Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03548/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 23 June 2016	**On 26 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YVONNE AGENTINA WANJUZI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble (Senior Presenting Officer)
For the Respondent: Ms N Wilkins (counsel instructed under the public access scheme)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal allowing the appeal Yvonne Agentina Wanjuzi, a citizen of Uganda born 6 December 1982, against the immigration decision of 16 January 2015 made by the Secretary of State having refused her asylum claim

2. She entered the country as a visitor on 28 September 2012, claiming asylum on 20 August 2013. Her asylum claim had two elements. Firstly she had been an activist with Action for Change, for whom she attended demonstrations, handed out leaflets, visited villages and towns speaking with locals informing them about their rights. On 18 June 2012 she was arrested and detained following a demonstration at which Besigye, the former leader of Forum of Democratic Change regarding the campaign for freedom for work. On 22 August 2012 she protested against the Homosexuality and Transgender Bill, when the demonstration was broken up by tear gas; she was rounded up by the police, handcuffed and taken to a large room in Kitante, where she was detained for three days, the second day of which she was interrogated. Her parents and siblings remained in Mbale, Uganda.

3. The Secretary of State rejected her asylum claim, because she was only thought to know limited information about the organisation which was actually called Activists for Change and was vague as to its objectives and activities, and its blog did not mention using leaflets as a form of communication; her release from detention was inconsistent with the country evidence that the police treated the organisation as an illegal one; and her claim about her involvement in the August 2012 protect contained discrepancies. In any event, she would be able to find work on a return to Uganda where she had previously worked as a civil servant.

4. She had had a child, [R], born [ ] 2013, with a British citizen [DO], for whom she was the sole carer; her relationship with [DO] was over but he regularly saw the child.

5. She gave further information about her background in her witness statement. She had long known herself to be a Lesbian, but had kept it secret in Uganda save from a very close friend, particularly because her mother was a born-again Christian who considered homosexuality to be an abomination; her father was a politician who had signed the anti-homosexuality legislation. She had been suspended from school following a relationship with a girl called Mary. Her mother subsequently arranged a place for her at Bible School in Bristol in the United Kingdom to help her change her ways; she attended that from 2004-2006 before returning to Uganda.

6. Mathias Mpuuga had been the founder of A4C which she described as more of a movement than a party, and had intended to give examples of their activities at interview; the blog was not practical as a way of communicating with people in villages which might lack electricity. Besigye was a supporter rather than leader of A4C who had involved himself with the Walk to Work protests; she had been ushering on the door when arrested, and was warned that if she did not vote for the NRM at the elections she would suffer the consequences. During her August 2012 detention she was warned that if she demonstrated publicly against the government they would retaliate against their families; complaints would be ineffective as the police would deny having detained her. Her politics were closely related to her sexuality. She did not claim asylum on arrival as she feared arrest for using a false passport. She had not involved herself in political activities in this country and lacked access to the internet.

7. Her current partner [K] was a British citizen and openly lesbian. They had first met in 2004. She had met [DO] over this period, their relationship had been one of friendship originally but subsequently she had a child by him, after which he told her that he was married; this was before she claimed asylum. He had stopped communicating with her after she told him about her sexuality and [K]. They had not agreed on his access arrangements to see [R] though he wrote requesting contact, had supported his application for a passport, and visited them in Norwich occasionally. Her relationship with [K] had been suspended over the period of her pregnancy though they were once again seeing one another, and hoped to move in with [K] if allowed to remain here. She had not wanted to introduce the asylum dimension of her claim at interview.

8. In its decision of May 2015, the First-tier Tribunal found that her evidence as to her difficulties in Uganda could not be accepted because of her delay in claiming asylum, a step she had taken only once pregnant; she was intelligent, articulate and educated and her claim to have feared arrest for travelling on a false passport was not plausible given that she had arranged and paid for such a document to facilitate her travel to this country. This went to the heart of her case. It accepted that she was a supporter of A4c given that her account of its work, organisation and objectives were consistent. Her arrests were not accepted given they were not mentioned at the screening interview and her English fluency undermined her explanation that she had thought she was being asked about events in England. Additionally she had made no effort to promote the objectives of A4C in this country. She had revealed her asserted sexual identity too late for its genuineness to be accepted, only after her asylum interview and further representations made by her Solicitors in January 2015. She would only be at risk of serious harm if she publicly spoke out or gathered with others to discuss politics, which was unlikely given her lack of activities in this country.

