IAC-AH-CO-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01621/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 28th January 2015	**On 16th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS STELLA AMA OFORIWAA KUMI-BOAHENE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Khan, Counsel
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 25th January 1975. She is the mother of three children the eldest two of whom are German citizens and therefore EEA nationals. Their youngest sibling is a Ghanaian national. On 25th September 2012 the Appellant's legal representatives applied on her behalf for a residence card as a confirmation of a right to reside in the United Kingdom on the basis that she is a parent/carer of an EEA national child who claims to be exercising Treaty Rights as a self-sufficient person as defined in the EEA Regulations 2006.

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2. On 16th December 2013 the Secretary of State issued a reasons for refusal letter on the basis that the Secretary of State did not consider that the Appellant satisfied the derivative right of residence and it was decided to refuse to issue a derivative residence card with reference to Regulation 15A(2) of the Immigration (European Economic Area) Regulations 2006.

3. The Appellant appealed and the appeal came before First-tier Tribunal Judge Herwald sitting at Manchester on 2nd May 2014. In a determination promulgated on 28th August 2014 the Appellant's appeal was dismissed under the EEA Regulations but was allowed pursuant to Article 8 of the European Convention of Human Rights.

4. On 2nd September 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 18th November 2014 First-tier Tribunal Judge Kamara granted permission to appeal to the Secretary of State stating:

> "In an otherwise well reasoned determination the judge arguably erred in law in appearing to accept the claim that the Appellant's children could not be cared for by anyone else, were the Appellant to leave the United Kingdom, notwithstanding his earlier, comprehensive, negative credibility findings."

5. No Rule 24 response has been filed by the Appellant's representatives. For the purpose of continuity throughout these proceedings albeit that this is an appeal by the Secretary of State the Secretary of State is referred to herein as the Respondent and Ms Kumi-Boahene as the Appellant. The Appellant appears by her instructed Counsel Mr Khan. Mr Khan is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr McVeety.

Evidence

6. In order to get an understanding of the factual position in this matter it was agreed that factual evidence from the Appellant would be taken. The Appellant is a citizen of Ghana. She has three children Sena who is male and born on 2nd May 2007 and Sedynam, a girl born on 11th November 2008 are German. She too is German. Their father is Christian Jamiji a citizen of Germany. The Appellant advises she lost contact with the children's father in 2010. That statement does not sit comfortably with paragraph 11(b) of the First-tier Tribunal Judge's determination where, having heard the Appellant's evidence, the judge states that the Appellant left her German husband in 2010. It is accepted that the Appellant and Mr Jamiji never married.

7. The Appellant confirmed the oral testimony from the First-tier Tribunal to be found at paragraph 11(d) of her claim that as a result of a one night fling with a man called Max whose surname she does not know she became pregnant and gave birth to a third child, Sefakor, on 6th March 2012. It appears that Max was a Ghanaian citizen and that she has had no contact with him since. Sefakor is therefore a Ghanaian national.

8. The Appellant states that she lives on her own in her sister's house in Salford. Her sister is Mavis Asante. Her sister is a British citizen and works in Nigeria for an oil company where she has been for some three years. The Appellant's evidence is that Miss Asante owns her own property and comes back to the UK to visit twice a year. She states that only the Appellant and the three children live in Miss Asante's house. She does have assistance from her sister (Ewuasi) who also lives in Manchester. Ewuasi is a nurse who is married with three children. The Appellant advises that the household accounts where she is living are met by Miss Asante, the owner of the property. It is against that factual background that this appeal proceeds.

