



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/02750/2013

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 14<sup>th</sup> October 2013

Determination Promulgated  
On 17<sup>th</sup> October 2013

Before

UPPER TRIBUNAL JUDGE REEDS

Between

TAHIRA KOUSAR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Khan, Counsel instructed on behalf of Parker Rhodes  
Hickmotts Solicitors  
For the Respondent: Mr Diwncyz, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of Pakistan born on 15<sup>th</sup> December 1976. She appeals with permission against the decision of the First-tier Tribunal (Judge Fisher) who in a determination promulgated on 31<sup>st</sup> July 2013 dismissed the Appellant's appeal

against the decision of the Respondent made on 4<sup>th</sup> December 2012 to refuse her admission to the United Kingdom as a family member of an EEA national.

### The Procedural Background to the Appeal

2. The Appellant is a national of Pakistan born on 15<sup>th</sup> December 1976. On 6<sup>th</sup> August 2009 she married Khalil Hussain, a British citizen born on 8<sup>th</sup> January 1974. In 2009 he was arrested for drugs offences. Prior to his court appearance, he fled to Pakistan where he decided to settle. In August 2009 he married the Appellant and their daughter, Sania was born on 22<sup>nd</sup> September 2010. Sania is a British citizen.
3. Mr Hussain returned to the United Kingdom on the grounds that he was unable to find work or provide for his family. He returned to the United Kingdom in January 2012. On 2<sup>nd</sup> July 2012 Mr Hussain was sentenced at Derby Crown Court to five years and seven months' imprisonment for criminal offences of possession with intent to supply and a concurrent sentence of twelve months for dangerous driving. He was also disqualified from driving for two years. It is common ground that he will be eligible for release on licence on 27<sup>th</sup> June 2014 and the sentence will expire (including the licence conditions) on 24<sup>th</sup> August 2017.
4. On 8<sup>th</sup> November 2012 the Appellant applied for admission into the United Kingdom as a family member of an EEA national. Whilst the form is signed 16<sup>th</sup> November it was made on 8<sup>th</sup> November. The application was refused by the Entry Clearance Officer in a notice of immigration decision dated 4<sup>th</sup> December 2012. The Grounds of Refusal state that the Appellant nor the child has ever lived or visited the United Kingdom and have given no valid reason why they believe the UK was the best place for the child. It was further asserted that the Appellant had resided in Pakistan for many months without her husband and would not have his support for several years due to his imprisonment. It was further said that the Appellant had a family support unit in Pakistan and it was her choice rather than necessity for wishing to live in the United Kingdom. Thus the Entry Clearance Officer was not satisfied that her right to family life would be affected by the decision to refuse her entry clearance. It was further refused on the basis that her husband living in the UK was not exercising treaty rights and was not economically viable as he was in prison. Thus the application was refused.
5. The Appellant sought permission to appeal that decision and the appeal came before the First-tier Tribunal (Judge Fisher) on 15<sup>th</sup> July 2013. In a determination promulgated on 31<sup>st</sup> July 2013 he considered the EEA Regulations and in particular Regulation 15A and the decision in **Zambrano v Office National de l'Emploi (ONEm) [2011] All ER (EC) 4**. He noted that the Appellant would satisfy the criteria for a derivative right of residence if she was the primary carer of a British citizen, the relevant British citizen is residing in the UK and would be unable to reside in the UK or in another EEA state if her carer were required to leave. The judge accepted that the Appellant was the primary carer of Sania her daughter but reached the conclusion that because her daughter was not residing in the United Kingdom she could not meet the Regulations (see paragraph 12 of the decision). He was also not

satisfied that she would be able to reside in the UK without her mother. Thus he dismissed the appeal under the EEA Regulations. He went on to consider the appeal under Article 8 but found that the decision was a proportionate one and not a breach of Article 8 for the reasons given at paragraphs 14 to 18.

