Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01578/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th March, 2016	**On 29th April 2016**

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

X. C.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Ms Hannan, a Trainee Solicitor with Corbans Solicitors

DECISION AND REASONS

1. In this appeal the Secretary of State for the Home Department is the appellant and to avoid confusion I shall refer to her as being, "the claimant".

2. The respondent is a citizen of Jamaica who was born on 28th March, 1981.

3. On 22nd April, 2009 at the High Court in Edinburgh the respondent was convicted of two offences of being concerned in the supply of class A drugs (heroin and cocaine) contrary to Section 4 of the Misuse of Drugs Act 1971, for which she received a sentence of six years' imprisonment. Following the respondent's conviction, the claimant signed a deportation

© CROWN COPYRIGHT 2016

order against her on 19th August, 2011. The First-tier Tribunal dismissed the respondent's appeal in a determination promulgated on 17th October, 2011 and although the Upper Tribunal subsequently granted permission to appeal, it eventually dismissed her appeal in a determination promulgated on 27th September, 2012.

4. On 5th November, 2012 the respondent made further representations to the Secretary of State shortly before she was due to be removed and claimed asylum on the basis that she faced persecution and/or breaches of her Article 2 and 3 rights on her removal. On 8th November, 2012 the claimant rejected the respondent's representations and certified the asylum claim under Section 96 of the Nationality, Immigration and Asylum Act 2006.

5. Removal directions which had been set for 8th November, 2012, could not be enforced because of the respondent's behaviour. Further representations were made but, were rejected by the claimant on 19th November, 2012. On 26th November, 2012 the respondent made application for judicial review of the decision to refuse the asylum application and pending its resolution the claimant lifted her removal directions set for 14th December, 2012. On 13th February, 2013 the judicial review application was settled on the claimant agreeing to reconsider the respondent's case. On 22nd July, 2013 the Secretary of State maintained her decision and refused to revoke the deportation order.

6. The respondent appealed the decision of the Secretary of State to refuse to revoke the deportation order and her appeal was heard by the First-tier Tribunal on 6th March, 2015. In a decision dated 16th March, 2015 First-tier Tribunal Judge Fitzgibbon QC allowed the respondent's appeal. The claimant sought and was granted permission to appeal to the Upper Tribunal on the basis of three grounds of challenge. During the course of the hearing before me, Mr Wilding indicated that he only relied on the first and last challenge.

7. The respondent is a Jamaican national and the mother of X, a British citizen who was 13 years of age at the date of the hearing before First-tier Tribunal Judge Fitzgibbon QC. The grounds allege that the judge materially erred by impermissibly conflating the EEA Regulations with rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The judge purported to allow the appeal under the EEA Regulations. The judge further erred by failing to consider Regulation 21A of the EEA Regulations which permits the removal of a person notwithstanding that they have established a derivative right of residence.

8. The judge has considered and purported to apply *Essa (EEA: rehabilitation/integration)* [2013] UKUT 316 (IAC). The grounds point out the respondent is not an EEA citizen and suggests that the judge materially erred in giving weight to findings based upon consideration of *Essa*.

9. The grounds also suggest that the judge materially erred in applying *Sanade and Others (British children – Zambrano – Dereci)* [2012] UKUT 00048 (IAC). He treated the decision of *Sanade* as if it were binding on the issue and failed to have regard to the earlier decision of *Omotunde (best interests – Zambrano applied – Razgar) Nigeria* [2011] UKUT 00247 (IAC) and also failed to have regard to the opinion of Advocate General Sharpston in *Zambrano* in that derogations are possible depending on compliance with the EU principle of proportionality. The grounds go on to suggest that the judge erred by having failed to give adequate regard to the judgment of *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550 where Laws LJ said at paragraph 38:-

> "With respect there is [in *Sanade*] no acknowledgment of the free-standing importance of the legislative source of the policy as a driver of the decision-maker's margin of discretion when the proportionality of its application in a particular case is being considered."

Nothing in the Advocate General's opinion or the determination of CJEU suggests that *Zambrano* is a complete bar to deportation in any circumstances and for this reason the Secretary of State legislated in the 2006 Regulations to allow the non-recognition of the *Zambrano* right of residence where recognition would not be conducive to the public good.

10. Ground 3 was simply that the judge failed to give appropriate weight to the seriousness of the respondent's offending as reflected in the sentence of six years' imprisonment particularly where, as here, the appellant continues to deny factual guilt for the index offence.

The Hearing

11. Mr Wilding explained that the matter had previously come before me in January when it was adjourned, because at that stage the Tribunal had before it a supplemental bundle and letter which, unfortunately, neither representative had. He confirmed that a supplemental letter was written as a result of which he no longer relied on the second challenge.

12. In relation to ground 1 the decision in *Essa* and the question of the respondent's rehabilitation are only relevant where a respondent is a European national with a permanent right of residence and here he relied on the decision of *Secretary of State for the Home Department v Dumliauskas and Others* [2015] EWCA Civ 145 at paragraphs 43 and 44. First-tier Tribunal Judge Fitzgibbon QC was clearly wrong at paragraph 31 in considering the case of *Essa* and at paragraph 32 of the determination.