9. [R] was at an age where his mother represented his whole life. His father saw him only infrequently though the Judge accepted that he would look after him if he remained in this country. Whilst he would lose the benefits of his British citizenship in Uganda this was not a trump card, particularly given the option was available of remaining here with his father which meant that the *Zambrano* principle was not in play; whilst it was in his best interests to stay with his mother here, this was finely balanced. Under Appendix FM the boy's departure for Uganda would not be unreasonable as he would have the benefit of any financial support from his father and the large family unit of his mother to support him in Uganda. The decision was not disproportionate outside the Rules as Ms Wanjuzi was in receipt of asylum support and could not show financial independence, she had established private life in this country on a precarious basis, and the child's departure would not be unreasonable.

10. This decision was set aside on 9 November 2015 and the matter was reheard; the appeal was allowed on 21 January 2016. The First-tier Tribunal (Judge Andrew) now found that the asylum claim was not made out. It did not accept that she was a lesbian or bisexual because of the lack of evidence of enduring contact between her and [K],

and because of a discrepancy as to whether she had stayed in touch with Mary in Uganda, and as it seemed unlikely that her mother would think the United Kingdom a safer environment for a young woman needing strict guidance than Uganda; furthermore [K] had previously sponsored a spouse application albeit in a relationship that she said had ended some years earlier, she herself having had a child. It accepted she was a member of A4C but given the lack of problems she faced following her release from detention and subsequently, it was not accepted that she would be in danger on a return; additionally her late asylum claim undermined her credibility.

11. As to her claim on Article 8 grounds, she had sole responsibility for [R]'s upbringing and the Home Office guidance was that it will usually be appropriate to grant leave to the primary carer where there was evidence of a genuine and subsisting relationship between parent and child, which was clearly established here. She did not fall within the categories which would defeat that application, as she did not have a very poor immigration history or any criminal history; accordingly her application succeeded applying the principles set out in cases such as *Sanade*, given that "on the evidence that is before me I must accept that Ms Wanjuzi is the primary carer for the child": she acknowledged the possibility that the father had some degree of contact with the boy.

12. The Secretary of State appealed on the grounds that

    (a) The Respondent's immigration history was very poor;
    (b) The analysis of her circumstances here was superficial and inadequate, having concentrated only on the child's nationality.

13. Permission to appeal was granted on 11 February 2016 by the First-tier Tribunal on the basis that no attention had been given to the Respondent's poor immigration history which featured use of a false passport to gain admission and maintaining a false asylum claim, which arguably meant that she would not have met the suitability requirements of the Immigration Rules.

14. A Rule 24 response provided argued that material considerations had been overlooked regarding the asylum claim (though this was not pressed before me at the hearing, Ms Wilkins indicating that she recognised the procedural obstacle to raising a cross-appeal without having made a prior application to the Upper Tribunal, and so I need say no more about it).

15. Mr Bramble submitted that the First-tier Tribunal had not adequately grappled with the suitability requirements under the Rules, and that the same considerations potentially adverse to Ms Wanjuzi were in play in relation to the public interest contra-indicating the recognition of *Zambrano* rights.

16. Ms Wilkins submitted that the only reasonable inference from the evidence was that there was no possibility that [R] could live with his father, who had formed an independent family unit that was not aware of his existence. The case law essentially holds that British citizenship is a trump card; in any event the First-tier Tribunal was

clearly aware of the poor immigration history in so far as Ms Wanjuzi had entered on a false document and pursued an unfounded asylum claim, and balanced these factors as public interest considerations. The Secretary of State had not seen any evidence that [R] was British at the date of the decision, and had not taken the point now sought to be raised before the First-tier Tribunal.

Findings and reasons

17. There are two grounds of appeal before me, one going to the adequacy of reasoning vis-á-vis the disposal of the appeal on Article 8 grounds outside the Immigration Rules, the other to the application of the *Zambrano* principle vis-á-vis a person with an immigration history such as that of the Respondent. No challenge has been made to the primary findings of fact below.

18. *Zambrano v Office National de l'Emploi (ONEm)* [2011] All E R (EC) 491 establishes that Article 20 of the Treaty on the Functioning of the European Union "is to be interpreted as meaning that it precludes a member state from refusing a third country national upon which his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen".

19. That principle has been now given expression in The Immigration (European Economic Area) Regulations 2006

> "**15A. Derivative right of residence**
> (1) A person ("P") who is not [an exempt person] 2 and who satisfies the criteria in paragraph (2), (3), (4) [, (4A)] 3 or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria. …
> (4A) P satisfies the criteria in this paragraph if—
> (a) P is the primary carer of a British citizen ("the relevant British citizen");
> (b) the relevant British citizen is residing in the United Kingdom; and
> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.
> (7) P is to be regarded as a "primary carer" of another person if
> (a) P is a direct relative or a legal guardian of that person; and
> (b) P—
> (i) is the person who has primary responsibility for that person's care;"

20. Hickinbottom J summarised the relevant principles for establishing when it might properly be said that "the relevant British citizen would be unable to reside in the UK or in another EEA State" in *Sanneh* [2013] EWHC 793 (Admin), emphasising the need for *compulsion*:

> "iv) Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; although (a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the a relevant ascendant relative, and hence the EU dependent citizen, to leave, and (b) such actions as removal or prevention of work may result in an interference with some other right, such as the right to respect for family life under article 8 of the European Convention on Human Rights."

