



IAC

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/08694/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 February 2016**

**Decision & Reasons Promulgated  
On 9 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS ANUM ATIF  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr P. Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr D. Brazini, Counsel, instructed by Oliver & Hasani Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the Ms Atif's appeal under the Immigration Rules. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make no anonymity order. No order was made by the First-tier Tribunal and there were no issues before me that might require such an order. Although the Secretary of State is the appellant before me, I refer to the parties as they were before the First-tier Tribunal.

## **Background**

2. The appellant is a citizen of Pakistan arrived in the United Kingdom on 20 August 2013 with entry clearance as the spouse of a tier 1 (post study work) migrant. Her application to vary her leave on the basis of her private and family life was refused on 19 February 2015 and a decision made to remove her by way of directions. The First-tier Tribunal heard her appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on 17 July 2015 and in a decision promulgated on 21 July 2015, Designated Judge of the First-tier Tribunal McCarthy allowed the appellant's appeal under paragraph EX.1 of Appendix FM.
3. The respondent appeals, with leave, on the basis that the Judge had found it unreasonable to expect the appellant's British Citizen child to return to Pakistan because the youngest child would be deprived of the ability to [be] breastfed. It was submitted that this approach was flawed as the ability for the child to be breastfed clearly does not rely on the child's presence in the UK. It was argued that there were no other factors identified by the First-tier Tribunal that would have led to a conclusion that to expect the child to return with his mother was not disproportionate.
4. Although Mr Duffy initially attempted to argue that the Judge was incorrect in his interpretation of Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09 [2011] Imm Ar 521 and relied on the Judge's finding that Ms Atif cannot meet the requirements of Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) (as her husband is an exempt person) he conceded that was not a ground of appeal before me.
5. Mr Duffy conceded that there was an error in the respondent's grounds of appeal in that it was argued there that the Judge had found that it was not unreasonable for the appellant's child to return to Pakistan with his mother and therefore breastfeeding could continue there. Mr Duffy was unable to point me to any such finding.
6. The Judge identified that as the appellant's second child is a British citizen and therefore the Judge had to consider under paragraph EX.1(a)(i)(cc) of Appendix FM, whether it would be reasonable to expect the child to leave the UK. The Judge identified three potential scenarios which he had to consider: the first was whether it was reasonable to expect the family group to return to Pakistan together; the second was for the child's father (who has indefinite leave to remain) to remain in the UK with his British citizen some whilst the appellant and her daughter return to Pakistan; and the third was for the family group to remain in the UK.
7. In relation to the first scenario the Judge considered the jurisprudence including of Ruiz Zambrano (above) and that it was not proportionate to expect a Union citizen child to give up their rights as a Union citizen, including the right to live within the EU, if 'such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching

to the status of European Union citizen'. As already stated the Judge noted (at [22]) that the appellant was not entitled to rely (nor had she appealed on that basis) on the derivative rights of residence provisions under the EEA Regulations.

8. However the Judge found at [21] that 'the expectation of removing the family en bloc would amount to the youngest child being deprived of his rights as a Union citizen'. Therefore relying on Ruiz Zambrano, as set out at [20] of his decision, it was clear that Judge found that it was not proportionate to expect the British citizen child to leave the UK. That was a finding open to him and the appellant's representative placed reliance on the Upper tribunal case of Sanade and others (British children - Zambrano- Dereci) [2012] UKUT 00048 (IAC) that it was not possible to require the family as a unit to relocate outside of the EU or to submit that it would be reasonable for them to do so.
9. Therefore, contrary to the submissions in the respondent's grounds, breastfeeding could not continue in Pakistan, as the Judge found that removal of the British citizen child would not be reasonable. Mr Duffy accepted that this was the case.
10. The Judge went on to consider the second scenario which was for the child to remain with his father in the UK but discounted this as the appellant was currently breastfeeding her son and the appellant's removal would bring this to an end. The Judge considered that it is necessary to balance the need to maintain effective immigration controls and to protect the economic wellbeing of the UK, which would outweigh the need to keep the family unit together because of the factors set out in MM (Lebanon) & Ors [2014] EWCA Civ. However the Judge found that such separation would bring breastfeeding to an end which would be contrary to the best interests of the youngest child and made the removal of the appellant disproportionate in all the circumstances. That was a finding properly open to the Judge. It is not a case of the best interests being considered as a 'trump card', contrary to ZH (Tanzania) [2011] UKSC 4 (paragraph 41) as the Judge properly considered the factors in favour of the appellant's removal.
11. Mr Duffy also conceded that in any event even if I was wrong and there had been an error, the respondent was unlikely to succeed on any remaking.
12. I am not satisfied that the decision of the First-tier Judge discloses any material error of law.

### **Notice of Decision**

The appeal is dismissed. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall stand.

No anonymity direction was sought or made.

Signed

Date: 4 February 2016

Deputy Upper Tribunal Judge Hutchinson