IAC-CH- CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12994/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision and Reasons Promulgated**
On 29th April 2015	**On 13th May 2015**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AW
(ANONYMITY DIRECTION MAINTAINED)

Respondent

Representation:
For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: Mr E Haq, Legal Representative

DETERMINATION

1. This appeal is subject to an anonymity order made by the First-Tier Tribunal. Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. In this document I will refer to the parties in the style in which they appeared before the First-Tier Tribunal.

3. The appellant is a female citizen of Thailand, born 13 May 1974. The appellant had entered the United Kingdom some years ago with leave to enter and in August 2008 she applied for leave to remain as a dependent spouse which was granted. She then applied for leave under the "10 year rule" this was refused in May 2013 and on 22 August 2014, she sought leave to remain under the "Zambrano Ruling". The application was refused and she appealed that decision.

4. The appellant's appeal came before Judge of the First-Tier Tribunal Obhi sitting at Birmingham in September 2014. Both parties were represented (in the appellant's case by Mr Haq).

5. In a determination dated 18 September 2014, Judge Obhi found that the appellant could not succeed under the "Zambrano Ruling" (for the reasons set out in paragraph 21 of the determination). In summary the child through which the appellant claimed had a father in the United Kingdom and that father was available to care for the child if the appellant were required to leave the United Kingdom. Accordingly she did not come within the Zambrano principles. The judge went onto consider the effect of Section 55 of the Borders, Citizenship & Immigration Act 2009, but found (paragraph 22) that did not assist the appellant.

6. However the judge then (paragraph 23) having noted the appellant had not made a separate application under Article 8 but that such a claim had been raised in the grounds of appeal then, in a very brief paragraph, considered that the appellant succeeded under Appendix FM of the Immigration Rules. The appeal was accordingly allowed.

7. The Secretary of State sought leave to appeal. The grounds allege a misdirection in law, in that the judge failed to properly consider the requirements of Appendix FM and the assessment of the requirements have been incorrectly assessed. The appellant had not made any application under the rules to remain as the parent or partner. The decision of the Secretary of State to refuse leave under "Zambrano" did not result in a removal decision and that accordingly Article 8 rights were not to be interfered with.

8. In granting leave to appeal another judge of the First-Tier Tribunal gave the following as his reasons:

> "1. The Respondent seeks permission to appeal, in time, against the decision of First-Tier Tribunal Judge Obhi who, in a determination promulgated on 19th September 2014 allowed the Appellant's appeal against the Respondent's decision to refuse her application for an EEA derivative residence card as the primary carer of a British child.
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> 2. The Judge dismissed the Appellant's application for a derivative residence card but allowed the appeal under Appendix FM of the Immigration Rules on the basis that the Appellant was the parent of a British child.

> 3. The grounds maintain, inter alia, that the Judge's decision was flawed as the Appellant had not made any application under Appendix FM and that in any event the Appellant did not satisfy the requirements thereof.
>
> 4. The grounds are clearly arguable given that the Appellant had not made any application for leave to remain under Appendix FM.
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> 5. For these reasons both the grounds and the determination disclose arguable errors of law".

9. Hence the matter came before me in the Upper Tribunal. Mr Mills relied upon the grounds seeking leave. The procedure would be that if the Secretary of State sought to remove the appellant a decision would give rise to a claim (and subsequent appeal) under Article 8. In addition there had been no application under Appendix FM.

10. I raised with Mr Mills the effect of **JM (Liberia)** and the effect of **Ahmed (Amos; Zambrano; Regulation 15A(3)(c) 2006 EEA Regulations) 2013 UKUT 0089**.

11. Mr Mills indicated that the matter was uncertain, but it was clearly the case that no removal decision had been made or was imminent. It was open to the appellant to make application now in respect of being the parent of a child present in the United Kingdom.

12. In any event, Mr Mills referred to the inadequate reasoning contained in the judge's determination.

13. Mr Haq confirmed that no application had been made, but could be made. Mr Haq acknowledged the argument put forward in the grounds and that the decision of the judge had been inadequately reasoned.

14. At the end of the hearing I indicated that I found a material error of law and that I would set aside the decision and remake it.

15. Consideration under the rules require an application under the rules. No application had been made in this case. The judge had found against the appellant in respect of the substantive consideration under appeal. That decision remains unchallenged. The existence of the child's father precluded her succeeding under the Zambrano principles. The father could bring up the child should the appellant be removed. No removal decision had been taken and it was clear this was not imminent. Even though the appellant had raised human rights in the grounds of appeal, it was not open to the judge to consider her position against a background of removal. Indeed the grounds of appeal only touch briefly on the question of Article 8 ECHR.

16. Even if it had been appropriate for the judge to move on towards Article 8 consideration, the eight lines contained in paragraph 23 are not sufficiently reasoned and it is not possible to understand how the judge arrived at the conclusion that the appellant succeeded under Appendix

FM, and/or Article 8 ECHR. These failings amounted to an error of law, in that the judge misdirected himself. They are material to the outcome.

17. I take the view that in the circumstances of this case the true situation is made out in the grounds seeking leave. The decision that the appellant did not succeed under Zambrano has not been challenged by the appellant. There is no removal decision and no application has been made under the Immigration Rules. Accordingly the appellant cannot succeed.

18. I remake the decision dismissing the appellant's appeal.

Signed Date **8th May 2015**

Upper Tribunal Judge Poole