IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11248/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 5th February 2014	**On 25th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

MAUREEN ANN LYTTLE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Claire, instructed by Messrs JM Wilson
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, who is from Jamaica, appeals with permission against the decision of Judge of the First-tier Tribunal Lloyd-Smith, in a determination promulgated on 8th October 2014, to dismiss her appeal against refusal to grant to her a derivative residence card as the primary carer of her children (who are British) and to dismiss her appeal also under Article 8 ECHR. The children in question are a daughter, M, who was born on 30th May 2008 and twin sons, OR and OB, born on 19th May 2012.

2. In the grounds of application (which now stands as the Grounds of Appeal) it is said that the judge failed to apply Regulation 15A of the 2006 EEA Regulations to the older child, M, had failed to have adequate regard to the principles in **ZH (Tanzania) v SSHD [2011] UKSC 4** with regard to the best interests of the children, had failed to observe the statutory guidance as to best interests under Section 55 of the Borders, Citizenship and Immigration Act 2009 and had failed to take account of Section 117B of the Nationality, Immigration and Asylum Act 2002, as amended. In a response under Rule 24 of the Upper Tribunal Procedure Rules it was contended that any error was not material to the outcome.

3. At the commencement of the hearing Mr Mills said that there were two elements to the appeal, derivative rights under the Regulations and Article 8 ECHR. His primary position was that Article 8 was not justiciable at this stage. There had been no removal decision. That was the position taken in the refusal letter and he understood that that was what the Presenting Officer had said at the hearing. He was however aware of the reported decision in **Ahmed (Amos; Zambrano; Reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC)**. Mr Claire for his part said that the grant of permission had been made on all grounds. He submitted that Regulation 15A(4A) was applicable in respect of M, whose biological father had no continuing relationship with her. He accepted that the regulation was not applicable in respect of the twins, whose biological father lived as part of the family unit and was himself British. He said that the Appellant was the primary carer in respect of the children and that M would be unable to remain if she were required to leave the United Kingdom. The best interests of the child were to be with her mother. Mr Mills interjected at this point that the best interests of the child were not relevant in this context, although they would be in consideration under Article 8.

4. Mr Claire continued that with regard to Article 8 the judge had failed to consider Section 117B of the 2002 Act. Section 117 had been in force at the date of the hearing and the judge erred in failing to refer to it. She had given disproportionate weight to the Appellant's immigration history and had confused the best interest consideration, having weighed it in the context of the evidence as a whole rather than first considering the interests of each child.

5. In response Mr Mills said that the test in **Zambrano Case C-34-/9 [2011] ECR 1-0000** and **Harrison v SSHD [2012] EWCA Civ 1736** was a stringent one, involving a British citizen being compelled to leave this country. It was accepted that the Appellant could not succeed in this regard on the basis of the twins. The judge had found that the Appellant's partner was the de facto father of M and there was no reason why he could not care for her. The principle in **Zambrano** was not engaged.

6. With regard to Article 8 the primary position was that there was no reason for the judge to consider that but he accepted that there had been no cross-appeal by the Secretary of State on that basis. Section 117 of the 2002 Act came into force on 28th July 2014. He accepted that the judge had failed to consider in particular Section 117B(6) but submitted that the error was not material. The question of reasonableness was for the judge and her conclusion was not irrational. The children were young and the partner had been born in Jamaica.

7. He accepted that the best interests of the children had not been considered as a separate discrete issue. Paragraph 20 of the determination could be read in more than one way and could be interpreted as meaning that the best interests of the children were to remain here but then putting that into the context with the other evidence. He submitted that the conclusions reached were rational and open to the judge. Finally Mr Claire said that there was no basis in law for the Appellant's current partner to look after M as he had no status in that respect. He was not her adoptive parent or her guardian. Mr Mills responded that there was no legal requirement for guardianship and the case law did not cover the point.

8. Addressing first the matter of the claimed derivative right I accept that the best interests of the children do not come into play in this regard. As Mr Mills said the test is a stringent one. It is set out with particular clarity in **Harrison**. At paragraph 19 of that judgment Lord Justice Elias stated as follows:

> "In my judgment by referring to action which deprives children of the 'substance of the right' the court is intending to say that the right may be infringed if in practice the children will be forced to leave with their ascendant relative even though they could in theory, as a matter of strict law, remain in the state of which they are nationals. It would be no answer for the state to say that the parents should be denied the right to remain because the children can be adopted for example. That approach of the court is consistent with the fundamental tenet of EU jurisprudence which is that it always looks at substance rather than form."

