Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48743/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2015	**On 16 July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL MURRAY

Between

KPW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Evans, Templeton Legal Services, Wembley Park, Middlesex
For the Respondent: Miss Fijiwala, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica born on 26 June 1971. She appeals against the decision of the Secretary of State for the Home Department refusing her application for a derivative residence card under European Union law. The refusal letter is dated 21 November 2014. The appeal was heard by Judge of the First-Tier Tribunal Cope on 27 February 2015. The appeal was dismissed in a determination promulgated on 30 March 2015.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Bird on 5 June 2015. The grounds of application state that the Judge has not correctly applied the

principles established in ***Harrison (Jamaica) v SSHD [2012] EWCA Civ 1736*** at paragraph 67, as the appellant is the sole carer of her daughter and there is evidence in the bundle from numerous sources to support this finding of fact. The case of ***ZH Tanzania v SSHD [2011] UKSC4*** is referred to, and the grounds state that with respect to the upbringing of a child the best interests of the child must be considered. The grounds state that ***ZH*** states that there is no precise definition of the best interests of a child, but the child's best interests must be the determining factor for specific actions, one being separation of a child from his/her parents against their will. The grounds state that the Judge failed to apply the correct test which is: "Would the child's quality or standard of life be seriously impaired by excluding the non EEA national from the UK?" The grounds state that in practice the expulsion of the appellant, who is the child's sole carer, would impair her standard of living to such an extent that it would compel the British citizen daughter to accompany her mother to Jamaica, thus depriving her of her EEA rights.

The Hearing

3. The appellant's representative submitted that Article 8 was not dealt with in the First-Tier decision although the Judge mentions it at paragraphs 90 to 94. He submitted that the respondent has not made a decision to remove the appellant from the United Kingdom and has only refused to issue a derivative residence card to the appellant. He submitted that there is no indication of any initiation of the removal process under the EEA Regulations or the Immigration Rules and nothing to indicate that it is proposed to remove the appellant at any particular time. He submitted however, that in spite of this, Article 8 should be considered as a right of appeal. I was referred to Section 84(1) of the Nationality Immigration and Asylum Act 2002. I explained that I was not going to consider Article 8 as no removal directions have been set. The representative referred me to the case of ***Vladimir Granovski [2015] EWHC 1478 (Admin)*** at paragraph 81. He submitted that there is no category of immigration decision making, to which consideration of Section 55 or the duty under Section 6 of the Human Rights Act 1998 does not apply. He submitted that the Judge in Ms Walter's case has not adequately performed the exercise of discretion and as he has not considered all the factors in this case.

4. The Presenting Officer pointed out that the case of ***Granovski*** is a points based system case and KPW can make a fresh application under Article 8 of ECHR. She submitted that Article 8 outside the Rules has not been raised. She submitted that based on the Regulations, discretion should not have been exercised differently and Article 8 cannot be dealt with at this hearing.

5. I declined to consider Article 8 in this claim finding it would not be appropriate for me to do so.

6. The appellant's representative made submissions on the First-Tier Judge's determination submitting that the Judge has failed to consider the said case of ***Harrison***. He submitted that there is no evidence that the child's father is in a position to look after her. He submitted that the Judge did not consider the quality of life of the child and if the appellant's appeal fails the child will require to leave the United Kingdom with her mother and go to Jamaica. He submitted that the evidence is that Mr R, the child's father, has little contact with the child and he submitted it has been accepted that the appellant is her sole carer and to remove her without the child will break the bond between them. He submitted that this is the only bond the child has had since her birth and to put her in the care of an incapable, disinterested father must be against her interests. He submitted that it would be equivalent to putting her with a foster family and this would not be good for her. He submitted that the Judge failed to consider the extent to which the child's quality of life will be diminished if she remains in the United Kingdom and the appellant returns to Jamaica so the child will require to leave the United Kingdom with her mother.

7. The Presenting Officer submitted that it is clear from the determination that the only issue is whether the child will be able to remain in the United Kingdom if the appellant is removed. I was referred to paragraph 51 of the determination and paragraph 43. She submitted that it is clear that the Judge has taken this matter into account. At paragraph 43 he states that it is for the appellant to establish to the appropriate standard of proof that she meets the requirements set out in the EEA Regulations for a derivative residence card and it is not for the respondent to prove that she does not meet these requirements.

8. The Presenting Officer submitted that the Judge has found there to be a lack of available evidence and because of this he finds the appellant has not discharged the burden of proof. It is not clear whether Mr R has contact with the child and the judge was only able to consider what was before him.

9. She submitted that the Judge refers to letters from friends of the appellant but these letters only refer to the appellant being the primary carer, there is no evidence about Mr R.

10. I was referred to the case of ***Sanneh [2013] AWHC 793 (Admin).*** At paragraph 19 of that case it is stated that nothing less than compulsion will engage Articles 20 and 21 of the TFEU and EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non EU national, upon whom she is dependent. being removed. She submitted that the Judge used the correct legal test and because of the lack of evidence about the child's father, has dismissed the appeal.

