Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50950/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 1st April 2015

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MS RONIZE MAUA GOMEZ BRANCA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bandigani - Counsel
For the Respondent: Mr G Harrison - Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. This is an appeal by Ms Ronize Maua Gomez Branca, a citizen of Guinea-Bissau born 25th September 1986. She appeals against the decision of First-tier Tribunal Judge Horvath issued on 26th November 2014 dismissing her appeal against the decision of

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the Respondent made on 28th November 2013 to refuse to grant her a residence card as evidence of a derivative right of residence under EEA law. She had previously entered the UK in 2007 on a visit visa, overstayed and sought an EEA residence card as a dependent of her father and his wife. This was refused by the Respondent and her appeal dismissed in November 2009. Nothing further was heard from her until 15th January 2013 when she made the application which is the subject of this appeal.

2. The Appellant sought permission to appeal against the decision of the First-tier Tribunal and on 26th January 2015 First-tier Tribunal Judge Kelly granted permission. He said:

> "The first ground of application is that the Tribunal's finding that the Appellant's child could be cared for by 'some other close relative' if the Appellant was required to leave the UK was one that was not founded upon any evidence. Whilst the Tribunal was entitled to disbelieve the Appellant's claim that she was the child's primary carer and that nobody else would be willing and able to care for him in her absence, it remains arguable – given the importance attaching to the welfare of the child – that positive evidence was required in order to support a specific finding to the contrary. As the Tribunal does not refer to any such evidence this was potentially material to the outcome of the appeal. The second ground of application is that the Tribunal was bound to allow the appeal on the ground that the Respondent had made an unlawful decision by failing to conduct an adequate assessment of the child's welfare under Section 55 of the Borders, Citizenship and Nationality Act 2009. This ground is also arguable in light of the presidential decision in **JO and Others (Section 55) Nigeria [2014] UKUT 00517**. It is also arguable that:
>
> (i) the Tribunal's ultimate conclusion – that it was reasonable and in the best interests of a British child to be separated from one or other of its parents, by the child either following his mother to her country of origin or by him remaining in the UK with his British father – it was irrational; and
>
> (ii) in having regard to the fact that the child was born at a time when his mother's immigration status was precarious it took account of an immaterial fact (paragraph 26 of the determination)."

3. It is submitted in the grounds seeking permission that the Judge misdirected herself in finding that some other close relative could take primary care of the child as opposed to having contact "for a few hours". The second submission is that she failed in her application of Section 55 of the Borders, Citizenship and Nationality Act 2009 (the 2009 Act). Reliance is placed on **JO** and it is submitted that given that the Appellant had provided evidence that she and her 3 year old child had been granted Section 17 support (ie support as provided for in s.17 of the Childrens Act 1989) having been thrown out of the family home and faced destitution and that she had been the victim of domestic abuse, the Judge erred in law by failing to find that the Respondent had totally failed in her duty to discharge the Section 55 duty set out in

the 2009 Act. It is submitted that although Section 55 is mentioned in the refusal letter there is no substantive consideration of the best interests of the child.

4. What the Tribunal said in **JO** was:

> (1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.
>
> (2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.
>
> (3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.

5. The suggestion made by Judge Horvath was that the Appellant deceived the government agencies who are providing her with housing, funding and assistance. She suggested that these agencies have not tested the evidence given to them by the Appellant of for example domestic violence and destitution. She relied on the decision in **Sanneh v Secretary of State for Work and Pensions [2013] EWHC 793 (Admin)**.

6. At the hearing Mr Harrison relied on the lack of evidence from the child's father, saying that there is a dearth of evidence in general. The position of Mr Bandigani was that if the requirement for the Secretary of State to consider Section 55 does not "bite" in this case then it never will given the circumstances of the Appellant and her child.

7. The Respondent says in the Refusal Letter relative to Section 55 that she has considered Section 55 but there is no reference to consideration of any particular circumstance of the Appellant or her child.

8. In the response submitted by the Secretary of State to the grant of permission to appeal it is submitted that the Judge directed herself appropriately. It is submitted that there was insufficient evidence to establish that the child would be unable to remain in the UK if the claimant were required to leave. It is submitted that the existence of a British citizen parent who would be able to assume the responsibility for caring for the child but chooses for economic or other reasons not to, excludes the claimant from qualifying for a derivative right under Regulation 15A. Reliance is placed on the decision in **MA and SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 00380** and in particular on what was said in paragraph 41 adopting and agreeing with the summary of the relevant principles to be derived from **Zambrano** and subsequent decisions of the CJEU and the domestic courts as set out in **Sanneh**.

