**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00942/2012

**THE IMMIGRATION ACTS**

| **Heard at Columbus House, Newport** | **Determination Promulgated** |
|---|---|
| **On 7 October 2013** | **On 15 November 2013** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**FK**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Duncan of Duncan Moghal Solicitors & Advocates
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Iraq who was born on 1 June 1977. He claims to have arrived in the UK in February 2004 when he came to the attention of the UK authorities. On 12 February 2004 he claimed asylum which was refused on 2 April 2004. The appellant unsuccessfully appealed and became appeals rights exhausted on 6 September 2004.

**Introduction**

3. On 26 January 2012, the appellant was convicted at the Cardiff Crown Court of a number of offences concerned with money laundering and possession of false documents. He was sentenced to a term of twelve months' imprisonment for each offence to run concurrently. On 1 November 2012, the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied on the basis that the appellant was a "foreign criminal" under the 2007 Act. The Secretary of State made a deportation order against the appellant.

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 14 January 2013, the First-tier Tribunal (Judge Colyer and Mrs R M Bray JP) dismissed the appellant's appeal. The Tribunal dismissed the appeal on asylum and related international protection grounds. That decision is unchallenged. In addition, the Tribunal concluded that the appellant had failed to establish a breach of the new Immigration Rules (in particular para 398 and 399) or that his deportation would breach Art 8 of the ECHR.

5. The appellant sought permission to appeal to the Upper Tribunal and on 21 February 2013 Upper Tribunal Judge Goldstein granted the appellant permission to appeal.

6. The appeal initially came before Upper Tribunal Judge Storey. He set aside the decision of the First-tier Tribunal on the basis that it had erred in law in two respects. First, the panel had failed properly to conduct an assessment of the best interests of the appellant's child (BK). Secondly, the Tribunal had wrongly applied the so-called Zambrano principle (Ruiz Zambrano v Office National de l'Emploi (Case C-34/09)) by assuming that BK's primary carer was his maternal grandmother who had taken over his care when the appellant was imprisoned. Whilst that might have been a valid assumption if the appellant had been sentenced to a lengthy period of imprisonment, it was not an assumption that could be made where the sentence was twelve months in duration.

7. Following UTJ Storey's decision on 6 June 2013, the appeal was adjourned in order that an independent report from a social worker or other appropriate professional could be obtained on the issue of BK's best interests. On behalf of the appellant, a report of Angeline Seymour, an experienced approved social worker specialising in mental health work dated 20 September 2013 was filed with the Upper Tribunal.

8. The resumed hearing was listed before me on 7 October 2013 in order to remake the decision in respect of the application of the Zambrano principle and under Art 8 of the ECHR.

**The Submissions**

9. The parties' representatives made brief and succinct submissions before me.

10. Mr Duncan, on behalf of the appellant, relied upon the report of Angeline Seymour. He submitted that it established that the appellant was the primary carer of BK and so the Zambrano principle applied. He submitted that the Zambrano issue was intertwined with the Art 8 issue. He submitted that BK's grandmother was only his carer because the appellant had been in prison. On the basis of this report it was on BK's best interests to live with his father and the report showed that BK's grandmother would be unable to cope and her already existing health condition would deteriorate if BK continued to live with her. Mr Duncan acknowledged, when I put the point to him, that the Zambrano principle still required, even if it applied, to be considered in the context of proportionality. Both as regards EU law and Art 8, Mr Duncan succinctly submitted that the appellant's offence was not "the most serious" with a term of imprisonment of twelve months.

11. Mr Hibbs referred me to [66] and [67] of Ahmed [2013] UKUT 0089 (IAC) as setting out the Zambrano principle, namely that it only applied where the effect of the decision: "Would lead to a situation where a Union citizen child would have to leave the territory of the Union". Mr Hibbs submitted that Zambrano did not apply as BK could be looked after by his grandmother and would not be forced to leave the Union.

12. In relation to Art 8, Mr Hibbs submitted that the balance should be struck in favour of deportation. He submitted that the appellant was not living with his son. The social worker's report was silent on who was the primary carer and BK's grandmother was a suitable alternative. He pointed out that, even though the appellant was out of prison, he was not living with BK. Mr Hibbs relied upon the case of Omotunde [2011] UKUT 00247 (IAC) which, he submitted, was very similar on its facts. Mr Hibbs submitted that although the appellant had a low risk of offending, he had been convicted of a "very serious offence".

13. In reply, Mr Duncan submitted that the appellant was living close to his son and his son's grandmother in order to allow for a "seamless" transition. Mr Duncan submitted that the appellant was putting the interests of his son before himself so as not to harm BK should the case go against him. In relation to the offending, Mr Duncan submitted that it was wrong to characterise the appellant's offending as "very serious".