6. Application for permission to appeal was made on 27<sup>th</sup> August 2013 on the grounds that the judge had erred in law by rejecting the Appellant's case under the Zambrano principles, that he had erred in law in his findings that the Appellant would be able to reside in the United Kingdom and his assessment under Article 8.
7. Permission to appeal that decision was granted by First-tier Tribunal (Judge Grant) on 9<sup>th</sup> September 2013.
8. On 23<sup>rd</sup> September 2013 the Secretary of State responded to the Grounds of Appeal under Rule 24. It was noted in that response that the Respondent did not oppose the application for permission to appeal and invited the Tribunal "to determine the appeal with a fresh oral (continuance) hearing." It was noted that the Secretary of State accepted that there was a material error of law in the First-tier Judge's approach to the case under the Zambrano principles. It was conceded that the Appellant can in principle rely on Zambrano even if the child has never lived within the EU.
9. Thus the appeal came before the Upper Tribunal. Ms Khan, Counsel appeared on behalf of the Appellant. Mr Diwncyz, Senior Presenting Officer appeared on behalf of the Secretary of State. It was agreed between the parties that in the light of the grounds as submitted on behalf of the Appellant in which the Respondent had accepted that there was an error of law that it was necessary to hear the evidence of the witnesses Zabina Akhtar and Mr Mohamed Salim. The Grounds of Appeal had made reference to the findings made in relation to Sania when the evidence had been unchallenged. Thus the Tribunal heard evidence from both of those witnesses. Ms Akhtar relied upon her statement (see pages 9 to 11 dated 3<sup>rd</sup> July 2013). In her oral evidence she confirmed that the Appellant was her maternal uncle's wife and that she had met the Appellant in 1986, 1993 and in 2013 when she visited Pakistan for a one month visit. During that visit she also met her daughter Sania as they stayed together for the duration of the visit. She confirmed that the Appellant and her daughter live on their own but have extended family around them.
10. In her statement at paragraph 2 she stated that the Appellant's daughter was "inseparable from her mother. She would not go to anyone but her mother. They were very close and Sania is extremely attached to her." She was asked in her evidence about that description. The witness said that Sania was "like a shadow, everywhere her mother went she followed her." Her mother could not even fill her plate without her being near her. She also described that Sania slept with her mother. She was asked during the visit whether or not she had tried to engage with Sania and she said that she had tried by taking her toys and a book but she was not prepared to interact with her. When asked why she was so attached to her mother, the witness could not give a reason other than to say that it is possible that she was close to her father and then her father disappeared leaving her only with her mother

and that may be a reason for the close attachment. When asked what would happen if separated from her mother, she said that she would “be traumatised and cry nonstop”. She said that her uncle Salim had gone annually and he had noticed a bond with her mother. She was asked if she would be able to care for Sania in the United Kingdom. The witness said that she could not as she worked full-time and that she had made a conscious decision not to have children and that her life was not ordered with that in mind. She said that her family lived in Huddersfield in Bradford and that it would be very difficult for her to look after Sania. As to other family members, she said she did not think there was anyone who could look after her; her uncle worked and her aunt had two grandchildren. She gave a description of the house by reference to the photographs at pages 6 and 7 noting the house was old, single storey and had not been cared for and was in a bad state of repair. She said she had seen that on her visit.

11. In relation to her own circumstances she confirmed that they had changed since her statement, that she still worked full-time but had taken on an additional job as a PA for BUPA with a gross income of £24,500. She estimated that her income per annum was £43,000 which was not dissimilar to what was at paragraph 4. She confirmed that she would still be willing to provide between £70 to £100 per week for the Appellant should she enter the United Kingdom.
12. In cross-examination she was asked about the house in Pakistan and it was put that the house was not that old and that it could be repaired. The witness agreed that it was feasible to repair it if there was money available. As to Sania’s father, in reference to the witness’s evidence that he would be able to obtain employment once he was released, it is put that as he had served a sentence for drugs offences he may find it difficult. The witness said that she would consider giving him financial support also. As to employment she explained that stigma in the community was not the same and that he has in the past had employment having worked for a tyre company in Bradford and that it is likely that he would be able to obtain employment. The evidence in relation to that was that he had been working at a tyre company in Bradford, Vertis Printing Firm and had done a brief stint with Thorntons; working both pre and post conviction.
13. The next witness was Mr Mohamed Salim. He had provided a letter in the Respondent’s bundle dated 29<sup>th</sup> October 2012. He adopted the contents of the letter. In addition he confirmed in his evidence-in-chief that he would not be charging the Appellant rent should entry clearance be granted and that they would live with the family. He said that he would not expect them to contribute to the bills. As to the Appellant’s husband’s work history he was asked if he knew of his previous employment. The witness then produced a number of payslips and P45s in relation to his past employment. Mr Diwncyz did not oppose this evidence. It consisted of a number of payslips from 2001 relating to Veritas (printing firm) and 2001 S&..... Limited. There were P45s for 2004 for Dove Valley Ashburn, 2007 and 2008.
14. In cross-examination he was asked if his situation was still the same as a letter and he confirmed that it was. As to the accommodation he described that he had a four

bedroom property and that there would be one bedroom still empty for the Appellant and Sania. He also said that he would be prepared to put up Khalil (the Appellant's husband) as he had in the past and he had stayed overnight on daily release visits from prison. He was then asked if he owned the house outright and he confirmed that he did. No further questions were asked.

