Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05416/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 11 July 2019	**On 02 August 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE M HALL

Between

MARIE [J]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pountney, Greater Manchester Immigration Aid Unit
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of Designated First-tier Judge McClure, promulgated on 23 January 2018 dismissing her appeal against a decision of the respondent taken on 25 May 2017 to refuse her an EEA residence card.

2. The appellant is a citizen of Gambia and is married to EJ, a citizen of the Netherlands. They have a child born in 2013.

3. The appellant's case before the First-tier Tribunal was that her husband was exercising treaty rights in the United Kingdom; or, that she is entitled to a derivative right of residence in accordance with the principles set out in Zambrano [2011] EUECJ C-34/09, Dereci [2011] EUECJ C-256/11 and Alokpa [2013] EUECJ C-6/12 on the basis as the child is a citizen of the EU and now in full-time education, he has a right to remain in the United Kingdom and thus the appellant derives a right to remain here from the child's right to remain in the United Kingdom.

4. The respondent's case was that the appellant is not entitled to a residence card as there was no evidence that EJ had ever been in gainful employment in the United Kingdom nor that he had carried on a business, was self-sufficient or was otherwise a qualified person. The respondent relied on evidence from HMRC to the effect that there was no record of him ever having worked or paid tax in the United Kingdom. The respondent did not accept either that the appellant was entitled to a derived right of residence in the United Kingdom.

5. The judge heard evidence from the appellant as well as submissions from Mr Pountney who appeared for the appellant before the First-tier Tribunal as he does before us. Before the First-tier Tribunal, the respondent was represented by Mr Phillips.

6. The judge held that:-

   (i) EJ was never a qualified person [15] and thus the appellant was not entitled to any rights under the Regulations stemming from her marriage to EJ [16];

   (ii) Zambrano, Dereci and Alokpa fell to be distinguished on the grounds that they considered the rights of an EU national child in the country of their nationality [20], [22] and [24], not an EU national child in another EU state;

   (iii) having had regard to Articles 20 and 21 TFEU as well as Articles 7, 12 to 14 of Directive 2004/38 ("the Citizenship Directive"), in order for there to be rights derived from a child there would be a need to have comprehensive sickness insurance which had not been provided. The child had therefore not acquired rights;

   (iv) the child is not a qualified person either as a self-sufficient person or as a student as he did not have comprehensive sickness insurance, nor was there evidence of resources to ensure that the child and his mother will not become dependent upon social assistance [39];

   (v) the appellant and his mother did not fall within Regulation 16(2) of the EEA Regulations and there was no evidence that they were self-sufficient (Reg 16(2)); or with regard to Regulation 16(3) as the EU parent had never been a worker in the United Kingdom nor, with respect to Regulation 16(5) could it be said to apply as there is no evidence that the child will not be able to reside in the country of his nationality, the Netherlands [43]; and, thus the child will not have to leave the EU [44].

7. The appellant sought permission to appeal on the grounds that the judge had erred:-

(i) In not engaging with the argument that the appellant had a right to reside in the United Kingdom pursuant to Zambrano as if the appellant had to leave the United Kingdom her son would have no choice but to leave the EU relying in part on Ahmad (Amos; Zambrano; Reg 15A(3)(c) [2006] EEA Regs) [2013] UKUT 00089;

(ii) in finding on the evidence before him that the child would be able to reside in the Netherlands, the appellant's son not being able to reside with his father due to domestic violence; and as neither the appellant or her son spoke Dutch, had any friends or family in the Netherlands other than her husband's family or had ever been to the country; and, that there would be difficulties for the appellant in obtaining health insurance in the Netherlands; and, in line with **Ahmad**, the judge should have considered whether it was reasonable for the appellant and her son to relocate to the Netherlands;

(iii) in failing to take into account the EU Charter of Fundamental Rights and Freedoms which was engaged in this case, specifically Articles 7 and 24; and, that it was in the child's best interests to remain in the United Kingdom;

(iv) in not having regard to Section 55 of the Borders, Citizenship and Immigration Act 2009.