Submissions/Discretion

9. Mr McVeety indicates that the thrust of the Secretary of State's Grounds of Appeal are to be found in paragraph 4 of the grounds and that it is not necessary or appropriate to address Grounds 1 to 3. He submits that the Tribunal has erred in finding that removing the Appellant from the UK would cause the Appellant's children to leave the EU in line with the case law of *Zambrano*. He submits that the Tribunal has not considered whether or not the Appellant's children's father can care for them or if anyone else is able to especially since the Appellant has a sister who could do so. He points out that the Tribunal had found that the Appellant and her sister were not credible witnesses and had lied to the Tribunal and it was submitted that any evidence that they had given in regard to the Appellant's children's father and his and anyone else's ability to care for them in the Appellant's absence could not be relied upon. He submits that there is no evidence that the Appellant's children's father or anybody else could not care for the children in the Appellant's absence thus allowing them to remain in the EU and should the Appellant wish not to leave her children the choice would remain for her to choose for her children to relocate to Ghana with her and would be a choice for her to make as to whether her children leave the EU or not. He submits that the judge has looked solely at the position of the Appellant and has made a damning condemnation of her credibility. He points out that in the judge's findings he has found the Appellant has lied to the court and has made adverse findings of credibility. Therefore he submits that it is incumbent upon the Appellant to show that there is no other alternative carer for the children and that no evidence has been given as to the involvement of the children's father in their care.

10. Mr McVeety submits that having heard the evidence of the Appellant today that there are yet further contradictions to the evidence she provided to the First-tier Tribunal. He refers me firstly to paragraph 15(d) of Judge Herwald's determination. He points out that evidence was provided for the First-tier Tribunal that contradicted itself as to what Miss Asante did for a living namely that she was either a computer analyst or a human resource manager and now it is suggested that she works in the oil industry. He conceded that the above tasks could be undertaken within the oil industry but comments that yet a third version of employment for

Miss Asante is now suggested by the Appellant and that their still remains no documentary evidence whatsoever to support these contentions. Further he takes me to paragraph 15(i) where reference is made to someone else also living in Miss Asante's house and the lie that was told regarding same. He submits that this is now further compounded by the evidence of the Appellant which casts even further doubt on the credibility of her testimony.

11. Finally he takes me to paragraph 22 of Judge Herwald's determination. He submits that the test set out therein is not the appropriate test under *Zambrano* that it is not appropriate to consider whether someone else could care for the children but that he should consider whether there is a viable alternative for looking after the children pointing out the appeal is brought under Article 8 by the Secretary of State not under *Zambrano* and that if there is an alternative carer they could look after the children. He contends it is reasonable for submissions to be made by the Secretary of State pursuant to Article 8 and that the situation is quite simply one which the Appellant has created of her own doing and that it is open to her to return to Ghana with the children. He submits that the judge has not considered this alternative approach and therefore that there has been a material error of law in the decision of the First-tier Tribunal.

12. In response Mr Khan submits the judge has realised that only the Appellant is able to look after the children and that the judge has properly addressed the issue under Article 8 and concluded that the only person available to look after the children is the Appellant. He submits that the circumstances are exceptional and that all the children can do is remain with the mother and it would be unduly harsh to expect the children to go to Ghana pointing out that all children have been born here in the UK. He contends it would not be practical to expect the Appellant's sister Ewuasi to have care of the children bearing in mind that she has a full-time job and has three children of her own already. He asked me to find there is no material error of law in the decision of the First-tier Tribunal.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law

for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Case Law

15. It is appropriate to consider the relevant case law position. The effect *of Zambrano v Office of National De L'Emploi C-34/09 (ECJ)* is that any third country national family which includes at least one dependant minor child who is an EU citizen even if that child is the citizen of the state where the family lives is entitled to rely on the EU child's rights under Article 20 TFEU to a residence right in that state. Such right for a third country national family member is based on the principle that the dependant minor with EU citizenship might have to leave the territory of the union in order to accompany his or her parents if they were not allowed to reside and worked to support the child. The position was considered further in *Ahmed (Amos; Zambrano; Regulation 15A(3)(c) 2006 EEA Regulations) [2013] UKUT 89 (IAC).* The Tribunal held that the principles established by the Court of Justice in Zambrano have potential application even where the EEA national/union citizen child of a third country is not a national of the host member state and that the test in all cases is whether the adverse decision would require the child to leave the territory of the union.

16. In *DH (Jamaica) and Others v SSHD [2012] EWCA Civ 1736* the Court of Appeal said that the application of the *Zambrano* test required a focus on whether as a matter of reality the EU citizen would be obliged to give up residence in the EU if the non-EU national was removed. The right of residence, and the right to reside in the territory not a right to any particular quality of life or particular standard of living and only if that was effected to such an extent that it was likely to compel the EU citizen to leave would the principle apply.

