



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11585/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 May 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MS CHARITY NNODIOGU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms N. Parson, instructed by D.J. Webb & Co., Solicitors
For the respondent: Ms N. Willock-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who appeals against the determination of First-tier Tribunal Judge Bowler promulgated on 20 October 2017 dismissing her appeal against the decision of the Secretary of State to refuse her further leave to remain.
2. The appellant arrived in the United Kingdom in 2014. She has a son, born on 7 November 2014 in the United Kingdom. He is a British citizen.
3. The respondent's refusal letter noted that the appellant is the child's sole carer and that the child's father, the appellant's former partner has no contact with him.

4. The inevitable consequence of the respondent's decision is that the appellant will be removed and that, as his sole carer, her son (a British and European citizen) will be removed too.
5. It remains something of a mystery to me how these circumstances could have been overlooked by the decision maker, the Presenting Officer, the appellant's former solicitors or the First-tier Tribunal Judge. It is trite law that the decision of the Court of Justice in *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09 (8 March 2011) prevents this.
6. The appellant might have applied for a derivative residence card pursuant to Reg.15A of the Immigration (European Economic Area) Regulations 2006 (as amended) or now Reg.16(5) of the Immigration (European Economic Area) Regulations 2016. The Regulations and the Directive behind them are declaratory of the underlying right. The derivative residence card does not create the right but only acknowledges its existence.
7. The Secretary of State's policy (published 22 February 2018) now makes the position under the Rules clear.

Where the child is a British citizen it is not reasonable to expect them to leave the United Kingdom with the applicant parent or primary carer facing removal.

8. This is a re-statement of the law as it applied when the First-tier Tribunal reached its decision; not the creation of a new policy.
9. EX.1 applied.
10. The First-tier Tribunal Judge's decision that EX.1 did not apply was an error of law. At the time of the decision, the appellant's visit visa had expired and she was not a visitor.
11. None of the other reasons for refusal raised by the Secretary of State or in the determination can operate to disbar the appellant's entitlement as Ms Willock-Briscoe conceded.

DECISION

The Judge made an error on a point of law and I substitute a determination allowing the appeal on human rights grounds.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
12 June 2018