IN THE UPPER TRIBUNAL **Case Nos** CF/2371/2017
ADMINISTRATIVE APPEALS CHAMBER CTC/16/2018

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeals are dismissed. The decisions of the First-tier Tribunal sitting at Hatton Cross on 6 March and 25 September 2017 under references SC173/16/00856 and SC173/17/00558 respectively did not involve the making of a material error of law.

REASONS FOR DECISION

1. The claimant is a Moroccan national, living and working in the United Kingdom. It is common ground that her right to be in the United Kingdom arises from her status as a *Zambrano* carer of her child, A. The amendments made with effect from 8 November 2012 across a range of benefits (collectively "the 2012 amendments") had the effect that people with *Zambrano* rights could not rely them to claim social security benefits. That exclusion was upheld by the Supreme Court in *R(HC) v SSWP* [2017] UKSC 73 (as to which, see further [18] below).

2. By a decision dated 19 November 2015, as subsequently revised on 17 August 2016, HMRC superseded a previous decision awarding child benefit, ruling that the claimant was not entitled to child benefit from 12 November 2012 and that an overpayment of £4017.60 had occurred between 12 November 2012 and 8 June 2016, but was not recoverable from the claimant.

3. By a s.18 decision dated 9 November 2016, HMRC removed any entitlement to child tax credit for the tax year 2015/16.

4. The claimant appealed and was fortunate to secure the assistance of the specialist advice team of the Hounslow CAB Service, who correctly identified what is the central feature in this case, namely the impact of the Euro-Mediterranean Agreement between the European Communities and the Kingdom of Morocco (Official Journal of 18.3.2000) ("the 1996 Agreement").

5. It may be helpful to some readers of this decision if I note here that such agreements also exist between the EU and a number of States in the Middle East and North Africa (I am aware of them in respect of Algeria, Lebanon, Egypt, Jordan and Tunisia but this list should not be assumed to be comprehensive). In social security cases involving nationals of the States concerned, consideration of them may well be required.

6. The claimant succeeded in her two appeals before the First-tier Tribunal ("FtT"). HMRC in both cases obtained permission to appeal to the Upper Tribunal from a judge of the FtT. I gave the Secretary of State for Work and Pensions ("SSWP") the opportunity to apply to be joined, as similar issues will apply to benefits for which she is responsible, and she did so.

Status of the 1996 Agreement

7. As a preliminary point, I raised a query as to the status of the 1996 Agreement in the UK. The 1996 Agreement is an association agreement made under Article 310 EC (now Article 217 TFEU). In general, a treaty entered into by the EU may in the UK be the subject of a declaration by Order in Council specifying it as an EU Treaty, for the purpose of s. 1(3) of the European Communities Act 1972. When this is done, it will have legal effect under s.2 of the 1972 Act. While that was done and is reflected in SI 1997/2577, the statutory instrument reflecting the Order in Council, the latter appears in an online database as "not in force". The same is true of the equivalent statutory instruments for the other States listed above.

8. HMRC (in an argument subsequently adopted by necessary implication by SSWP) submitted that the 1996 Agreement is in force despite the fact that the implementing order does not appear to be. They point out that the 1996 Agreement is shown as being in force on EUR-Lex and that there is a notice in the Official Journal of the European Communities indicating that the relevant approval precures have been completed. "Treaties Online", maintained by the Foreign and Commonwealth Office, shows the 1996 Agreement as having been ratified in the United Kingdom on 30 January 1998. Further directions from the Upper Tribunal, inviting submissions as to whether, despite the above, the question whether or not the implementing statutory instrument made consequent upon the Order in Council was in force made any difference to an individual's ability to rely on rights under the 1996 Agreement did not result in a further submission. The ability to rely on the 1996 Agreement is effectively conceded in this litigation by the State and I proceed on that basis.

Relevant provisions of the 1996 Agreement

9. Article 65 of the 1996 Agreement provides:

> "1. Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed. The concept of social security shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial occupational disease benefits and death, unemployment and family benefits.
> …"

Article 66 provides:

> "The provisions of this chapter shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries."

It is common ground that the claimant is a "worker" and is not "residing or working illegally".

Domestic law: child tax credit

10. Reg 3(5)(b) of the Tax Credits (Residence) Regulations 2003/654 (as amended by the 2012 amendments) provides that "a person shall be treated as not being in the United Kingdom for the purposes of Part I of the Act" (and so ineligible for tax credit) if he has a right under reg 15A(1) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") via reg 15A(4A) (i.e. *Zambrano* carers). The provision is not further qualified in any way in that regulation.

11. Reg 15A of the 2006 Regulations does however include some qualifications as to when a right arises under reg 15A(4A). In particular, by reg 15A(1), if a person is an "exempt person", a derivative right such as that under reg 15A(4A) does not arise. The categories of "exempt person" are set out in reg 15A(6)(c) and (in essence) make clear that a derivative right will only arise in cases where the person does not have a right under national law (including under the 2006 Regulations which seek to implement a number of aspects of EU law.) Such persons do not need a derivative right and would rely on their other rights so as to fall outside the restrictions applicable to *Zambrano* carers. The right of Moroccan workers not to be discriminated against under Art 65 of the 1996 Agreement is not a matter falling under the 2006 Regulations. On the face of it therefore, so far as her position falls to be considered by reference to her status as a *Zambrano* carer, the domestic legislation excluding the claimant from entitlement applies.