**Discussion**

14. A number of matters were resolved by the First-tier Tribunal and are now not challenged. First, the appellant cannot succeed in his international protection claim whether for asylum, humanitarian protection or under Arts 2 and 3 of the ECHR. Secondly, the First-tier Tribunal's finding that the appellant cannot meet the requirements of paras 398 and 399 of the Immigration Rules stands.

15. The crucial issues, as identified in the submissions made to me by both parties, are as follows. First, can the appellant rely on the Zambrano principle? Even if he can, the Tribunal recognised in Omotunde that the non-national parent's right of residence under EU law is not absolute. Rather, it is subject to the Community law principle of proportionality. There is no substantial difference between the human rights based assessment of proportionality under Art 8 of the ECHR and that required by EU law. Secondly, even if the appellant cannot rely upon the Zambrano principle, is it established that the appellant's deportation would breach Art 8 of the ECHR?

16. The Zambrano principle recognises that a non-national parent may have a right to reside under Art 20 TFEU where a decision would otherwise: "deprive [a child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union Citizen." [45]. That would arise, for example, where the effect of a decision would be to require or force the EU national child to leave the EU. In Harrison (Jamaica) v SSHD [2012] EWCA Civ 1736, the Court of Appeal concluded that the Zambrano principle only applied where the EU national child would be *de facto* compelled to leave. It was not engaged where the level of interference with the right to enjoy the status of EU citizenship was rendered less advantageous, beneficial or enjoyable alone.

17. In this appeal, the appellant was the primary carer for BK before he was convicted and sentenced to a twelve month period of imprisonment on 26 January 2012. The evidence before the First-tier Tribunal, and it is not doubted before me, was that the appellant's wife (BK's mother) had, in effect, abandoned him to live in North Africa after they separated in July 2009. She has subsequently married and spends the majority of her time there. It was not suggested before me that BK's mother was a potential future carer for BK.

18. Before me, the issue came down to whether BK's primary carer should be seen as his grandmother or his father. In stepping in to care for BK whilst the appellant was in prison, BK's grandmother took on a role which had previously been that of the appellant. She had only done this because the appellant had been imprisoned. Had he not been in prison, it is clear that the appellant would have carried on as BK's primary carer. The contrary has not been suggested. The evidence (referred to in the social worker's report) is that BK's grandmother had cared for BK's half-brother since he was about 2 and he was born in February 2003.

19. In determining whether the Zambrano principle is engaged, it is important in my judgment to consider the reality of BK's circumstances and his best interests.

20. As regards the former, and again this was not challenged by Mr Hibbs, the appellant has not taken on the role of primary carer (in the sense of having BK live with him) since he was released from prison because he does not want to risk any damage to BK if, in fact, he is deported. Consequently, he has left BK with BK's grandmother although he lives close by and he is seeking somewhere suitable for them to live together.

21. In my judgment, the separation of the appellant from BK was, necessarily, forced upon him by his imprisonment. He was and, in my judgment, would have remained, his primary carer. His decision not to do so on being released from prison is, in my view, borne of his concern for BK's best interests.

22. If one looks at what are BK's best interests, the report of Angeline Seymour is indicative. I will not set out the report in detail. Its contents were not challenged by Mr Hibbs. It clearly sets out a very close relationship between the appellant and BK. It also reports a very clear impact upon BK of being separated from his father. That separation caused distress and difficulties for BK. Since his father's release, BK's wellbeing has undoubtedly improved. Positive change has been noticed by his teacher in school over the last few months. His teacher describes BK as being "more confident in class" and "able to answer more questions" and to be "interacting more".

23. Angeline Seymour also deals (in section 7 of her report) with the effect upon BK's grandmother if the appellant is deported. BK's grandmother suffers from fibromyalgia and is registered disabled. Her house has been adapted and to assist her she has been provided with crutches to make mobility easier. She experiences fatigue, pain in her back, hips and shoulders as well as low mood. She is prescribed painkillers and other medication by her GP to manage her symptoms. BK's grandmother suffers from poor physical health which makes it difficult for her to play with her grandchildren. She also feels exhausted by her poor health and caring for her two young grandchildren and some days is unable to care for BK, for example during school holidays, and he goes to friends in Cardiff to give his grandmother a rest. The report also refers to a time, during the appellant's imprisonment, when BK's grandmother asked BK's mother to assist her and BK went to stay with his mother. It is not entirely clear, but this appears to have been somewhere in the UK. However, it is reported that BK did not settle at his mother's house and his grandmother was forced to collect him because he became inconsolable. As I have already indicated, it was not suggested that BK's mother is a suitable future primary carer because her principal home is in North Africa where she lives with her new husband and baby.

