the intention. The evidence, other than the child's uncle expressing his view that the child would come to the UK, pointed the other way. The uncle and the appellant's uncle spoke of the very close bond with the appellant. There was nothing in the evidence to suggest that the uncle or the appellant's uncle or the aunts in the UK were or came close to being the primary carer of the child. The evidence all pointed the other way.
13. Unless there is an *intention* that the child would come to the UK irrespective of whether the primary carer/parent was coming then, as stated in the headnote to *MA and SM*, the refusal of a derivative residence permit would deny access by the child to rights she is entitled to by virtue of her citizenship.
14. I find that there is no *intention* that the child should travel to the UK without her mother who is her primary carer. I allow the appeal against the decision to refuse to issue the appellant with a derivative family residence permit. It follows, in so far as it is necessary to state given that there has been no human rights application although the ECO considered Article 8, that the decision to refuse to grant the permit is disproportionate.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by allowing it

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make an order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 12th July 2018

A handwritten signature in black ink, appearing to read "Jane Coker". The signature is written in a cursive, flowing style.

Upper Tribunal Judge Coker