15. At the conclusion of the evidence I heard submissions from each of the parties. Mr Diwncyz stated that having had the opportunity to cross-examine the witnesses and to hear their evidence, there was no reason to doubt the credibility of the parties; that Ms Akhtar was willing and able to provide financial support to the Appellant and her daughter and would extend it to the Appellant's husband upon release. He noted that the Appellant had also worked. He accepted that the evidence of Ms Akhtar in relation to Sania was also credible. Thus he accepted that the Appellant had satisfied the EEA Regulations in this case noting that the Appellant was Sania's primary carer, given her age and the attachment to her daughter.
16. Ms Khan relied on her skeleton argument noting that it was common ground that Sania's mother was her primary carer. It was now also accepted that the evidence demonstrated that there was an attachment to her mother that no-one else would be able to undertake in the United Kingdom. Her father being detained at least until the end of 2014 when the licence period began. It was accepted also that Ms Akhtar was a credible witness and that she was unable to care for Sania and that her evidence concerning this strong attachment between the Appellant and her daughter may be due to the circumstances of her father's disappearance. There were no other family relatives available and thus she satisfied Regulation 15A(iva.....).

## Conclusions

17. There is no dispute about the evidence in this case. It is common ground that the Appellant is the main carer of her daughter Sania. The previous evidence that was before the First-tier Tribunal also had not been challenged. Mr Diwncyz after having cross-examined both witnesses accepted that they were both credible witnesses and that the evidence demonstrated that there was a strong attachment between the Appellant and her daughter not only by reason of her age but of their relationship and that in those circumstances there was no other family member in the United Kingdom who would be able to care for Sania if she entered the United Kingdom.
18. As I say the evidence is accepted. The evidence of Ms Akhtar which was entirely credible paid regard to the relationship between the Appellant and her daughter. She had viewed the relationship herself during a month long visit and found that it was striking in the way that the child would not leave her mother. She described her as inseparable not only in terms of wishing to be with her which is entirely natural for a young child of that age but also that she slept with her mother and did not wish to interact with other adults. It is perhaps not surprising that she has her main and significant attachment to her mother given her tender years and that is the usual attachment in a child of that age. However a further reason was also posed by the witness namely that she had been close to her father and that he had suddenly

disappeared leaving only her mother. That may also provide a further explanation for the significant attachment that there appeared to be between the mother and daughter.

19. It is further accepted evidence that to expect Sania to exercise her rights as a British citizen by residing in the United Kingdom away from her mother would be likely to cause her harm and distress. Whilst there are other relatives living in the United Kingdom, it would not be reasonable to expect that they would be able to undertake the care of this child given her significant attachment to her mother. The evidence is that Ms Akhtar, who works full-time and has no children of her own would not be able to look after Sania given her own commitments. Mr Salim and his wife also have their own commitments including two grandchildren for whom they care and also Mr Salim is in employment. Even if it were feasible that such relatives would be able to care, that would fail to take into account the significant attachment between mother and daughter the breaking of which would lead to distress and harm.
20. There was also no dispute that Ms Akhtar is willing and available to provide financial assistance for the Appellant and Sania of between £70 to £100 per week. She had provided all of her financial documentation and this was accepted by the Respondent.
21. I turn to the law. EC Directive 2004/38/EC (“the Citizens Directive”) grants rights to EU citizens, and to any “family member” of such citizens (defined as a spouse or partner of the EU citizen, or direct minor and/or dependent descendant or direct dependent descendant relative of the EU citizen or his/her spouse or partner – but not a non-dependent ascendant relative). As a matter of domestic law, the Citizens Directive is given effect by the Immigration (European Economic Area) Regulations 2006 [SI 2006 No. 1003] (“the EEA Regulations”).
22. Article 20 of the Treaty on the Functioning of the European Union (“TFEU”) provides that every national of a member state should be a citizen of the EU, and shall have the right to move and reside freely within the territory of the member states.
23. Article 20 of the TFEU is in the following terms:
  - “1. Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
  2. Citizens of the Union shall enjoy the rights and subject to the duties provided for in the Treaties. They shall, inter alia:
    - (a) The right to move and reside freely within the territory of the member states;
    - (b) ...
    - (c) ...

(d) ...

These rights shall be exercised in accordance with the conditions and limits defined by the treaties and by the measures adopted thereunder.”