8. On 4 April 2019 Upper Tribunal Judge Allen granted permission.

9. We heard submissions from both parties. Mr Pountney submitted that the judge appeared not to have properly understood Alokpa, thereby focusing only on the laws that related to citizens who are in the country of nationality, rather than the factual situation in Alokpa where the children in question were French nationals living in Luxembourg with their mother who was a citizen of Togo. Mr Pountney submitted that the child could not go there to the Netherlands without his mother and that the mother would require health insurance as was seen from a document issued by the Dutch authorities (appellant's bundle, page 87).

10. Mr Pountney submitted that the appellant was in a "Catch 22" scenario in that the she could not get health insurance in the Netherlands unless she was there; and, she could not get there without having health insurance.

11. Mr Pountney submitted that it could not be considered as proportionate pursuant to Article 7 of the Charter of Fundamental Rights and Freedoms to require the family to go to the Netherlands as they had never lived there, had no connections, did not speak the language and that it will be difficult accordingly for the mother to obtain a job.

12. Mr Bates submitted that the appellant was wrong to rely on the concession given by the Secretary of State in Ahmad given that this was withdrawn when it went to the Court of Appeal, reported as NA (Pakistan) v SSHD [2015] EWCA 140. It also had to be seen in the context of the response from the Court of Justice to the questions put to it by the Court of Appeal by way of preliminary reference.

13. Mr Bates submitted that in this case the mother would have a "Zambrano" right in the Netherlands. At present the child would be able to reside in the Netherlands and would require health insurance but he submitted that not all the necessary steps had been taken in the circumstances of applying to the Netherlands. It was submitted it was unlikely that, as the mother would get three months initially, that the Netherlands would impose impossible conditions on them.

14. Mr Bates submitted further that there were in terms of Article 7/8 avenues pursuant to the Immigration Rules which the family could follow and asked us to note that there was no removal decision made. He accepted that there had been no reference to Article 7 of the Charter in the decision.

15. In response, Mr Pountney submitted that the judge had failed to consider what difficulties the appellant and the child would face and had failed properly to ask the question of whether at the end of the day the child would have to leave the European Union.

The Law

16. We bear in mind that the sole ground of appeal in this case is that the decision was contrary to the United Kingdom's obligations pursuant to the EU Treaties. That is, of necessity, wider than an appeal solely on the basis that the decision is not in accordance with the EEA Regulations.

17. It is, we consider, appropriate to start with the decision in **Alokpa** which concerned a Togolese national, living in Luxembourg, caring for her children who were French nationals. As in this case, Mrs Alokpa had no right to remain in Luxembourg and her children born there had an EU nationality through their father. It was not in dispute that the children had never enjoyed a family life with their father nor had they exercised their right to free movement [18]. The court characterised the question put as follows:

> "21 Therefore, question referred by the national court must be construed as seeking to ascertain, in essence, whether, in a situation such as that at issue in the main proceedings, Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and having made use of their right to freedom of movement.
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> 22 In that regard, it should be recalled that any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights, in particular rights of entry and residence of family members of a Union citizen, are based on the fact that a refusal to allow them would be such as to interfere with freedom of movement by discouraging that citizen from exercising his rights of entry into and residence in the host Member State (see, to

that effect, Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR I-0000, paragraph 35 and the case-law cited)."

18. The court held as follows:-

> "32 Concerning, in the second place, Article 20 TFEU, the Court has held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the European Union (see *Iida*, paragraph 71, and *Ymeraga and Ymeraga-Tafarshiku*, paragraph 36).
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> 33 Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.
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> 34 In that regard, as the Advocate-General stated in points 55 and 56 of his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France.
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> 35 It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case. "

19. We have also had regard to Rendon-Marin [2016] EUECJ C-165/14 at [78] to [79] where the court said this:

> "78 Thus, if — a matter which is for the referring court to check — the refusal to grant residence to Mr Rendón Marín, a third-country national, to whose sole care those children have been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that right, in particular the right of residence, as the children could be compelled to go with him, and therefore to leave the territory of the European Union as a whole. Any obligation on their father to leave the territory of the European Union would thus deprive them of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon them (see, to this effect, judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).

