Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01564/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 March 2018	**On 21 March 2018**

Before

UPPER TRIBUNAL JUDGE O'CONNOR
UPPER TRIBUNAL JUDGE CANAVAN

Between

JENNIFER [O]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr A. Corban of Corban Solicitors
For the respondent: Ms A. Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 29 January 2016 to refuse to issue a residence card recognising a derivative right of residence as the primary carer of a self-sufficient EEA national child (a '*Chen*' child) with reference to regulation 15A(2) of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006").

2. First-tier Tribunal Judge Hanley ("the judge") dismissed the appeal in a decision promulgated on 10 May 2017. The judge found the appellant to be an "unhelpful and evasive witness" [67]. He was not satisfied that she had given a truthful account of the nature and the level of contact that she has with the children's Spanish father. Although the judge accepted that Mr [G] was likely to be the children's father because his name was included on their birth certificates, he did not accept the appellant's claim that he no longer had any involvement in the children's lives [67]. The appellant contacted him to provide a witness statement in support of the appeal, but no information was provided in the statement to explain the nature and extent of his contact with the children [68]. The judge accepted that Mr [G] was in Spain when the statement was certified by a notary, but given the fact that the appellant's 'uncle's' wife was living in Spain, he concluded that there were family connections there, and for that reason, he could not be satisfied on the balance of probabilities that Mr [G] "is not in the UK, nor that his permanent home is in Spain." [69].

3. The judge rejected the appellant's claim to be a primary carer for the children because he was not satisfied that she had been truthful about her family circumstances (regulation 15A(2)(a)) [73]. It was accepted that the children are Spanish nationals who were under 18 years old (regulation 15A(2)(b)(i)) [71]. He was not satisfied that the children were self-sufficient because the main evidence of support came from the appellant's 'cousin', Mr Prince [I]. The evidence did not support his claim that he provided the appellant and the children with financial support of £450 a month (regulation 15A(2)(b)(ii)) [75].

4. In relation to the final part of the requirements, the judge concluded that there was insufficient evidence to show that the children would be unable to remain in the United Kingdom if the appellant was required to leave (regulation 15A(2)(b)(iii)). The judge found that her reliance on the case of *Ruiz Zambrano* [2011] EUECJ C-34/09 was "misplaced" because Mr [I] said that he would be willing to look after the children if necessary and because there had been "no real explanation as to why the children cannot live with their father wherever he is living." [74].

5. The grounds of appeal were poorly pleaded. They outlined general disagreements with the decision without particularising the arguments within the proper context of European law. Mr Corban's oral submissions tended towards general submissions on the facts of the case rather than focussing on whether the First-tier Tribunal decision involved the making of an error of law. However, the Tribunal identified three grounds of appeal from the written arguments, which Mr Corban agreed at the hearing.

   (i) The First-tier Tribunal findings relating to the whereabouts of the children's father were outside a range of reasonable responses to the evidence and/or the judge failed to give adequate reasons for his findings.

   (ii) The judge erred in finding that Mr [I] could look after the children and failed to consider the best interests of the children and section 55 of the Borders, Citizenship and Immigration Act 2009.

(iii) The First-tier Tribunal's finding that the appellant failed to discharge the burden of proof to show that the children were self-sufficient was not consistent with the evidence.

6. The Upper Tribunal granted permission because it was at least arguable that the judge made assumptions about the whereabouts of the children's father that were not supported by evidence. It was also arguable that the judge's finding that Mr [I] could care for the children failed to consider (i) whether he was a suitable person to care for the children; and (ii) the best interests of the children.

Decision and reasons

7. Mr Corban's submissions did not assist us in assessing whether the First-tier Tribunal decision involved the making of an error of law. As we have already noted, he made general submissions about the facts of the case and appeared unable to make any clear arguments in relation to the relevant principles of European law except to repeatedly insist that it was not in the interests of the children to be forced to leave the UK.

8. Nevertheless, we have considered the First-tier Tribunal decision in detail to assess whether it involved the making of an error of law that might have been material to the outcome of the appeal.

9. Ms Brocklesby-Weller accepted that the respondent's duty under section 55 to consider the welfare of children in the UK extends to decisions made under European law. She also accepted that the judge erred in finding that Mr [I] was an appropriate person to care for the children without further analysis of whether he could do so and it was in the best interests of the children. However, she argued that the error was not material because there was no evidence to show that the children would be forced to leave the territory of the EU because they both had the right to reside in Spain. Even if the children's father is resident in Spain, the appellant was not divorced and previously resided in Spain. The appellant and the children could live in Spain. She argued that the principles outlined in *Zambrano* did not apply. Any errors in the judge's findings would not have made any material difference to the outcome of the appeal. The judge's findings relating to self-sufficiency were open to him on the evidence.

Findings relating to 'self-sufficiency'

10. The ground of appeal outlined in the original application for permission to appeal made to the First-tier Tribunal asserted that there was evidence to show that the children were self-sufficient without addressing any of the reasons given by the judge for rejecting this aspect of the case. Mr Corban was unable to expand on the general assertion made in the grounds when asked to do so at the hearing.