11. I was then referred to the case of ***Hines [2014] EWCA Civ 660***. At paragraph 24 of that case alternative care is considered. The Presenting Officer submitted that what has to be considered is whether the quality of

life of the child would be so seriously impaired by her removal from her mother or being placed in foster care, that she would effectively be compelled to leave the UK. In the case of Hines the child was going to be removed from the care of one responsible parent to the care of another responsible parent and so the situation in that case is different. The Presenting Officer submitted that the Judge has considered the alternative care options and I was referred to paragraphs 74 and 75 of the determination. At paragraph 75 the judge finds that it would not be in the child's best interests for her to be put into statutory care and it would not be in the economic interests of the United Kingdom either because of the cost of that care. The Presenting Officer submitted that the appellant is able to stay with her father in the United Kingdom and because of the lack of evidence about her father and his relationship with the child, the appellant did not discharge the burden of proof, so the Judge was entitled to reach the decision he did.

12. The appellant's representative referred me to the said case of ***Hines***, accepting that the situation in that case is different to this, as there were two responsible carers but he submitted that the appellant in this case is the sole carer of the child not just the primary carer, and the issue is to what extent the child's enjoyment of her rights would be diminished if the appellant has to go to Jamaica. He submitted that at paragraph 19 of the said case of ***Sanneh*** reference is made to the diminution in the quality of life of the child and he submitted that if the appellant and the child have to leave the United Kingdom, the case of ***Sanneh*** makes it clear that this could result in an interference with EU law and that is the issue. He submitted that for the child to be cared for by anyone other than her mother, in the particular circumstances of this case, must diminish the quality of her life and he submitted that if her mother has to take her to Jamaica the Judge has made no finding about the severity of the change in the child's life.

13. I put to the representative that the reason the Judge came to his decision was because there was not enough evidence before him of the child's relationship with her father and that even the letters of support made no reference to him.

14. The representative submitted that the appellant's previous appeal was abandoned because the child was not British at that time but the child is now British. He submitted that because Mr R is not in touch with the appellant it was only by chance that the appellant found out that Mr R had been granted British nationality thus making the child British.

15. He submitted that the Judge found that the appellant has raised the child from birth and the letter from Social Services and the Children's Centre confirm this and support the appellant's appeal. He submitted that there is sufficient evidence about the effect the destruction of the appellant's relationship with the child would have on the child, for the appeal to be allowed.

Decision

16. I have carefully considered the determination of the First-Tier Judge. The Judge had to work with the evidence that was before him. He points out that the appellant must have been in touch with Mr R in relation to the nationality application for the child, as he must have supplied various documents. He found that there should be much more detailed evidence obtained from Brent London Borough and the people in the nursery that the child attends, the family doctor and any church leader who could comment, from a more independent view, about why they believe the appellant to be the sole carer of the child and on what basis. They could have commented on Mr R's role and whether he has or had any involvement with the child or would have any involvement in her life if the appellant had to leave the United Kingdom.

17. The appeal was heard on the papers.

18. Paragraph 52 of the determination refers to the lack of evidence to support the appellant's claim. The judge notes that there is no up to date statement from the appellant. Although this appeal was dealt with on the papers, the only evidence about Mr R not being involved in the child's life is from the appellant in her statement. I noted that the most recent evidence from the appellant was on 4 February 2014. The situation about Mr R is not clear. The Judge found he was unable to find that Mr R has not and does not play any part in the child's life and he found that it was not clear whether Mr R would play a part if the appellant had to leave the United Kingdom. He refers to the letters of support, none of which mention Mr R. He notes that the appellant had legal representatives although it was a paper hearing but the up to date information was not provided. In all, the Judge has considered everything before him and finds that he cannot allow the appeal without further information about Mr R and what his relationship is with the child and what it would be if the appellant had to leave the United Kingdom. The judge accepts that for the child to be placed in some sort of statutory care framework would not be in her best interests or in the best interests of the United Kingdom and he refers to the said case of ***Harrison***. Based on the evidence before him it is not clear whether, if the appellant is removed from the UK, the child would be compelled to go with her. The test is high and is "compulsion". At paragraph 78 the judge refers to the case of ***Zambrano [2011] IMM AR 521,*** stating that not only must it be shown that the child would be unable to live in the United Kingdom if the appellant leaves, but that she would also be unable to live in another European Union State, although he notes that in this case the child's mother appears to have no connection with any other European Union State.

19. At paragraph 82 the Judge states that the appellant has not provided a sufficient evidential basis to establish that Mr R would not care for the child if the appellant had to leave the United Kingdom. He finds that this is a possibility and states that it has not been shown to be more likely than

not, so based on the standard of proof of the balance of probabilities, he finds that the appellant has not established her case.

20. The Judge has carefully considered all the evidence before him and I have considered all the evidence that was before him.

21. EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non EU national, upon whom she is dependent, being removed. Diminution in the quality of the child's life might engage EU law but based on what was before the Judge he was unable to reach that conclusion.

22. The Judge has referred to Article 8 in the determination. As the appellant is not going to be removed from the United Kingdom if her derivative right of residence is not granted, I do not require to consider Article 8 of ECHR. The Judge's dismissal of this appeal does not have any adverse impact on the family or private life of the appellant or her child.

23. Based on the above I find that the Judge's decision to dismiss the appeal on European Union law grounds must stand.

24. The appellant's appeal is dismissed on all issues.

25. Anonymity has been directed.

Signed Date

Designated Judge Murray
Deputy Judge of the Upper Tribunal