> 79 Several Member States which have submitted observations have contended that Mr Rendón Marín and his children could move to Poland, the Member State of which his daughter is a national. Mr Rendón Marín, for his part, stated at the hearing that he maintains no ties with the family of his daughter's mother, who, according to him, does not reside in Poland, and that neither he nor his children know the Polish language. In this regard, it is for the referring court to check whether, in the light of all the circumstances of the main proceedings, Mr Rendón Marín, as the parent who is the sole carer of his children, may in fact enjoy the derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the European Union as a whole (see, to this effect, judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraphs 34 and 35)."

20. We turn next to Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC) upon which the appellant has sought to rely in her grounds. At [68] the Upper Tribunal stated:

> "68. We accept that nothing said by the Court of Justice in any of the Article 20 TFEU cases excludes the potential application of **Zambrano** principles to third-country national parents if the practical effect of a refusal decision is that the children are obligated to leave the territory of the Union as a whole, notwithstanding that the children are not, as in **Zambrano**, citizens of the host member state. That was also the stated position of Mr Deller, Ms Asanovich and Mr Weiss. Ordinarily in such a case it would be necessary for applicants to prove that the children concerned were prevented from living in the territory of their host Member State (of nationality) together with their parent(s) and that may not be easy to do, given that for a child to have acquired citizenship of a Member State his or her third-country national parent will often have lived there lawfully in the past. In the appellant's case, however, there is no suggestion of the children being able to live with the father and Mr Deller said that he accepted that it was not realistic to expect that she could live in Germany with her children. He also accepted that for her and her children there was no alternative Union territory location other than the UK. In our view Mr Deller was right to make that concession. The appellant did not have any immigration status in Germany nor could she rely in Germany on any EU right of residence (to our understanding she would only be entitled to reside in Germany as a matter of EU law if able to show (as she clearly could not) that she was a self-sufficient parent in accordance with the principles set out by the Court of Justice in **Chen [2004] ECR 1-9925**). Accordingly, in our judgment the appellant is able to rely on her children's Article 20 right of Union citizenship under the Treaty."

21. It must, however, be borne in mind that this decision was appealed to the Court of Appeal both by the appellant and by the Secretary of State. The first was reported at [2014] EWCA Civ 995 and resulted in a reference to the Court of Justice. The Secretary of State's appeal was reported at [2015] EWCA Civ 140 where at [6] – [7] the Court of Appeal said this about the concession made before the Upper Tribunal:

> "6. At the adjourned hearing on the 19th and 20th of January 2015 it was common ground that the Upper Tribunal's conclusion that NA had a *Zambrano* right to remain in the UK because she could not rely on any EU right of residence

in Germany was wrong. As German nationals, both of NA's daughters, MA and IA, are entitled to live in Germany. If MA and IA were to move to Germany NA, who is their parent with sole care, would have a derived right of residence in Germany applying *Zambrano* principles.

7. The Respondent submitted that her Presenting Officer's concession before the Upper Tribunal (paragraph 5 above) that it was not realistic to expect that NA could live in Germany with her children was a concession that was made in the context of NA's Article 8 claim, and should not be construed as a concession that to deny NA a right of residence in the UK would compel her in practice to leave the territory of the EU together with MA and IA. If the concession was to be so construed it was withdrawn as having been wrongly made. The Respondent did not dispute the Appellant's contention that refusing to grant NA, the sole parent with custody and care of MA and IA, a right to reside in the UK would force MA and IA to leave the UK with her."

22. The questions put to the CJEU by the Court of Appeal were as follows:

"30. Accordingly, we pose the following questions for the Court:

(1) Does an EU citizen have a right to reside in a host member state under Articles 20 and 21 of the TFEU in circumstances where the only state within the EU in which the citizen is entitled to reside is his state of nationality, but there is a finding of fact by a competent tribunal that the removal of the citizen from the host member state to his state of nationality would breach his rights under Article 8 of the ECHR or Article 7 of the Charter?

(2) If the EU citizen in (1) (above) is a child, does the parent having sole care of that child have a derived right of residence in the host member state if the child would have to accompany the parent on removal of the parent from the host member state?

(3) Does a child have a right to reside in the host Member State pursuant to Article 12 of Regulation 1612/68 EEC (now Article 10 of Regulation 492/2011/EU) if the child's Union citizen parent, who has been employed in the host Member State, has ceased to reside in the host Member State before the child enters education in that state?"