In the current case the judge at first instance dismissed the appeal on derivative rights grounds as it appears to have been accepted that the Appellant's current partner was the "de facto father of M …" (paragraph 9). In the following paragraph the judge stated "In this instance, given the fact that Mr Bent is a British citizen he would therefore be in a position to remain with the children if the Appellant were forced to leave. Thus the Appellant fails to comply with Regulation 15A." The Appellant's current partner has no blood or legal relationship with M. The judge failed to engage with the issue as to whether, although the family currently live as a unit, in reality M would be able to continue to live with Mr Bent if the Appellant had to leave or whether she would, in fact, have to go with her mother to Jamaica. There is some analogy here to the comments of Lord Justice Elias that the prospect of adoption would not be an answer by the state to whether the substance of the EU right was affected. The judge erred in this regard and I set aside her decision.

9. With regard to issues under Article 8 Mr Mills submitted that this was not a matter for the judge to consider but it had been raised in the Grounds of Appeal, the judge did consider it, permission to appeal to this Tribunal was granted on all grounds and there was no cross-appeal by the Secretary of State contending that the matter was not in issue. I appreciate that there are differing views as to whether Article 8 is engaged in a residence card case but having regard to all of those factors and to the only reported decision on the topic, namely **Ahmed**, I do regard the matter as properly before me.

10. Section 117B of the 2002 Act came into force on 28th July 2014. It was not however considered by the judge in her deliberations. Subsection (6) provides that

"In the case of a person who is not liable to deportation the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

That section was clearly relevant to the judge's decision making process and should have been addressed. It was also the case that the judge failed to make a discrete and separate finding upon the best interests of the children. At paragraph 20 of her determination she stated "in assessing the best interests of the children and the fact that leaving the UK would affect their education and medical treatment I have to weigh that up against the other factors." That sentence is not without ambiguity and there is no express clear finding as to what the best interests of the children are. That should have been done before other factors were put into the balance, the more so when the children involved are British citizens; see the comments of Lady Hale at paragraph 33 of **ZH (Tanzania) v SSHD [2011] UKSC 4**. The judge was aware of that consideration as she referred to the case at paragraph 15 of her decision but she did not make the finding required as to where the best interests of the children lay. I accordingly set aside the judge's decision in that respect also.

11. I indicated that I would re-decide the appeal as there was time available for me to hear evidence and submissions. The documents before me consisted of the Respondent's core bundle, the Appellant's bundle containing fifteen pages together with a supplemental bundle containing seven pages.

12. The Appellant gave evidence first and adopted her statement. She said that she had primary responsibility for the children and main responsibility for M as her current partner was not the biological father and did not have parental responsibility. M needed her mother to clothe and wash her. If she had to leave she would not be prepared to leave the children. Her partner was not in a position to look after them. M's biological father had not been involved with her since she was 6 months old. The last time she had seen him was when M was 2½ years old and that was to get documentation for her British passport. He had shown no fatherly affection to her. She had no idea where he currently was and he had no interest in M's life.

13. She continued that her partner worked nights but he would help in picking M up from school and would see her at the weekends. He would not be happy to look after M were she to leave. She called him Dad but was aware that he was not her real father. With regard to the twins, who had severe medical difficulties due to their premature birth, one was still having oxygen overnight which she had to monitor. She was not sure whether treatment was available in Jamaica but knew that it would be at a cost of thousands of dollars. She was not sure whether if she had to leave she could leave the twins with her partner. In Jamaica she had maternal uncles, cousins and an aunt. Her own parents were here, with discretionary leave, and her sister was a British citizen. Her partner worked as a paint sprayer and earned just over £16,000 per annum. She had not worked since 2011; she had previously worked as a support worker in a care home. If they went to Jamaica she had nowhere to stay and

it would be difficult for her with three children. There was a shortage of jobs. In Jamaica she had previously worked in a wholesale shop and her partner had worked as a farmer. He had some family in Jamaica although his parents were deceased. In addition to the supply of oxygen at night the twins had numerous other medical aids in connection with walking, occupational therapy, physiotherapy and assistance with vision. There had been contact with the father of M in August 2014 but he had refused to take care of her and said it was her responsibility.

14. The Appellant's current partner, Donovan Mark Bent, also gave evidence and adopted his statement. He said he had a strong relationship with M but did not have parental responsibility and he could not give permission for matters at school or with regard to her doctor. The children required the Appellant's full attention. As a man there was much he could not do for M as she was a young girl. For instance he could not bathe her or clothe her and she needed her mother. M's father had no contact with her and would not look after her.