21. Of critical importance, then, is the position of the British Citizen child. The First-tier Tribunal found that if his mother left the country, on balance of probabilities it would be likely that [R] would be required to relocate abroad too. The father's undisputed evidence is that he is not in a current relationship with her and is in fact married to another woman with whom he has his own family; he has stated that he would have to divorce her in order to take care of [R], and in the face of the inherent unlikelihood of that chain of events coming to pass, the First-tier Tribunal's conclusions as to the potential application of the *Zambrano* principle are wholly understandable. [R] would indeed be unable to reside in the UK (no other potential EEA state of residence has been identified in this case) if the immigration decision was to be implemented, and would thus be *compelled* to forgo the benefits of his nationality, which would be inconsistent with the *Zambrano* principle as expounded in *Sanneh*.

22. That leads onto the further question, which was the real focus of the argument before me, as to whether Ms Wanjuzi's immigration history was sufficiently poor to prevent the *Zambrano* principle availing her. I understand that the prevailing policy is found in The Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (August 2015):

> "**11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?**
> Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in *Zambrano* ...
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

23. The relationship between the public interest and the *Zambrano* principle does not so far appear to have been the subject of a decision of the Court of Justice of the European Union, though Advocate-General Szpunar delivered his opinion on the issue on 4 February 2016 in *Alfredo Rendón Marín v Administración del Estado* (Case C‑165/14), concluding that

> "It is, in principle, contrary to Article 20 TFEU for a Member State to expel from its territory to a non-member State a third-country national who is the parent of a child who is a national of that Member State and of whom the parent has sole care and custody, when to do so would deprive the child who is a citizen of the Union of genuine enjoyment of the substance of his or her rights as a citizen of the Union. Nevertheless, in exceptional circumstances, a Member State may adopt such a measure, provided that it:
> - observes the principle of proportionality and is based on the personal conduct of the foreign national, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and
> - is based on an imperative reason relating to public security."

24. The Opinion in *Marín* is of course not binding upon me as the Court's judgment is still awaited, but it is of interest in indicating that only a very significant threat to the public interest will suffice to trump a *Zambrano* right. That sets the bar very much higher than does the Home Office guidance, which countenances interference with EU citizenship rights based on a much lower threshold. It would be very difficult indeed to hold that Ms Wanjuzi poses a present threat to a fundamental societal interest given that her only immigration misdemeanours relate to her quest to enter and remain in this country, a difficulty which would be resolved by the grant of residence.

25. I shall determine the appeal on the basis agreed by the advocates before me, ie with reference to the published Home Office guidance. The First-tier Tribunal found that any misdemeanours in her past did not reach the threshold posited therein. I consider that finding to be a tenable one. Ms Wanjuzi's behaviour never fell foul of the criminal law, and so the only question was whether her use of a false passport and pursuit of an unfounded asylum claim amounted to "a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules".

26. I note that she did not rely on the false passport beyond her original entry to the United Kingdom (so her situation is to be contrasted to that stigmatised by the mandatory refusal reasons in the Rules that indicate the weight to be attributed to putting forward an application based on a false identity document), and, aside from making an exaggerated asylum claim which has failed on appeal, there has been no other incident such as to amount to a repeated breach of the Rules. Her asylum claim was not rejected as wholly fabricated: past detentions were described by the First-tier Tribunal as arising from her being in the wrong place at the wrong time. It might be said that the finding below was a generous one, but I cannot see that any relevant consideration was overlooked or that the conclusion was irrational.

27. I also note that this line of refusal does not appear to have been pressed by the Secretary of State at the two hearings in the First-tier Tribunal (it does not appear in any refusal letter, and Mr Bramble indicated that there was no sign on the Home Office file of distinct questioning or submissions on the issue below), meaning that there has been no detailed investigation as to the history of the Ms Wanjuzi's time in the United Kingdom in so far as she might be accused of repeatedly and deliberately breaching the Rules such as to pose a threat to the public interest. In these circumstances it seems to me that the relatively concise treatment of the issue below was understandable.

28. Accordingly, I do not consider that any error of law has been made out. The First-tier Tribunal was entitled to find that the Respondent's appeal fell to be allowed because otherwise the rights of a British citizen child would be unduly compromised.

Decision:

The decision of the First-tier Tribunal did not contain a material error of law.
The appeal is dismissed

Signed: Date: 25 July 2016
Deputy Upper Tribunal Judge Symes