23. The Court of Justice gave its ruling in June 2016, reported as SSHD v NA [2016] EUECJ C-115/15. The court held this:-

"79 Last, the Court has held that, where Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, those same provisions allow a parent who is that national's primary carer to reside with that national in the host Member State (see judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 29).

80 The Court has held that a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child, who is a Union citizen and who has a right of residence under Article 21 TFEU and Directive 2004/38, to reside with that Union citizen in the host Member State would deprive that citizen's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the

> child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 45, and 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 28).
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> 81 In the light of the foregoing, the answer to the second and third questions is as follows:
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> – Article 20 TFEU must be interpreted as meaning that it does not confer a right of residence in the host Member State either on a minor Union citizen, who has resided since birth in that Member State but is not a national of that State, or on a parent who is a third-county national and who has sole custody of that minor, where they qualify for a right of residence in that Member State under a provision of secondary EU law.
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> – Article 21 TFEU must be interpreted as meaning that it confers on a minor Union citizen a right of residence in the host Member State, provided that that citizen satisfies the conditions set out in Article 7(1) of Directive 2004/38, which it is for the referring court to determine. If so, that same provision allows the parent who is the primary carer of that Union citizen to reside with that citizen in the host Member State."

24. The important distinction between NA and this case is that in NA the court held that there was no derived right pursuant to Article 20 because on the facts NA had a right of residence pursuant to Article 12 of Regulation 1612/68) (see NA at paragraph 67). That is not applicable here.

25. Pausing there to take stock, we consider that it must be recalled that a Zambrano right arises only when there is no other basis on which an individual has a right to remain in the host member state; that is what happened on the facts in NA and it is in that context that the CJEU held that Article 20 does not confer a right on the parent of a minor; it was because she already had a right under a provision of Directive 1612/68. That does not apply here as the appellant's husband had never exercised Treaty Rights and so the provisions of Directive 1612/68 and its successor, Regulation (EU) No 492/2011 do not apply. Given the findings as to lack of sickness insurance and lack of self-sufficiency, there is no basis, other than a derived right on the basis of Alokpa, that the appellant could remain in the United Kingdom.

26. We consider that what Alokpa requires is a factual evaluation of the circumstances of the non-EEA state parent and the children to determine whether the reality would be that the non-EEA child would be required to leave the territory of the EEA. This, we consider, could occur if the parent caring for the child could not enter that state of its nationality, and the other parent cannot be traced. The effect of this would be that the child would have to be separated if they could not live in the host state.

27. There is an intersection here between Articles 7 and 24 of the Charter of Fundamental Rights and Freedoms in that these inform the assessment of whether the genuine enjoyment of child's rights would be restricted to such an extent as to render them ineffective. This would, we accept, on the basis of domestic authorities be the case were the child to have to go into care.

28. In what is otherwise a very careful decision by an experienced judge it does not appear from the decision that consideration was given as to whether the appellant (as opposed to her son) could go to live in the Netherlands. It is not in doubt that she has sole care of the child and that without her there would, in effect, be a deprivation of the effective enjoyment and substance of the rights conferred on citizenship. In effect the question that needs to be asked is whether the appellant would be able to go and live in the Netherlands with her son. EU law was engaged in this case and accordingly, regard must be had to Article 7 and 24 of the Charter of Fundamental Rights and Freedoms.

29. Accordingly, we set aside the decision on this narrow point and accordingly, we remake the decision on that point, that is to consider whether the appellant has shown that she would not able to accompany her child.

Remaking the decision

30. We heard evidence from the appellant, Mr Pountney having explained to us that the child's passport had now expired. We accept that is so as it is clear from the copy of the passport that it was valid only until 2018.

31. The appellant was asked what steps she had taken to renew her son's passport. She said that she contacted the Consulate and been told that she needed the father's consent but that she was not in contact with him. She said she had been advised to get a tracing agent to get consent from him but that she did not have the means to do so. She said also that if he had been summoned to court and did not appear and the judge made an order, that she would have the rights necessary to obtain a passport. She confirmed that the advice was given to her but that she would start proceedings in the United Kingdom to obtain a new passport for her son. She said that her son is in school, will be starting year two in September.

