IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-005503
UI-2022-005504
First-tier Tribunal Nos: EA/05301/2020
EA/05302/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 June 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant

and

'DO' (Nigeria)
'MP' (Nigeria)
(ANONYMITY ORDER MADE)

Respondents

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the respondents, likely to lead members of the public to identify the respondents. Failure to comply with this order could amount to a contempt of court. The reason is that the second respondent is a minor and naming her mother, the first respondent, could result in 'jigsaw' identification.

Representation:
For the Claimant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondents: Mr A Slatter, instructed by Paul John & Co Solicitors

Heard at Field House on 4th May 2023

DECISION AND REASONS

Background

1. This is the Secretary of State's appeal. To avoid confusion, I refer to her by that title and to the respondents (who were the appellants before the First-tier Tribunal) as the claimants.

2. By a decision promulgated on 7th July 2021, a Judge of the First-tier Tribunal, Judge Bunting, allowed the claimants' appeals under the Immigration (EEA) Regulations 2016. The facts are uncontested. I repeat them as they were recorded by the judge.

3. The first claimant is a citizen of Nigeria, born on 13th July 1977. The second claimant, her daughter, and also a citizen of Nigeria, was born on 11th August 2015 and so is now aged seven at the date of this decision. They currently reside in the UK. They applied on 25th February 2020 for derivative residence cards, by virtue of the 'Zambrano' judgment (see Ruiz Zambrano v Office National de l'Emploi, case no. C34/09, [2012] QB 265). The Secretary of State refused the applications on 17th September 2020. The date of the applications is important because they were made before the 'exit date' for the UK leaving the EU (31st December 2020). The Secretary of State's decisions were not by reference to Appendices EU or EU (Family Permit) and there is no jurisdictional issue about whether the Judge could consider the appeals.

4. The first claimant had arrived in the UK on 30th August 2000 on a visit visa and had overstayed. She formed a relationship with a British citizen and gave birth to a daughter, whom I will refer to as 'G', on 5th October 2004. G, a British citizen, is the second claimant's half-sister. The first claimant is her primary carer. The first claimant and G's father subsequently separated and a number of years later, the first claimant began a relationship with a different man, a Nigerian citizen, and as a result of that relationship the second claimant was born. The first claimant and the father of the second claimant have also since separated.

5. The claimants applied for leave to remain on human rights grounds, outside the Immigration Rules, on 29th July 2016 which was granted, but their leave expired on 24th February 2020. The claimants then made the applications, which are the subject of this appeal. The Secretary of State refused them under regulation 16(5) the 2016 Regulations, not because any facts were disputed, but because they had been previously been granted leave on the basis of Article 8 ECHR, and that avenue remained open to them to obtain further leave.

The Judge's decision

6. The Judge considered an appeal under the 2016 Regulations. However, and also relevant to this appeal, the Judge considered that the Secretary of State had consented to a "new matter" being considered. At §28, the Judge stated:

> "For that reason, although I am considering only the question of the EEA appeal and not a freestanding article 8 appeal, I am permitted to look at the question of the claimants (and [G's]) article 8 rights to inform the proportionality of the EEA decision."

7. The Judge asked the parties whether the two appeals stood or fell together and both accepted that they did (§38).

8. Having cited regulation 16 of the 2016 Regulations, the Judge made relevant findings. In relation to G, she had had no contact with her father for a number of years. The first claimant was the sole (and therefore primary) carer for her (§43).

9. The Judge found that the second claimant is the daughter of the first claimant and lives predominantly with her, but does have contact with her third country national (Nigerian) father. This involves twice-weekly contact and occasional overnight stays with the claimants (but never at his home); some financial contributions by the father to the second claimant, and some input into her schooling.

10. At §47, the Judge concluded that the first claimant is the primary carer of the second claimant, but also that the second claimant's father was involved with the child's life, and if required there was "no reason why the second claimant could live with her father if her mother [the first claimant] were to leave the United Kingdom". The Secretary of State argues that the word "not" is missing after the word "could" in that paragraph.

11. The Judge then went on to analyse the legal principles, citing the judgment of the High Court in R (Akinsanya) v SSHD [2021] EWHC 1535 (Admin), which the Judge regarded as a "complete answer" to the Secretary of State's position (§48). The import of that case was not discussed further, although I should add, by way of context, that the Judge had earlier refused the Secretary of State's application to adjourn the hearing, which the Secretary of State had sought because R (Akinsanya) was being appealed, by saying at §22 that the claimants' circumstances were substantially different from the claimant in R (Akinsanya), as the claimants had no form of leave to remain. The issues in R (Akinsanya) had included whether limited leave to remain would extinguish a Zambrano right and the effect of the 2016 Regulations. Even if the Secretary of State were to successfully appeal, R (Akinsanya) would not mean that she would succeed in resisting this appeal.