17. In *Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)* the Tribunal held that where in the context of Article 8 one parent of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right) the removal of the other parent did not mean that either the child or the remaining parent would be required to leave thereby infringing *Zambrano* principles. The critical question is whether the child is dependent on the parent being removed for the exercise of his union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the union.

Findings

18. The above analysis of *Zambrano* and extended principles is highly relevant in this matter. It is however only given the most curt of discussion in the First-tier Tribunal Judge's determination. It is appropriate to note his findings.

> "... I considered that the ruling by the highest court in Europe, in the case of *Zambrano*, leaves the court with no choice but to allow the appeal. It is clear that were the mother to be excluded from this country, then technical EEA nationals could not remain here without her and would face informal exclusion from the EEA."

19. That is an accurate analysis of the law and is expanded upon and confirmed in the decisions referred to above. The two elder children are German citizens. They are consequently EU citizens and quite simply if the Appellant as the non-EU national was removed the judge found that the EU citizens i.e. the two elder children were obliged to give up their residence in the EU. On that basis the judge felt that he had no alternative but to allow the appeal.

20. The thrust of the Secretary of State's appeal is that the findings of adverse credibility was so great and have remained unchallenged in the Upper Tribunal by the Appellant's legal representatives that the Appellant has not discharged the burden of proof and that it should be assumed that someone else can support the children. The judge has looked in considerable detail at the family life. He has found that despite the fact that the Appellant has lied the core of the Appellant's case appears true in that this is an Appellant who is separated from her husband (for whatever reason), has no contact with him, and lives in her sister's house in the UK. It is not seriously contended that her other sister who has three children of her own and in full-time employment has the ability to look after these children. Judge Herwald in a damning determination has castigated the Appellant. It is difficult to imagine a case where a judge has felt so impotent to make the findings that he wanted and constrained by European law and that his view is that principles of natural justice are offended by allowing the Appellant's appeal. However he finds himself constrained by *Zambrano* principles to do so. I find nothing wrong in that analysis. He has described the case before him as a cynical manipulation of Rules pertaining to the EU and that the children could easily adapt to life in their African homeland but has felt constrained by the decisions of the European Court and subsequent endorsement in extensions of those decisions to find in the Appellant's favour.

21. *Zambrano* is now enshrined in paragraph 15A – a derivative right of residence – of the Immigration (EEA) Regulations 2006. This Regulation was inserted on 16th July 2012. Consequently I find that the judge was entitled to reach the decision that he did and that he gave full and due consideration to all the factors and the suggestion made by the Secretary of State based on the judge's credibility findings that the Appellant had not discharged the burden of proof under *Zambrano* and that it should be assumed that someone else can support the children is not sustainable. The judge gave very clear reasons as to why he reached his decision.

However the correct approach bearing in mind the embracing of *Zambrano* within the 2006 Regulations by amendment from July 2012 under the claim for a derivative right pursuant to paragraph 15A is to set aside the decision of the First-tier Tribunal and to remake the decision allowing the decision under the 2006 Regulations and not Article 8 of the European Convention of Human Rights. That approach was adopted in *Harrison v Secretary of State for the Home Department [2012] EWCA Civ 1736* and *Hines v London Borough of Lambeth [2014] EWCA Civ 660.* Those authorities apply the test applicable under Regulation 15A(4A)(c) and that it is necessary to consider in this instant case the effects upon the EU children to which the quality or standard of their lives would be impaired if their mother were required to leave. That answers the question whether the children would, as a matter of practicality, be unable to remain in the UK and this requires a consideration amongst other things of the impact which the removal of the primary carer would have on the child and the alternative care available for the child. Those were matters considered in some detail by the First-tier Tribunal Judge and ones which I consider sustainable. For all the above reasons therefore the decision is remade allowing the appeal under the 2006 EEA Regulations.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law in that the judge allowed the appeal under Article 8 rather than the Immigration (EEA) Regulations 2006. The decision is remade allowing the appeal under the 2006 Regulations.

No anonymity order is made.

Signed Date **15th April 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee award.

Signed Date **15th April 2015**

Deputy Upper Tribunal Judge D N Harris