24. Angeline Seymour's report clearly establishes, in my judgment, the importance of the appellant to BK as his effective sole parent. Equally, the report expresses the opinion (with which I agree) that BK's grandmother could not be seen as a long-term carer for BK given her physical health. It is clear to me that BK's father is both his natural parent and the person with whom it is in his "best interests" to live. It is only circumstances (albeit of his own making) that have resulted in BK's father not being his primary carer. I quote, and rely upon, the concluding remarks of Angeline Seymour as follows:

> "Finally, in my experience as a mental health practitioner and on the basis of my assessment of the issues and problems this family have personally, if this situation is not resolved in a positive way, it would lead to deterioration in the wellbeing of [BK] both physically and psychologically. The overall emotional cost to this child and his future

> would be great. I am concerned that there is a real risk of this eventuality on the basis of what I have observed and what has been reported to me.
>
> I am of the opinion that the permanent removal of [the appellant] from the UK is likely to cause significant detriment to [BK] and also on the integrity of the family unit as a whole with lasting and damaging effects particularly on this child."

25. In my judgment, the Zambrano principle is engaged in this appeal. The effect of the appellant's deportation would be, in the light of BK's best interests and the physical condition of his grandmother, to force him to leave the EU in order to live with the appellant. That, he cannot be expected to do under EU law as he has a right of residence under EU law. Likewise, therefore, the appellant has a right of residence under EU law.

26. In Omotunde the Upper Tribunal accepted that in a deportation case where the Zambrano principle was engaged it was necessary to consider whether any interference with rights derived from Art 20 TFEU was proportionate. At [32], the Tribunal said this:

> "We would conclude (subject to any further guidance from the CJEU or the Court of Appeal) that any right of residence for the parent is not an absolute one but is subject the Community law principle of proportionality. We doubt whether there is a substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in ZH (Tanzania) and the approach required by Community law."

27. In Harrison, the Court of Appeal did not address the question of whether, if the Zambrano principle was applicable, Art 7 of the European Charter on Fundamental Rights was engaged and an assessment of proportionality had to be made. However, the Court of Appeal cast no doubt on the view expressed in Omotunde and, in my judgment, it is necessary for me to determine whether any interference with the Art 20 TFEU rights was proportionate. As the Tribunal indicated in Omotunde, I approach that issue in the same way as, and for convenience as part of, an assessment of Art 8.

28. Turning then to Art 8, I apply the five-stage approach set out by Lord Bingham in R (Razgar) v SSHD [2004] UKHL 28. First, is there family life enjoyed between the appellant and his son BK? There is no doubt that the appellant has a genuine and subsisting relationship with his son BK who is now 7 years of age. Until his imprisonment in December 2012, the appellant was the primary carer of BK. BK's mother and the appellant separated in 2009 and she moved to North Africa where she resides with her husband and new baby. I accept that the appellant remains the primary carer of BK although BK is currently looked after by his maternal grandmother, a situation necessitated by the appellant's imprisonment and continued, for the present, out of a concern to not harm BK's interests if the appellant is deported. I am satisfied that family life exists between the appellant and BK.

29. Secondly, would the appellant's deportation interfere with the enjoyment of his family life with BK? If the appellant were deported, BK would lose his primary carer and only parent who has any continuing involvement in his life. BK is a British

citizen and has a right derived from the TFEU to remain within the European Union. It would not be reasonable to require BK to return with the appellant to Iraq. Any continuing contact between BK and the appellant would, thereafter, only be by way of telephone, email contact or through the internet. Those methods of communication would not, in my judgment, be any real substitute for the presence of the appellant to act as BK's primary carer. Consequently, the appellant's deportation would interfere with the family life enjoyed between the appellant and BK such as to engage Art 8.1.

30. Thirdly, would any such interference be in accordance with the law? Subject to the appellant's deportation breaching Art 8, his deportation would be in accordance with the law, namely s.32 of the UK Borders Act 2007.

31. Fourthly, would any such interference be in pursuit of a legitimate aim? The answer is 'yes' because the appellant's deportation would be for the legitimate aim of the prevention of disorder or crime.

32. Fifthly, would the appellant's deportation be necessary in the sense of proportionate carrying out a fair balance between the right to respect for the family life of the appellant and BK and the legitimate aim of the prevention of disorder or crime? In carrying out the balancing exercise, I bear in mind the factors set out by the Strasbourg Court in Üner v Netherlands [2007] Imm AR 303 at [57] and [58]. I further bear in mind the public interest represented by the appellant's offending and the three facets of that, namely the risk of reoffending, the importance of deterring foreign nationals from committing serious crimes and the role of deportation as an expression of society's revulsion at serious crimes (see OH (Serbia) v SSHD [2008] EWCA Civ 694 at [15]) which retain their force in automatic deportation cases (see RU (Bangladesh) v SSHD [2011] EWCA Civ 651 and AM v SSHD [2012] EWCA Civ 1634). The public interest engaged in automatic deportation cases is an important and pressing factor in carrying out the balancing exercise required in assessing proportionality such that a "very strong claim" is required to outweigh it (see SS (Nigeria) v SSHD [2013] EWCA Civ 550 at [54] *per* Laws LJ)..