12. Returning to the substance of the Judge's decision, having cited R (Akinsanya), as a complete answer, the Judge said at §50 that the claimants "are in a different position" as they do not have leave. For that reason, the Judge said that he would have agreed with the claimants' arguments even without R (Akinsanya) and even if any appeal against it had been allowed. The Judge observed that regulation 16 did not appear to place the restrictions on the exercise of the Zambrano rights as contended for by the Secretary of State. As per the authority of Chavez-Vilchez & Others v Raad van Bestuur van de Sociale Verbekeringsbank & Others [2017] 3 CMLR 35, Zambrano rights extended to where, as a practical matter of fact, the effect of refusal of leave would be that the EU national child would have to leave the EU with their third country national mother, as confirmed in Patel & Shah v SSHD [2019] UKSC 59. The Judge considered the Secretary of State's argument that because an application under Appendix FM or Article 8 could have been made and might succeed, it could not be said that G would be required to leave the EU. At §57 the Judge concluded that he did not consider there was anything in the Regulations or the domestic or EU case law that supported that contention.

13. The Judge concluded that in the first claimant's case, she was G's primary carer and if she were required to leave the UK, then G would be compelled to do so and therefore her claim succeeded without more (§60). The Judge concluded that the

position of the second claimant was different, on the basis that if the second claimant were compelled to leave, then G would not necessarily be compelled to do so but nevertheless the second claimant met the terms of regulation 16(6), by virtue of being under 18; her mother was entitled to a derivative right to reside; and the second claimant did not have any form of leave to remain. Moreover if the second claimant were required to leave, the first claimant would have to leave with her, as the second claimant was without any other support network outside the UK. The Judge concluded that the fact of contact with second claimant's father did not change the position and whilst he was involved in her life it could not be said that her claim was defeated under regulation 16(6)(d) (the first claimant would have to leave the UK if the second claimant did so for an indefinite period).

14. In the alternative, the Judge considered that if he were wrong in relation to the appeal under the 2016 Regulations, then the Secretary of State's decision must comply with the principles of proportionality, in light of the Secretary of State's consent to Article 8 being considered. The Judge concluded that the Secretary of State's refusals were disproportionate under "EU law" (§71). Notably, in the Notice of Decision, the Judge allowed the appeal under the 2016 Regulations and not by reference to Article 8.

The Secretary of State's Appeal

15. The Secretary of sought permission to appeal initially to the First-tier Tribunal, which was refused, and on renewal, to the Upper Tribunal. I mention both, because the initial grounds refer to five grounds, on which the renewed grounds then elaborate. Permission had eventually been granted on all grounds by Upper Tribunal Judge Rimington. In terms of the five grounds contained within the original grounds of appeal dated 21st July 2021, the Secretary of State says as follows.

16. Ground (1) is that the Judge had been contradictory, by stating, on the one hand, that the facts of R (Akinsanya) did not justify an adjournment application, while on the other, stating that it was a complete answer to the claimants' case.

17. Ground (2) is that R (Akinsanya) was wrongly decided (it has since been upheld by the Court of Appeal, albeit part of the High Court's reasoning was not approved - see Akinsanya v SSHD [2022] EWCA Civ 37).

18. Ground (3) is that the Judge erred in considering Article 8 as a new matter, by applying it to interpret regulations 16(5) and (6) of the 2016 Regulations. Ground (4) (connected) was in applying article 8 notions of proportionality to the 2016 Regulations.

19. Ground (5) argues that if the second claimant could live with her father, it was unclear how she could succeed under regulation 16(6). In renewing the grounds, the Secretary of State argued that while the Court of Appeal had upheld the High Court in R (Akinsanya), the Zambrano right was one of last resort, a concept expanded on by the Court of Appeal in Velaj v SSHD [2022] EWCA Civ 767. That concept was relevant to whether, if the first claimant were required to leave the UK, 'G' would be required to leave the UK. The renewed grounds add that article 8 ECHR had to be considered in the context that there was no proposed removal, nor was there likely to be.

The Claimants' Rule 24 Reply

20. The claimants contend that in relation to ground (1), there was no inconsistency. The only point that the Judge was making was that even if they had had limited leave to remain they would not have been 'exempt persons' within the meaning of regulation 16(7), as per the High Court decision in R (Akinsanya), which was the "complete answer," but their cases were not on all fours, in any event, so that there was no basis for adjourning the First-tier Tribunal hearing to await the Court of Appeal decision. The proposition relied on by the Secretary of State as surviving the Court of Appeal's rejection of her appeal was not identified. It was not clear how any proposition in R (Akinsanya) supported a submission that the Judge had erred in law.

21. Taking ground (5) out of order, the possibility of the second claimant remaining with her father had to be viewed in a different light, given the Court of Appeal decisions in Akinsanya and Velaj. However, notwithstanding that, the Judge had held that the second claimant met regulation 16(6). The Judge had considered that the child saw her father twice a week but did not stay with him and it was in that context that regulation 16(6)(d) was satisfied.

22. Grounds (3) and (4) were not material errors. Whilst it was accepted that importing a concept of article 8 proportionality was a misdirection, the decision and appeal had only been allowed under the 2016 Regulations. The Judge had not misapplied any proportionality concept at §§61 to 71 of his decision.