11. We are satisfied that the judge gave adequate reasons for finding that Mr [I] was not able to provide the claimed level of financial support to the appellant and her

children [75]. He noted that Mr [I]'s claim to provide the appellant with £450 a month was inconsistent with his income and the evidence of limited resources in his bank account. Given his doubts about the credibility of the appellant and her witness, it was open to the judge to place little weight on other evidence produced in support of the appeal from people who did not attend to give evidence.

12. The requirement for a child to be self-sufficient is an essential element of regulation 15A(2). If the judge's findings relating to self-sufficiency do not disclose an error of law it matters not whether he made any errors in relation to the other issues e.g. whether the appellant was a primary carer or the children would be required to leave the UK. All the elements of regulation 15A(2) must be satisfied for the appellant to acquire a derivative right of residence as the primary carer of a '*Chen* child'.

Findings relating to the whereabouts of the children's father

13. We agree that the judge did not make clear findings as to whether the children's father was likely to be resident in Spain or the UK. This was relevant to the issue of whether the appellant was the 'primary carer' of the children for the purpose of regulation 15A(2)(a).

14. Having accepted that there was evidence to show that Mr [G] was in Spain when the witness statement was certified by a notary, the judge failed to give adequate reasons to explain why thought he might be living in the UK. The only reason appeared to be that there was some "family connection" between Spain and the UK, but this hardly explained how or why this suggested that Mr [G] might be living in the UK. It is difficult to see why the appellant would apply for a derivative residence card if her estranged husband was exercising rights of free movement in the UK. It would be far easier to apply for a residence card as a 'family member'.

15. Although we find that the judge failed to make a clear finding, and failed to give adequate reasons for his findings regarding the father's whereabouts, we conclude that this error would not have made any material difference to the outcome of the appeal. The judge heard evidence from the appellant. It was open to him to find that she was an "unhelpful and evasive witness". The burden of proof was on the appellant to show that she was the primary carer of the EEA national children. It was open to the judge to find that she had failed to produce sufficient reliable evidence of her family circumstances to satisfy the requirements of regulation 15A(2)(a). The outcome of the appeal would, in any event, have been the same because the judge's findings relating to self-sufficiency under regulation 15A(2)(b)(ii) were sustainable (see above).

Findings relating to alternative care in the UK

16. We also accept that the judge erred in finding that the children could live with Mr [I] on the sole ground that he agreed to look after them. Consideration should have been given to (i) whether he was a suitable carer; (ii) whether he was able to care for the

children given the judge's findings regarding his resources; and (iii) whether it was in the best interests of the children to be separated from their mother. Given the consequences of such a finding the interests of the children were a primary consideration albeit they must be considered within the context of existing EU law principles: see *Patel v SSHD* [2017] EWCA Civ 2028.

17. However, for the reasons outlined above, the error would not have made any material difference to the outcome of the appeal. The issue of whether the children would be unable to remain in the UK if the appellant was required to leave is relevant to the test outlined in regulation 15A(2)(b)(iii). If the appellant failed to produce sufficient evidence to show that the children were self-sufficient within the meaning of EU law the appeal would have been dismissed in any event.

'Zambrano' issues

18. The appellant might have had an alternative strand of argument under EU law even if she failed to show that she met the requirements of regulation 15A(2). The principles outlined in *Zambrano* are wider than the test set out in regulation 15A(2)(b)(iii), which only considers whether the children would have to leave the UK. However, to succeed with reference to the principles outlined in *Zambrano*, the appellant would have to show that the children would be compelled to leave the area of the EU.

19. Even if the judge had taken the appellant's evidence at its highest, the children's father was living in Spain. The appellant is separated, but not divorced. As Spanish citizens the children would be entitled to live in Spain. Apart from general assertions about the best interests of the children, no evidence appears to have been adduced to show that it would contrary to the interests of the children to live in Spain. The appellant failed to produce any evidence to show the nature or the extent of the relationship the children had with their father.

20. The appellant failed to produce any evidence to show that she would not qualify for residence in Spain following her separation from the children's father. Even if the children's father was unwilling or unable to look after the children, the appellant failed to show that she would not be able to obtain a derivative right of residence in Spain on *Zambrano* principles. In short, the appellant failed to produce sufficient evidence even to engage the possibility that the children might be compelled to leave the area of the EU. In such circumstances, it was open to the judge to conclude that her reliance on *Zambrano* was misplaced "because there has been no real explanation as to why the children cannot live with their father wherever he is living" [74].

Conclusion

21. For the reasons given above, we find that the First-tier Tribunal decision relating to self-sufficiency under regulation 15A(2)(b)(ii) was sustainable. Any errors relating to the judge's findings relating to the whereabouts of the children's father and

alternative care in the UK were not material because the appellant was unable to satisfy all the requirements of regulation 15A(2). It was open to the judge to conclude that insufficient evidence had been produced to engage the *Zambrano* principles.

22. We conclude that the First-tier Tribunal decision did not involve the making of a material error of law.

DECISION

The First-tier Tribunal decision did not involve the making of a material error of law

The decision shall stand

Signed  Date 20 March 2018
Upper Tribunal Judge Canavan