33. As regards the seriousness of the offence, Mr Hibbs' reliance upon Omotunde as a factually similar case is perhaps surprising given that the Upper Tribunal found a breach of Art 8 in Omotunde in a case where the fraudulent offending was probably more serious than in this appeal: the sentence was one of 2½ years imprisonment. Here, the appellant pleaded guilty to a number of serious offences involving fraud. The sentence was, in total, one of 12 months imprisonment. He has no other convictions. The pre-sentence report records that his risk of further offending is "low". Whilst this offence was undoubtedly serious, it did not fall into the category of offence involving serious intentional violence or sexual misconduct, or of importing or of dealing in class A drugs or trafficking people where deportation as a measure to deter others may have particular importance.

34. The appellant has been in the United Kingdom since February 2004. He has, as a consequence, been in the UK some nine years and eight months. The appellant has

never had leave to enter or remain. There is no suggestion that, since his release on licence earlier this year, the appellant has committed any further offences.

35. Turning to the family circumstances of the appellant. As I have noted above, the appellant was the primary carer of his son BK until his imprisonment in December 2012. That had arisen because following the separation of the appellant from his wife (BK's mother) in 2009, BK's mother moved to North Africa where she lives with her new husband and baby. During the appellant's imprisonment, out of necessity BK's maternal grandmother looked after BK. She continues to do so whilst the appellant's deportation issue is resolved. The appellant lives close to BK and the report of Angeline Seymour, Independent Social Worker to which I have referred above, establishes the closeness of the appellant's relationship with BK together with the positive effect the appellant has upon BK and the detrimental effect there is likely to be if the appellant and BK are separated. Given BK is a British citizen and, therefore, an EU national, it is not reasonable to expect BK to move to Iraq to live with the appellant (see Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)). As I have indicated above, having regard to the report of Angeline Seymour, I have concluded that it is in the best interests of BK that the appellant should live with him as his parent. In assessing proportionality, the "best interests" of BK are a primary consideration (see ZH (Tanzania) v SSHD [2011] UKSC 4). As Baroness Hale explained in ZH that does not mean that those interests must necessarily prevail. At [26] she said this:

> "This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first."

(See further HH v Deputy Prosecutor for the Italian Republic [2012] UKSC 25, especially at [9]-[15] *per* Baroness Hale.)

36. As I have already indicated, in practical terms BK is dependent upon the appellant for the exercise of his EU right of residence and that to deport the appellant will deprive BK of the effective exercise of that right of residence. These are very powerful factors weighing in the proportionality assessment against the public interest. Whilst I accept that the appellant has, himself, spent the majority of his life in Iraq and, disregarding the interests of BK, it could not be said to be unreasonable to expect him to live in Iraq.

37. Carrying out the balancing exercise, and giving due weight to the public interest represented by the appellant's offending, taking into account the "best interests" of BK as a primary consideration and that the deportation of the appellant will effectively end the family life between BK and his father, in all the circumstances I do not consider that the interference with the appellant's family life is justified by the public interest in this case. Deportation of the appellant would not be a

proportionate means of giving effect to the legitimate aim of the prevention of disorder and crime.

38. In reaching my decision, I note that the First-tier Tribunal found that the appellant could not satisfy the requirements of the Immigration Rules in paras 398 and 399. In particular, at para 116 the Tribunal stated that it was not established that there are "exceptional circumstances" that outweigh the public interest applying para 398(c). That finding is not formally challenged in this appeal. However, the issue of "exceptional circumstances" is in essence the issue of whether the appellant can establish a breach of Art 8 (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192). I also note that the Tribunal finding in para 116 is essentially unreasoned unless it relies upon the Tribunal's earlier assessment under Art 8 of the relevant factors in reaching a finding (set aside by UTJ Storey in this appeal) that the appellant's deportation would be proportionate. In reaching that assessment, for the reasons I have given, I come to a different conclusion to that of the First-tier Tribunal, particularly in the light of the Zambrano principle and BK's best interests clearly demonstrated in the report of Angeline Seymour which was not before the First-tier Tribunal when it reached its decision.

39. Consequently, I am satisfied that the appellant's deportation would breach Art 8 and also, on the basis of the Zambrano principle, would be a breach of the appellant's and BK's rights under EU law.

**Decision**

40. The decision of the First-tier Tribunal involved the making of an error of law in dismissing the appellant's appeal under Art 8 and EU law. That decision is set aside. I remake the decision allowing the appellant's appeal under Art 8 and EU law.

41. The First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under the Immigration Rules stands.

Signed

A Grubb
Judge of the Upper Tribunal