Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26594/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 September 2015	**On 25 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

ANILA CALLAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Kerr of Counsel
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant a citizen of Albania, born on 26 August 1988 appealed the respondent's decision dated 10 June 2014 to remove her from the United Kingdom.

2. The appellant's appeal against the respondent's decision was allowed by Judge M P W Harris in a decision promulgated on 8 March 2015. He found

the appellant was entitled to rely upon the respondent's policy "Immigration Directorate Instruction Family Migration: Appendix FM s.1.0. (b) dated 2014 at s.11.2.3. See [18] of the decision. He found the appellant satisfied paragraph EX.1(b) and succeeded under Appendix FM.

3. The grounds claim the judge misapplied the Immigration Directorate Instruction I have referred to above.

4. At [18] the judge made reference to the IDI on Family Migration dated November 2014 and found that the appellant was able to rely upon the IDI to assist in his interpretation of what was reasonable. See [22].

5. A consequence of that was that the judge found after application of the IDI that relocation for the appellant's children outside the United Kingdom would be unreasonable. See [24] of the decision.

6. The grounds claim that the judge relied upon the IDI out of context and in error. In quoting the IDI at [18] he was referring to a "**Zambrano**" type situation where the parent or primary carer would have to leave the EU and the child would be forced to leave the EU. The judge erred in failing to acknowledge that the IDI provided a number of instructions. It was only if there was no other parent or guardian or carer available to care for the child in the absence of the appellant that advice needed to be sought pending a **Zambrano** decision. See pages 52-54 of the IDI as follows:

> *"Where the applicant has made an application under the family and/or private life Immigration Rules, the application must:*
>
> *(a) be considered under those Immigration Rules first;*
>
> *(b) where the applicant falls for refusal, the decision maker must go on to consider whether there are any exceptional circumstances that would warrant a grant of leave to remain outside the Immigration Rules; and*
>
> *(c) where the applicant falls for refusal under the Immigration Rules and there are no exceptional circumstances, and where satisfactory evidence has been provided that all of the following criteria are met, the case must be referred to European Casework for review:*
>
> *(i) the child is under the age of 18; and*
>
> *(ii) the child is a British citizen; and*
>
> *(iii) the primary carer (care responsibilities and court orders are examples of evidence) of the child is a non-EEA national in the UK; and*
>
> *(iv) there is no other parent/guardian/carer upon whom the child is dependent or who could care for the child if the primary carer left the UK to go to a country outside the EU.*

*The originating decision maker should not issue a decision on the Immigration Rules' application whilst awaiting this **Zambrano** decision."*

7. The grounds claim the judge arguably failed to understand what the IDI was trying to achieve and misapplied the same. As a consequence he failed to adequately apply the Immigration Rules, notably EX.1.

8. Judge Colyer considered the permission to appeal. He found that it was arguable the judge erred by making a material misdirection as to the law in terms of the IDIs. It was arguable the judge failed to acknowledge that the IDI provided a number of instructions and failed to appreciate what the IDI was trying to achieve as a result of which he misapplied the IDI and failed to adequately apply the Immigration Rules, notably EX.1.

Submissions on Error of Law

9. Mr Kandola submitted that the judge treated the guidance at 11.2.3. "**Would it be unreasonable to expect a British citizen child to leave the UK?**" to be determinative of the appeal rather than it is simply a statement of the law in terms of **Zambrano**. Because both parents were present in the United Kingdom, 11.2.3. did not apply.

10. Mr Kerr submitted that the IDI gave a clear view as to when it was reasonable for a British citizen child to leave the United Kingdom. If there had been intended a discussion regarding other possible carers, the policy would have said so.

Conclusion on Error of Law

11. The Secretary of State's grounds argue that the judge misapplied the guidance because he failed to take into account the guidance in its entirety.

12. What the judge did was to carry out an analysis of the Immigration Rule E-LTRP.1.2., 276ADE and EX.1.(a). The judge found it would not be reasonable to expect the children to leave the UK. Mr Kandola submitted that the guidance provided for the judge to take into account the fact that the children's father could care for them if the appellant left the UK. That guidance is contained in 11.2.3. and is only operative in circumstances where the application has first been considered under the Immigration Rules and falls for refusal under the Immigration Rules. EX.1. carries no such qualification. The judge allowed the appeal under the Immigration Rules, in particular, under EX.1.(a)(ii). The judge also found in the alternative under EX.1.(b).

13. I find that if the guidance was seeking to discuss circumstances where another parent might be available to care for the children in the absence of an appellant, it would have said so.

14. The guidance at 11.2.3.(c)(iv) anticipates an EEA **Zambrano** decision and I bear in mind in that regard that arguably, Regulation 15A of the

Immigration (European Economic Area) Regulations 2006 anticipates a higher threshold, that is, 15A(4A)(c):

> "the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave."

That is a different test from that which the judge applied under EX.1.(a)(ii):

> "it would not be reasonable to expect the child to leave the UK."

15. The judge carried out a careful and comprehensive analysis of the family's circumstances set out against the requirements of the Immigration Rules. He took into account the fact that one child was aged 2 and the other was only a few weeks old as at the date of the hearing. Both children had British nationality. The judge took into account the relevant case law and the guidance. The judge bore in mind that British nationality did not automatically trump all other factors. He bore in mind the appellant's immigration history.

16. It might be that another judge would have come to a different conclusion but I do not accept that the judge erred in his analysis, findings or conclusion. In my view, the judge was entitled to reach the decision he made on the facts before him, for the reasons he gave.

17. In summary, I conclude that the decision does not contain a material error of law, such that the decision of the First-tier Tribunal should be set aside.

Notice of Decision

18. The decision of the First-tier Tribunal contains no error of law and shall stand.

No anonymity direction is made.

Signed Date 22 September 2015

Deputy Upper Tribunal Judge Peart