24. In **Ruiz Zambrano v The Office National de l’Emploi (ONEm) [2011] All ER (EC) 491**, the CJEU confirmed that Article 20 of the TFEU conferred the status of citizen of the union on every person holding the nationality of a member state.
25. The CJEU’s decision in **Zambrano** has been considered in a number of decisions of the CJEU: **McCarthy v the SSHD [2011] All ER (EC) 729**; **Dereci and Others v the Bundesministerium fur Innern [2012] All ER (EC) 373**; **O and S v Maahanmuuttovirasto [2012] EUECJ C-356/11 and C-356/12** and **Yoshikazu Iida v Stadt Ulm [2012] EUECJ C-40/11**; and by the Court of Appeal in **Harrison (Jamaica) and AB (Morocco) v the SSHD [2012] EWCA Civ 1736**.
26. In the decision of **Jamil Sanneh v (1) Secretary of State for Work and Pensions and (2) the Commissioners for Her Majesty’s Revenue and Customs [2013] EWHC 793 (Admin)** gave a summary of the decision in **Zambrano** and other decisions of the CJEU. In that decision it stated:-
- “(i) All nationals of all member states are EU citizens. It is for each member state to determine how nationality of that state may be acquired, but once it is acquired by an individual, that individual has the right to enjoy the substance of the rights that attach to the status of EU citizen, including the right to reside in the territory of the EU. That applies equally to minors, irrespective of the nationality of their parents, and irrespective of whether one or both parents have EU citizenship.
  - (ii) An EU citizen must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For a minor, that freedom may be jeopardised if, although legally entitled to reside in the EU, he is compelled to leave EU territory because an ascendant relative upon whom he is dependent is compelled to leave. That relative may be compelled to leave by dint of direct state action (e.g. he is the subject of an order for removal) or by virtue of being driven to leave and reside in a non-EU country by force of economic necessity (by having insufficient resources to provide for his EU child because the state refuses him a work permit). The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.
  - (iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen will be compelled to leave the EU to follow a non-EU national upon whom he is dependent.
  - (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 if 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 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 ECHR.

- (v) Although such Article 8 rights are similar in scope to the EU rights confirmed by Article 7 of the Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to member states only when they are implementing EU law. If EU law is not engaged, then the domestic courts have to undertake the examination of the right to family life under Article 8; but that is an entirely distinct area of protection.
- (vi) The overriding of the general national right to refuse a non-EU national a right to residence, by reference to the effective employment of the right to reside of a dependent EU citizen, is described in both Dereci (paragraph 67) and Harrison (paragraph 66) as 'exceptional', meaning as a principle, it will not be regularly engaged."

27. In the decision of the Upper Tribunal MA and SM (Zambrano): EU children outside EU (Iran) [2013] UKUT 000380 (IAC) stated this in the headnote of that decision:-

- "(i) In EU law terms there is no reason why the decision in Zambrano could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship.
- (ii) The above conclusion is fortified by the terms of the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (SI2012/2560), brought into force on 8<sup>th</sup> November 2012. Paragraphs 2 and 3 of the Schedule to the Regulations give effect to the CJEU's decision in Zambrano by amending Regulations 11 and 15A of the Immigration (EEA) Regulations 2006 in order to confer rights of entry and residence on the primary care of a British citizen who is joining the British citizen in, or accompanying the British citizen to the United Kingdom and where the denial of such a right of residence will prevent the British citizen from being able to reside in the United Kingdom or in an EEA state."

28. There is no dispute as to the law as set out above between the parties. In the light of the Regulations being amended to take account of the principles established by the case of Zambrano, the amendment to Regulation 11 (right of admission to the United Kingdom) now reads as follows:-

"Regulation 11 Rights of Admission to the United Kingdom

- [(5) A person ("P") meets the criteria in this paragraph where -



...

[(e) P is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and P would be entitled to reside in the United Kingdom pursuant to Regulation 15A(4A) were P and the British citizen both in the United Kingdom.]

29. Regulation 15 was also amended to include 15A derivative rights of residence. It is conceded on behalf of the Respondent that in the light of the evidence in this appeal that the Appellant meets the requirements of Regulation 11(5)(e) and thus meets the requirements of Regulation 15A(4A). The Appellant is Sania's primary carer and meets the definition of Regulation 15A(7)(a) as Sania's mother she is a direct relative and under 15A(7)(b)(i) she has the primary responsibility for Sania's care which she does not share with any other relative. Furthermore it is accepted evidence that in the light of the attachment between mother and daughter that there is no other family member able to care for Sania and in those circumstances the Appellant has demonstrated that she meets the EEA Regulations.

### **Decision**

30. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The decision is re-made as follows:- the appeal is allowed under the EEA Regulations.

Signed

Date

Upper Tribunal Judge Reeds