32. Cross-examined, the appellant said that she had explained everything to the Consulate but that it was their rule. She said she had no documentary evidence and that it had all been done by telephone. She was asked if she enquired if there was any other way that he could enter the Netherlands with an expired passport; she replied she did not think there is any other way. It was put to her that she had not asked and just assumed that you need passports; she said they have no ties to the Netherlands and she does not have a permit to go there or a visa as he is still a minor.

33. The appellant was asked if she had made any enquiries if her son could re-enter the Netherlands and ask what assistance would be available. She said she did not think that there would be any benefits, that it was not just him and that she would need to go as well. She said she was not qualified and that he could not go without her. Asked why she would not be able to go work in the Netherlands if allowed to enter. She said it is a Dutch speaking country and she does not speak Dutch and had never been there. She said if forced to choose between living in the Netherlands and the Gambia she said it would be the Netherlands.

34. Mr Bates submitted that the appellant had failed to provide sufficient evidence that they would be denied entry. He asked us to note that no formal application had been

made; the evidence about the passports was oral only and it was clear that not all avenues had been explored, for example there was no attempt to obtain an emergency passport. He asked us to note also that the appellant would have a **Zambrano** right in the Netherlands and that it was reasonable to assume that she would not be forced to return to Gambia with the child.

35. Mr Bates submitted also that the child was not a qualified child of the United Kingdom, he was dependent on his mother and that an inadequate investigation had been made as to what he would obtain in the Netherlands. He submitted that although there may be language difficulties, if he went to live in the Netherlands he would have the added benefit of residing in the country of nationality.

36. Mr Pountney submitted that the appellant had given clear evidence with regard to his entry into the Netherlands and that there was no reason to dispute that she had been in contact to resolve the issues. He said that she had explained her difficulties with the father and that no other options were given to her by the Dutch authorities. It was submitted that there would be significant difficulties in going to the Netherlands and so that in effect the appellant would have to leave the EU and so would her son; and, accordingly, **Zambrano** would then apply.

37. Mr Bates drew our attention to the protracted nature of the proceedings. The first application had been made in 2014 and a new decision had been made in 2015. It had been once remitted, remade in 2017 and now, some four years after the decision, it was still not resolved. It is submitted it was relevant whether it was reasonable to expect the appellant and her son to leave the United Kingdom given that he is now 6 and was established at school here. He submitted that in all the circumstances it would not be proportionate.

38. It is for the appellant to show that she could not go to the Netherlands to live with her son.

39. We accept that the child's passport has expired. That is clear from its expiry date. We do not profess to have any knowledge of what the position is under Dutch law with regard to whether a single parent can apply for a passport. There are of course clearly child protection issues where one parent who is not living with the other and applies for a passport. We do not have the precise details of what is involved nor, surprisingly, has any written documentation been provided to us. It may well be that the Consulate would be satisfied with an order from a court for example giving all parental rights to the appellant but we simply do not know.

40. We do not know whether it would be possible to obtain an emergency passport and there is no indication that any such enquiries have been made. Similarly, there appears to have been no proper application made by the appellant, nor does she appear to have set out in writing the particular circumstances of her case and asked for advice from the Dutch Consulate. This deficiency was drawn to her attention in cross-examination and also formed the basis of submissions.

41. We do not accept the material referred to us by Mr Pountney is sufficient evidence to show that it would not be possible for the appellant to accompany her son to the

Netherlands. We note the email from the Dutch Immigration and Naturalisation Service at pages 87 to 88 of the bundle but this was dated 7 November 2014. We note that it requires the mother to contact the Dutch Embassy to issue a facilitating visa and then to make an appointment to submit an application. There is no indication this has been done or that an attempt has been made recently to do this.

42. We note that the letter concludes as follow:-

> "In addition, the following evidence is required in general:
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> - a copy of a valid passport of the third country parent;
> - evidence that both the community national and the third country national are insured for medical costs;"

43. It is the requirement for medical insurance which appears to be, as Mr Pountney put it the main difficulty. But what this letter does not say is what type of medical insurance would be sufficient. Nor for that matter is it clear what is meant by "in general"; or whether that would apply here.