12. Reg 3 of the Tax Credit (Immigration) Regulations 2003/653 excludes from entitlement to tax credits a "person subject to immigration control", unless the person falls within one of a number of defined "Cases". One of those provides that a person who is lawfully working and a member of a State with which the EU has concluded an agreement under Art 310 of the Treaty of Amsterdam amending the European Treaties (i.e. now Art 217 TFEU) would be allowed to claim child tax credit even while they were a person subject to immigration control: reg 3, case 5. However, this cannot help the claimant. A "person subject to immigration control" is defined by s115(9) of the Immigration and Asylum Act 1999 which I set out in full:

> "(9) *"A person subject to immigration control"* means a person who is not a national of an EEA State and who—
> (a) requires leave to enter or remain in the United Kingdom but does not have it;
> (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
> (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
> (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4."

13. Section 7(1) of the Immigration Act 1988 provides that:

> "A person shall not under [the Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable [EU] right or of any provision made under section 2(2) of the European Communities Act 1972."

While I have not received full argument on this and in particular on the decision of the Court of Appeal in *Pryce v LB Southwark* [201] EWCA Civ 1572, it appears to me that the claimant as a Zambrano carer has an "enforceable EU right" and so long as she does so does not require leave to enter or remain in the UK. It has not been suggested that any of the other provisions of s.115(9) of the 1999 Act apply to her, so I conclude that she is not a "person subject to immigration control" and cannot rely on the Cases which provide exemption from reg 3 of the Tax Credit (Immigration) regulations, as they are exempting people from a category into which the claimant does not fall in the first place.

14. Ultimately, even if her claim fails so far as purely domestic legislation goes, it succeeds on other grounds.

Domestic legislation – child benefit

15. A similar situation arises in relation to child benefit. So far as her status as *Zambrano* carer goes, under reg 23(4)(b) of the Child Benefit (General) Regulations 2006 as amended by the 2012 amendments, because the claimant has a right falling under reg 15A(1) via reg 15A(4A), she falls to be treated as not being in GB for child benefit purposes and so ineligible.

16. Although Part II of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations SI 2000/636 makes special provision for people who can rely on rights under agreements such as the 1996 Agreement, it does so by excluding them from being disentitled to benefit by reason of s.115 of the 1999 Act. The point discussed in [13] above again arises: the claimant is not disentitled under the 1999 Act, but by other domestic legislation.

The 1996 Agreement – status and effect in EU law

17. In C-276/06 *El Youssfi v Office National des Pensions*, Mrs El Youssfi was a Moroccan national who was legally resident in Belgium. Having reached the relevant age of 65 years under Belgian law to claim the Guaranteed Income for Elderly Persons she did so, but her claim was refused because she was not a Belgian national and did not meet conditions applicable to foreign nationals. The CJEU, applying its earlier ruling in C-336/05 *Echouikh*, held that Art. 65(1)

> "must be interpreted as precluding the host Member State from refusing to grant the statutory Guaranteed Income for Elderly Persons

> to a Moroccan national who has reached the age of 65 and resides legally in the territory of that State as long as she comes within the scope of that provision, either because she herself has been employed in the Member State concerned or she is a member of the family of a worker of Moroccan nationality who is or who has been employed in that Member State."

Conclusion

18. In consequence, rights under Art.65 of the 1996 Agreement would prevail over inconsistent domestic law. In *HC*, the Supreme Court, endorsing earlier decisions such as *Harrison v SSHD* [2012] EWCA Civ 1736, held that all that EU law requires in the case of *Zambrano* carers is the provision of sufficient support to enable the *Zambrano* carer and their EU citizen dependent to remain in the EU. The provision of more generous support is an "exercise of choice under national law" (*HC* at [28].) The UK decided that following the 2012 amendments more generous support would not be provided. As an exercise of choice under national law, it must yield to the primacy of EU law, in this case the direct effect of Article 65(1) as established though the line of authorities culminating in *El Youssfi*.

19. As noted above, the claimant has a right to remain in the UK as a matter of EU law, because of *Zambrano*. That is sufficient to make her residence "lawful" for the purposes of Arts. 65 and 66 of the 1996 Agreement and the other conditions for Art 65 to apply are conceded also.

20. HMRC have reversed their position in the course of the appeal and now accept that the claimant's original appeals to the FtT correctly succeeded. I am grateful for the careful work done by their (un-named) legal adviser. SSWP likewise support it. They invite me either to remake or to uphold the decisions of the FtTs. Counsel recently instructed pro bono on behalf of the claimant have expressed the view that in essence the position now adopted by HMRC and SSWP amounts to upholding the decisions of the FtT, with the consequence that the appeals should be dismissed. I agree.

CG Ward
Judge of the Upper Tribunal
17 July 2018