15. He continued that M knew that he was not her real father. He worked at nights and would see her in connection with going to school. Asked why he had not adopted her he said he did not see himself able to look after her as she had the needs of a girl and if the Appellant left he would not look after her. He took the twins to nursery and brought them back. When they woke in the morning they would come into the parental bed. However he said that he could not manage the twins on his own. Asked about medical treatment in Jamaica he said that his sister was training as a nurse in Jamaica and she said care for the twins was not possible there. There was not the equipment nor the training nor the staff available for physiotherapy, speech and language training or development. The twins could not stand by themselves. They needed someone with them all the time. They needed professionals to take care of them. The family were struggling already and if the Appellant had to leave he would not be able to manage. The twins had a very low immune system and their lungs had not developed properly.

16. With regard to his own immigration history he said that he had come here on a marriage visa but he and his wife were separated and he had not obtained British citizenship until last year although he had held indefinite leave to remain since 2011. He had no children by his former wife. In Jamaica he had worked as a farmer on a small plot at his parents' home. They were deceased and an uncle was now living at the property. It was in the country, some 100 miles from Kingston, where any medical treatment would be. He particularly did not want to go back to Jamaica because of the violence and the high murder rate. He also said that he would not be able to obtain the sort of highly technical job that he was doing in a factory here and he did not know whether other work was available.

17. In submissions Mr Mills stated that the test was high for derivative rights and as M had a British parent prima facie the Appellant would not succeed on that basis although circumstances might show that the test was met. He submitted that the requirements were not fulfilled. There would be substantive disruption but that was not sufficient to succeed. The Appellant's partner had acted as the father of M and there was no good reason why he could not continue.

18. With regard to Article 8 the Appellant did not meet the requirements of the Rules and the best interests were covered under the Rules. It was very unlikely that she could succeed on that basis as the partner's income was insufficient. As to the test at EX.1 that was the same question posed as at Section 117B(6) of the 2002 Act and also in **Razgar**. The Appellant had a poor immigration history, being an overstayer since 2005. With regard to the best interests of the children he did not seek to say that it was not in their interests for the Appellant to remain but it was reasonable for the family as a whole to return. The partner had only been a British citizen for a year. He accepted that the children were the crux and he had no evidence to disprove the claim that care would not be available in Jamaica. Both parents had worked previously.

19. In response Mr Claire said the ultimate question was the interests of the British children in Jamaica. The twins had substantial medical needs and were entitled to free medical care in the UK. If the best interests of the children were to remain then the best interests also required the mother to be here. There had been candid evidence by both witnesses. There might be facilities for medical assistance in Jamaica but there would be very substantial obstacles to them being accessed. With regard to M the Appellant's current partner had no legal status with regard to her.

20. The first issue I have to decide relates to the derivative right claimed. It was accepted that the Appellant could not succeed with regard to her relationship to the twins as their biological father, with parental rights, lives with them. However inconvenient it might be for him to have to give up work in order to care for them and however unsatisfactory to their wellbeing it is clear from the case law on derivative rights that the crucial issue is whether the British citizen would be able to remain without the third country national. It was accepted by the representative that this was the case in respect of the twins.

21. As for M the situation is different. She is not the biological child of the Appellant's partner, Mr Bent. He has no parental responsibility for her, he is not her guardian and he has not adopted her. He stated in evidence that he would not be able or be prepared to care for her if her mother were obliged to return to Jamaica. He clearly felt most uncomfortable about raising a female child who was not his own flesh and blood on his own and on the balance of probabilities I find that he would not do so. I accept that the child has no substantive relationship with her real father who has stated expressly to the Appellant that the child is her responsibility and he will not look after her. There was no indication, or suggestion, that other persons in this country could or would look after the child. The conclusion is that she would be obliged to go to Jamaica with the Appellant and would thereby lose the reality of her rights as an EU citizen to live within the Union. As the child would lose the substance of her right to remain within the Union if the Appellant had to leave, the appeal on the basis of Regulation 15A(4A) of the Regulations succeeds.

22. I turn now to issues arising under Article 8. The Appellant could not qualify under the parent route of the Immigration Rules as she and Mr Bent live together and neither is a single parent. She could potentially succeed under the partner route; as an overstayer that route remains open to her if paragraph EX.1. applies. However it does appear that Mr Bent would be unable to meet the finance requirements, earning

less than £18,600 per annum. As Mr Mills acknowledged EX.1(a) is potentially engaged. There is no doubt that the Appellant is in a genuine and subsisting parental relationship with M and the twins who are in the United Kingdom and are British citizens. The remaining question being under subparagraph (ii) of EX.1 (a) is whether it would not be reasonable to expect the children to leave the UK. In effect the same issue arises under Section 117B(6) of the 2002 Act.