13. An acceptance that the respondent is the primary carer for her minor child was taken by the First-tier Tribunal Judge as determinative of the appeal. At paragraph 35 the judge said:-

> "35. I also take account of the UT's reeling in *Sanade* that 'Where a child ... is a British citizen and therefore a citizen of the European Union, it is not possible to require them to locate outside the European Union or to submit that it would be reasonable for them to do so.' The deportation of the appellant will have the effect of separating X from her mother for many years with no alternative carer available in the UK. That is impermissible."

14. Mr Wilding pointed out that Regulation 15A has now been incorporated within the Regulations and at Regulation 21A the Secretary of State is permitted, in principle, to deport the primary carer of an EEA national child, on policy grounds. The judge did not consider this.

15. The judge has given no consideration of the public interest in the deportation. The judge is impressed by evidence in the form of a letter from the respondent's offender manager but there clearly was a lack of findings.

16. Finally Mr Wilding told me that the European Court of Justice is currently considering a reference on the very point in the case of *S (Morocco)* DA/00146/2013. This is likely to be heard in May, he believed, and as a result in the event that I find an error of law he invited me to ensure that the matter is not listed for hearing until the decision of the European Court in *S (Morocco)* is known.

17. I invited the respondent's representative to address me. She told me that if I was satisfied that *Essa* had been wrongly applied then I should allow the appeal. I suggested that she might find it helpful to have a copy of the decision in *Essa* before her and I adjourned to enable her to obtain a copy. On resuming the hearing I again invited her to address me. She told me that the respondent was not prepared to agree that the judge erred by applying *Essa* because, there is nothing in *Essa* which indicates that it is a decision which does not apply to an EEA national. I pointed out to her that her submissions were not helpful and asked whether there was any other reason why she believed that the judge had not erred by applying a decision which clearly related to EEA nationals. She told me it was a matter for me and that if I thought there was an error I should allow the appeal. She maintained that the decision could be applied because the decision did not say that it was not applicable to people other than EEA nationals. She suggested that the appeal had been allowed under Article 8 ECHR.

18. Ms Hannan did not address me on any other matter despite the repeated invitations to her to do so.

19. Responding briefly on behalf of the claimant, Mr Wilding suggested that there was nothing in the decision of the Upper Tribunal which lent support for the concept in question applying to anyone other than an EEA national. Rehabilitation stems from the concept of integration of EEA nationals. The appeal needs to be considered again because the respondent needs to be considered through the prism of Regulation 21 because she is the sole carer of her daughter a British subject, but the concept of rehabilitation considered in *Essa* is the question of integration. The derivative rights under *Zambrano* have nothing at all to do with it. The judge has clearly conflated the rights under Article 8 and the rights under Regulation 21A. The appeal was not allowed under Article 8.

My Consideration of the Issues

20. It is clear to me from the headnote, that the Upper Tribunal's decision in *Essa* applies only to EEA nationals and since the respondent is not an EEA national the First-tier Tribunal Judge was wrong in considering it and the question of rehabilitation. I accept that the judge has materially erred by giving weight to the findings based upon his consideration of *Essa*. I also find that the judge has erred by holding that there can be no derogation from the principle in *Zambrano* and by treating *Sanade* as binding authority on this point. At paragraph 121 of the opinion in *Zambrano* the Advocate General said:-

> "I therefore conclude that Articles 20 and 21 TFEU are to be interpreted as conferring a right of residence in the territory of the member states, based on citizenship of the Union, that is independent of the right to move between member states. Those provisions do not preclude a member state from refusing to grant a derivative right of residence to an ascendant relative of a citizen of the Union who is a national of the member state concerned and who has not yet exercised rights of free movement, provided that the decision complies with the principle of proportionality. I believe that the use of the conduciveness test in the 2006 Regulations is compatible with that approach."

21. So far as the third challenge is concerned, the First-tier Tribunal Judge did record the fact that at her criminal trial the respondent gave evidence which the jury disbelieved and despite that, that the respondent maintains the same account and insists that she was not actually guilty of the drug dealing charges. Given this denial of factual guilt it is difficult to appreciate the basis on which the judge found that the appellant had taken her rehabilitation seriously. I do not believe that the judge erred in failing to give appropriate weight to the seriousness of the appellant's offending; this challenge appears to me to be a simple disagreement with the decision. The judge recognised that the respondent had committed very serious offences (see paragraph 32 of the determination) he was aware of the offences for which the claimant was sent to prison.

22. Nonetheless I am satisfied that the first challenge does disclose material errors of law on the part of the First-tier Tribunal Judge and I have concluded that given the need for clear and detailed findings that it is appropriate that I should remit the appeal for hearing afresh by the First-tier Tribunal. In doing so I direct that it should be heard by a judge other than First-tier Tribunal Judge Fitzgibbon QC, or First-tier Tribunal Judge J G Macdonald and the decision should not be listed until the CJEU has published its decision in *S (Morocco)* DA/00146/2013 which is expected in May 2016.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Chalkley