44. Whilst there is material, again from 2014 at pages 89 to 90 about the requirements of health insurance in the Netherlands, this states "he must take out Dutch health insurance within four months of your permanent residence permit." It is unclear how this advice would apply in a situation as here. The material at page 91 indicates also that those under 18 are insured for free but the point remains that what the appellant has not done is make a proper enquiry to the Dutch authorities as to what difficulties she would face or what benefits would be available to her were she to be located to the Netherlands with her son. It is instructive that there is no indication of an email or other information sought by GMIAU from the Dutch authorities since 2014 on the health insurance point. This is surprising given their involvement with this from such an early stage.

45. Accordingly, we are not satisfied by the evidence before us that the appellant has shown that she could not enter the Netherlands with her son or that she would not be able to access any social support there. We note also that the appellant, when questioned, said that she would prefer to live in the Netherlands with her son rather than in Gambia.

46. With regards to Article 7 and 24, we bear in mind that these were in play in Alokpa, and that the CJEU identified a limited basis on which a derived right could arise, that is that there needed to be an evaluation of whether the children would have to leave the EU. We bear in mind that the right of free movement is not absolute. It is circumscribed and it requires activities to be undertaken – see Dano [2014] EUECJ C-333/13. There is no evidence of treaty rights being exercised in this case either by the father or by the child and thus there are no EU rights being exercised in the United Kingdom. This has the effect that the child has no right of residence in the United Kingdom.

47. We remind ourselves that the CJEU has on several occasions stated that it follows the case law of the ECtHR on Article 8 in assessing article 7 of the Charter. We consider

also that, by analogy, CS [2016] EUECJ C-304/14, is relevant here in relation to the nature of the exceptions to the general rule that a right of residence is not granted to the third-country national family members of EU nationals who have not exercised Treaty Rights.

48. In CS, the court stated:

> "29. In this connection, the Court has already held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see, to this effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 66 and 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).
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> 30. The above situations have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom (see, to this effect, judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 72, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 37)."

49. Unlike in CS, in this case, for the reasons set out above, there is no prospect of the child being deprived of his rights under EU law. Further, we remind ourselves that in the cases referred to above, the CJEU was clearly aware of the impact of articles 7 and 24 of the Charter.

50. We adopt the 5 stage test set out in Razgar which mirrors the jurisprudence of the ECtHR. We accept that the first 4 steps are met in the appellant's favour. We accept also that there is a family life between the appellant and her son; and, that they have private lives here.

51. The starting point must be a consideration of the child's best interests as set out in article 24 of the Charter. It is a primary consideration as it is under domestic law.

52. Mr Pountney did not address us in any detail on this aspect of the case beyond asserting that it will be difficult for the child to relocate, that at present his best interests would be to remain in the United Kingdom rather than to relocate to the

Netherlands given that there would be difficulty in him integrating at least in the short term into a new schooling system, home and into a country with which he has no familiarity and with which his mother has no familiarity. There is, however, insufficient detail as to current circumstances, and what the situation would be in the Netherlands. Much of the difficulties that are said to exist are matters of conjecture.

53. We bear in mind that the appellant and her son have not shown they could not continue to live as a family unit in the Netherlands. Neither of them have the right to remain in the United Kingdom, under domestic or EU law and weight must be attached to that fact. There is nothing in the jurisprudence of the ECtHR to suggest otherwise.

54. We accept that the child is now 6 and has started school. There will inevitably be disruption to his life were he now to relocate, but he is still young.

55. These considerations are outweighed by the fact that the neither the appellant nor her son has shown that he has the right to remain in the United Kingdom. It is not shown that they cannot live in the Netherlands, or that the change of circumstances of which there is little evidence, only conjecture, would be such that the need to maintain control of immigration, even of those who are EU citizens, is outweighed.

56. Accordingly, for these reasons, we are not satisfied that the decision breaches the United Kingdom's obligations under the EU Treaties and we dismiss this appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decision by dismissing the appeal.

Signed Date 26 July 2019

Upper Tribunal Judge Rintoul