23. The children are young but they are in my judgment part of a coherent family unit. M has only just started her education. The twins are at nursery. However there are very particular considerations applying to the twins as a result of their medical condition, a consequence of premature birth at 29 weeks gestation. The Appellant gave evidence as to the care necessary for the twins, in particular that one had to receive oxygen at night which she had to supervise. She also gave evidence, which again I accept, of the many appointments she has to attend for them to receive help with various aspects of their lives, including walking, seeing and speaking.

24. A letter in the Appellant's bundle dated 8th July 2014 from a consultant paediatrician, Dr Penny Broggio gives details of the medical position of the twins, OB and OR. OR is said to suffer from chronic lung disease due to immature lungs and still requires oxygen at night. He requires medication to prevent water logging on his lungs and is closely monitored by a community nursing team. He has suffered from bowel obstruction and has short gut syndrome with associated liver disease requiring significant input from the gastroenterology and liver teams and with that assistance is eating well and thriving. He had bilateral significant intraventricular haemorrhages and has suffered some brain damage from being born prematurely and has delayed development. He has regular physiotherapy and has below knee casts to help stretch his Achilles tendons. He also required laser treatment for problems with his eyes as a result of the premature birth and is under follow-up scrutiny with the ophthalmology clinic.

25. OB also suffers from chronic lung disease because of immature lungs but is no longer taking oxygen. He too has the heart problems described for his brother with brain damage and delayed development as a result. He too receives regular physiotherapy and attends a child development centre. He also had the same eye problem requiring laser therapy and has possible hearing loss. He also had to have surgery on the gut. The letter concludes that the twins each have ongoing significant medical problems requiring input from a number of professionals. They appeared well cared for and had always been brought to their appointments. Advice given had been followed. The mother usually brought them and she was at home with them when the community team called. They believed she was providing good care. From the perspective of the neonatal unit and community nursing there were no concerns about the care provided by the mother.

26. In his evidence Mr Bent said that there would be real difficulties in gaining access to appropriate treatment for the twins in Jamaica. His sister, a trainee nurse there, said that she thought the treatment was not available but in any event it would have to be paid for and would not be available in the country area where the family house was.

27. Not only must I consider whether it is reasonable to expect the children to accompany the Appellant to Jamaica. I expressly also have to consider their best interests as a primary consideration under Section 55 of the Borders, Citizenship and Immigration Act 2009. The recently reported Presidential decision in **JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)** gives guidance with regard to the degree of scrutiny necessary in carrying out this duty.

28. It was abundantly clear from the medical letter and from the oral evidence given that the twins require very particular support. On the evidence that support is unlikely to be available, certainly not to the same extent, in Jamaica and in any event would have to be paid for. On the evidence I find it unlikely that the Appellant would be in a position, even with the support of her partner, to be able to afford anything like the support which she receives gratis in this country for the twins. They are British citizens and are entitled as of right to that care. The position with regard to M is less clear but it is apparent that she is doing well at school. She too is a British citizen. She would receive education in Jamaica but her material prosperity is likely to be adversely affected and, should she need it, there would not be free medical care.

29. I have come to the view that it would not be reasonable to expect these British children to leave the United Kingdom. The Appellant is therefore entitled to succeed under EX.1 and with regard to Section 117B(6) of the 2002 Act, to which I must have regard in considering Article 8 issues outside the Rules. Following the **Razgar [2004] UKHL 27** steps, it was not in doubt and was not questioned that the Appellant has both family and private life in this country with the other members of her family and that obliging her to leave would have an adverse effect on those rights. The decision would be in accordance with the law, in pursuit of legitimate aims, in particular fair and consistent immigration control, which itself comes within Section 117 of the 2002 Act. However balancing all factors, including that need for immigration control, in this particular case to require the Appellant to leave this country would be disproportionate to the legitimate aims pursued.

Notices of Decision

The original decision contained errors of law and I have set aside the decisions then made. I have re-made the decisions and for the reasons set out above the appeal is allowed under the 2006 EEA Regulations and on Article 8 grounds.

There was no request for anonymity and no anonymity order is made.

Signed Dated 24 February 2015

Deputy Upper Tribunal Judge French

TO THE RESPONDENT
FEE AWARD

I have considered whether to make a fee award in favour of the Appellant. The appeal only succeeded as a result of the oral evidence given before me which I have described above. In those circumstances I do not make any fee award.

Signed Dated 24 February 2015

Deputy Upper Tribunal Judge French