Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07282/2014
IA/07283/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 18 November 2014	**On 8 December 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Talent Gold Gabriel-Oluwatobi
Favour Eniola Gabriel-Oluwatobi
[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr S Iketubosin, instructed by Leslie Charles Solicitors
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, Talent Gold Gabriel-Oluwatobi, date of birth 24.4.77, and her daughter, Favour Eniola Gabriel-Oluwatobi, date of birth 4.1.04, are citizens of Nigeria.

2. This are their appeals against the determination of First-tier Tribunal Judge Pacey promulgated 13.6.14, dismissing their linked appeals against the decisions of the respondent to refuse their applications made on 4.10.13 for leave to remain in the UK on the basis of private and family life and to remove them from the UK pursuant to

section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 2.6.14.

3. First-tier Tribunal Judge Froom granted permission to appeal on 25.7.14.

4. Thus the matter came before me on 18.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Pacey should be set aside.

6. The relevant background to the appeal can be summarised as follows. The first appellant came to the UK as the dependant of a Tier 4 (General) Student in March 2011, with her children. Their leave was subsequently extended to 7.12.13. The first appellant gave birth to a child in relation to which her husband was not the father, leading to the breakdown of the relationship. She applied for leave to remain as the carer for her youngest son, Franklin, a British citizen. The other children were Nigerian nationals and it was asserted that they could not be expected to return to Nigeria without their mother or British half-sibling, reliance being placed on section 55 of the Borders, Citizenship and Immigration Act 2009, as well as on human rights.

7. On 7.3.14 it had been decided that there was no valid appeal for the first appellant's son Fortune and thus his case was not before the First-tier Tribunal. The appeal had been adjourned to allow the Secretary of State to consider making a removal decision for Fortune and to confirm whether Franklin was a British citizen. However, neither issue had been resolved by the date of the First-tier Tribunal appeal hearing before Judge Pacey, who proceeded on the basis that Franklin is a British citizen, his birth certificate and passport having been produced.

8. In summary, the First-tier Tribunal Judge found that the rules applicable in article 8 cases were not met. In particular, she found the first appellant had not established that she had sole responsibility for her youngest child, Franklin, who is a British citizen. She did not believe that his father had lost contact. She found Franklin could live with his mother in Nigeria, which was in his best interests. She found no exceptional or compelling circumstances to justify a grant of leave outside the Rules and, in any event, found the removal decision proportionate to the appellants' article 8 rights.

9. The grounds of application for permission to appeal take issue with the judge's findings on sole responsibility. In granting permission to appeal, Judge Froom found little merit in those grounds because it appears the judge considered the evidence and made a finding which it was open to her to make. "However, I grant permission to appeal because it is arguable the judge failed to grapple with the Zambrano issue, which was raised in the grounds of appeal. On the face of it, absent a finding that Franklin could live with his father, removing the first appellant would compel Franklin to leave as well, with the result that his freedom to reside in the EU would be jeopardised."

10. The Rule 24 response, dated 7.8.14, submits that whilst the judge did not mention the 'Zambrano issue' in her determination, "it is clear from the content that she is not satisfied that the main appellant has sole responsibility for the British citizen child and as such the child's father was in contact. It is accepted that no definitive findings were made on the Zambrano issue, but it will be submitted that given the findings the appellant's appeal cannot succeed."

11. In Gerado Ruiz Zambrano v Office national de l'emploi [2011] AER (D) 199, the refusal of residence to the two Colombian parents meant that their minor dependent children, who were Union citizens, would have to leave the territory of the Union in order to accompany their parents (not just the territory of the country in question). In those circumstances, those Union citizens would be unable to exercise the substance of the rights conferred on them by virtue of their status as Union citizens.

12. In DH (Jamaica) and others v SSHD [2012] EWCA Civ 1736 the Court of Appeal said that the application of the Zambrano test required a focus on whether, as a matter of reality, the EU citizen would be obliged to give up residence in the EU if the non-EU national was removed. If the EU citizen, be it wife or child, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there was nothing in the jurisprudence to suggest that EU law would be engaged simply because their continuing residence was in some sense affected, for example, in relation to the quality of life. The right of residence was a right to reside in the territory not a right to any particular quality of life or particular standard of living and only if that was affected to such an extent that it was likely to compel the EU citizen to leave would the principle apply.

13. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) the Tribunal held that where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.

14. It follows that the issue of sole responsibility was at the heart of the appeal before the First-tier Tribunal, both in relation to the Immigration Rules and the Zambrano principle. Under section E-LTRPT of Appendix FM, in order to qualify for leave to remain as the parent of a child, all the requirements of E-LTRPT 2.2 to 5.2 must be met. On the circumstances of this case, E-LTRPT 2.3(a) requires the first appellant to have sole responsibility for the child and E-LTRPT 2.4 requires her to provide evidence that she has sole responsibility.

15. Franklin is entitled to live and enjoy the rights of a British citizen. The Zambrano principle would be infringed if the removal of his mother, the first appellant, means that Franklin will be required to leave.

16. In relation to sole responsibility the judge rejected the evidence of the first appellant that Franklin's father had disappeared and did not have contact with him and no means of doing so and concluded at §17 that she did not have sole responsibility for the child. As did Judge Froom, I also find that conclusion was open to the judge on the evidence and for which she has given cogent reasons in the determination. It thus follows that the first appellant could not succeed under Appendix FM.

17. The judge went on to find, for good reason, that the first appellant cannot succeed under paragraph 276ADE of the Immigration Rules. Whilst it was not directly considered in the determination an application of 276ADE to the second appellant who had lived in the UK since 2011 could not have succeeded.

18. In relation to human rights, it is clear that from §20 the judge was considering the proportionality of the decision balancing on the one hand the legitimate and necessary aim of the state to protect the economic well-being of the UK through immigration control, and on the other the private and family life rights of the appellants, as well as that of Franklin and Fortune. At §22 the judge specifically addressed the best interests of Franklin as a British citizen.

19. I do not accept the submissions in the grounds of appeal that the conclusion that it would not be unreasonable to expect Franklin to accompany his mother to Nigeria is inconsistent or at odds with the earlier finding that she does not have sole responsibility for that child. The judge was considering different issues and the fact that it would be reasonable to expect the child to accompany her to Nigeria, does not mean that he is obliged to leave the UK. The question at this stage was the proportionality of the decision to remove the two appellants. That does not mean that it can never be reasonable to expect a British citizen child to accompany his mother and siblings to Nigeria.

20. The British citizenship of the child is not a trump card for the mother to play. If she does not have sole responsibility for Franklin, and there is contact with the father, it implies that there is another person, his father, available to care for him in the UK, so that the Zambrano principle is not infringed. Whether the child accompanies her or stays with his natural father is a matter for the parents to resolve, but the judge gave good reasons for concluding in the proportionality assessment that it would not be unreasonable to expect the appellants to return, together with the other children, to Nigeria. In reaching that conclusion the judge took into account and grappled with the competing interests, including the best interests of the child under section 55, and his rights as a British citizen, but noting the young age and obvious lack of integration in the UK. In the circumstances, the decision of the judge was one open to her and for which cogent reasons have been given.

21. I note in passing that it may be that the first appellant has a derivative right of residence under the Immigration (EEA) Regulations 2006, but that was not part of her application and not raised in any grounds of appeal.

Conclusions:

22. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed.

Signed: Date: 4 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 4 December 2014

Deputy Upper Tribunal Judge Pickup