Discussion and conclusions

23. I do not recite each of the representatives' further submissions, except to explain why I have reached my decision.

24. At the outset, both representatives accepted that the facts of this case do not fall squarely within those of R (Akinsanya), where the primary carer of the British child had limited leave, but not indefinite leave to remain. In those circumstances, the question was therefore whether refusal under Appendix EU, on the basis of Zambrano rights was permissible, because the primary carer was an 'exempt person'. That question in turn required an interpretation of the 2016 Regulations (Annex 1 of Appendix EU cross-referred to the 2016 Regulations), in particular regulation 16(7) which excludes those who have indefinite leave to remain from benefitting from Zambrano rights. The 2016 Regulations went beyond the Zambrano principle and the Court accepted that as the wording of the 2016 Regulations was sufficiently clear, the 2016 Regulations could 'gold plate,' or go beyond EU rights. Ms Akinsanya did not have indefinite leave to remain, was the primary carer and therefore her claim was successful.

25. I have considered what principles may be taken from the Court of Appeal's decision in Akinsanya, which may be applicable here. The Court had rejected Ms Akinsanya's argument that Zambrano rights existed alongside other domestic rights (§55). However, it accepted the argument that such potential rights are waiting in the wings, and crystalise in the event that other rights are extinguished, provided that the effect of the carer leaving will be that the EU citizen child also has to do so (§57).

26. Returning to the facts of this appeal, Mr Deller argues that although the first claimant meets regulation 16(7) because she no longer has leave, she does not meet regulation 16(5)(c), as G would not be unable to live in the UK if the first claimant left the UK for an indefinite period. This is because, adopting the practical approach in Velaj, the first claimant would not leave. The facts of Velaj had involved two parents, one of whom had made clear that she would stay with the child whereas Mr Velaj, who resisted deportation, contended that the hypothetical scenario existed. He lost. If, as here, the first claimant could apply for leave to remain under the Immigration Rules separately then it followed, applying the practical approach, that she would not leave the UK. Bearing in mind the principle that Zambrano leave was a right of last resort, Mr Deller argues that the Judge erred in regarding Akinsanya as a "complete answer." The first claimant was not an exempt person (the Akinsanya question) but did not meet regulation 16(5)(c), applying Velaj. The importation of proportionality was a muddle, but the core focus was on the 2016 Regulations.

27. I agree with the principle that the consideration of whether 'G' would be unable to live in the UK if the first claimant left the UK for an indefinite period is a practical one, as per Velaj. However, I also accept Mr Slatter's submission that the Judge considered and applied such a practical consideration, at §§55 to to 58:

> "55. The Supreme Court's judgment in Patel & Shah v SSHD [2019] UKSC 59 confirmed that the test is whether, as a practical matter of fact, the Zambrano carer would be forced to leave the EU.
>
> 56. The argument put forward by the respondent is that because an application under Appendix FM or article 8 could be made (and might succeed), then it cannot be said that the appellants would be required to leave.
>
> 57. I do not consider that there is anything in the Regulations, or the domestic or European caselaw that supports that contention.
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> 58. There will be people who could succeed under both EU and domestic law, people who can succeed under neither and people who can succeed under one but not the other. However, Regulation 16 is clear, and there is nothing to indicate that it is limited to exclude people who could apply under the Immigration Rules."

28. In relation to the first claimant, she did not have leave and is G's primary carer. I accept Mr Slatter's submission that the Secretary of State's proposition, that all other avenues of leave to remain must have been exhausted before reliance is placed on regulation 16, is not supported by Akinsanya or Velaj. To impose such a requirement would require assessment of not only whether carers would apply, but whether such applications would be successful, which in many cases would be highly speculative. The test is whether, practically, the carer would leave the UK. It is no answer to say that they would not, because they have not exhausted all other avenues of staying in the UK. The Judge did not err in his application of regulation 16.

29. In addition, I accept Mr Slatter's submission that even though the Judge's self-direction, by importing the requirement of proportionality, was plainly wrong, that

was not material, as it did not affect the reasoning as outlined above and the Judge had not allowed any appeal under Article 8.

30. Turning to the second claimant and regulation 16(6), I regard it as tolerably clear that the meaning of §47 was the second claimant could not live with her father, who had only limited involvement with his daughter, but in any event, this is not the point. Regulation 16(6) requires consideration of what the first claimant would do if the second claimant had to leave the UK for an indefinite period. The Judge answered this at §64. If the second claimant were removed, that would in turn require the first claimant to leave, which would in turn result in G having to leave the UK. The chain of consequences was not, as Mr Deller suggests, a shortcut in the Judge's reasoning, but a sufficiently reasoned, practical assessment.

31. In the circumstances, whilst elements of the judgment could have been expressed more clearly ultimately I do not accept that the Judge materially erred in law such that his decision is unsafe and cannot stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law, such that his decision should be set aside.
The decision of the First-tier Tribunal stands.
The anonymity directions continue to apply.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1st June 2023