9. Reliance is also placed on paragraph 56 of **MA and SM** in which the Upper Tribunal said:

> "The mere fact that the Sponsor cannot be as economically active as he would wish, because of his care responsibilities to [the children] is not sufficient to support a conclusion that [the children] would be denied the genuine enjoyment of their EU citizenship rights, nor would this be the case if the Sponsor were required to stop working altogether. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living".

10. It is submitted that although Judge Horvath did not expressly refer to **MA and SM** she has clearly applied its ratio. It is further submitted that although the Judge was not obliged to look at Article 8 ECHR in this case she did so and gave valid reasons for dismissing the appeal under Article 8. It is submitted that there are no material errors of law.

11. Judge Horvath said that the Appellant 'has contrived a situation giving the appearance that' she is the primary carer of the child or the person who has primary responsibility for the child's care 'when this may not be the case'. She noted that although the evidence before her was that the child's father does not care for him on any day of the week he is in receipt of child benefit and child tax credit. At paragraph 19 she noted the family circumstances and found that the child would be able to live with her father or a grandparent. Judge Horvath expressly said that she did not find the Appellant to be 'a credible or honest witness'. She noted the lack of evidence from people with whom the Appellant and child had lived on a temporary basis after she had left the child's father. She reasonably took the view that if the Appellant had been 'sofa surfing' as she claimed (for a period of 10 months) someone could have provided a statement to confirm that. There was also no evidence of the alleged domestic violence. The Appellant had mentioned family and friends so it was not as if there was no one to confirm her account.

12. I have not found this an easy decision but the point is that the burden is on the Appellant, even once it is established that she is the main carer of the child, to show that none of the other family members could care for the child if the Appellant had to leave the UK. Clearly there are relatives that the child sees. He sees his father who incidentally is inexplicably in receipt of child benefit. It may well be that a different Judge would have taken a different view but Judge Horvath took account of all the evidence before her, applied the relevant law and gave sound and perfectly reasonable reasons for her decision. She dealt at length with s.55. She did not accept the Appellant's account and indeed took the view that it had been concocted to facilitate her application to remain in the UK. This was not in my view a decision that could be described as perverse. It was a decision she was entitled to make on the evidence before her for the reasons given.

13. It is submitted that Judge Horvath erred in law in failing to remit the appeal to the Secretary of State of State so that s.55 could be properly considered in terms of **JO**. It

is said in **JO** that the Secretary of State of State as a decision maker must be 'properly informed' and that she has to have asked herself the right question and taken reasonable steps to acquaint herself with the relevant information to enable her to answer that question correctly. It is clear that the Secretary of State twice requested information and evidence from the Appellant. The letter confirming the support under section 17 that is in the Appellant's bundle is dated 30th October 2014 so could not have been sent to the Home Office in 2013. That is the only document before me that mentions s. 17. Nothing was received by the Respondent in response to the request for documents made on 23rd October 2013. The Secretary of State was aware that the Appellant was dependant on Social Services for accommodation and financial support but there is nothing to suggest that at the time this case was considered she was aware of the s.17 support. The Respondent did consider s. 55 on page 5 (there are no numbered paragraphs) of the Refusal Letter. At that point, although two opportunities had been given to provide it, there was no satisfactory evidence that the Appellant was the sole carer of the child. There was indeed no evidence at all of the family circumstances other than that there was a father and grandparents. Unsubstantiated allegations of domestic violence had been made. The Appellant had been advised what documents she should provide to support her claim of domestic violence, including perhaps evidence from her doctor but nothing was received.. The Respondent was obliged to consider the best interests of the child. The questions were whether the Appellant was the sole carer and whether in the event that she was, whether the child would have to leave the UK with the Appellant because there was no other family member in the UK who could properly look after him, always bearing in mind his best interests. The Secretary of State asked the Appellant to provide the necessary information for these questions to be answered. The Appellant failed to provide it. It seems to me that the reality of the situation is that in all the circumstances, in particular the failure of the Appellant to assist with her own case and the fact that there was nothing to suggest that the child was at any risk, the Secretary of State could not have been expected to have done more than she did and indeed took all reasonable steps to acquaint herself with the relevant information. .

<u>Notice of Decision</u>

I find that the decision of the First-tier Tribunal does not contain a material error of law and shall therefore stand. The appeal of the Appellant is dismissed.

Signed Date: 15th April 2015

N. A Baird
Deputy Judge of the Upper Tribunal