



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

Appeal Number: IA/05600/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 March 2015**

**Decision & Reasons Promulgated
On 27 March 2015**

Before

**MR JUSTICE MALES
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**YETUNDE ANIKE SMITH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr J Siri, Counsel, instructed by Montas Solicitors

DECISION AND REASONS

1. On 5 September 2014 the First-tier Tribunal determined an appeal by Ms Yetunde Smith against the Secretary of State, in which the judge dismissed an appeal under the Immigration (European Economic Area) Regulations 2006 as amended (“the EEA Regulations”) but allowed the appeal on human rights grounds pursuant to Article 8 of the ECHR. That decision was the subject of an appeal to Deputy Upper Tribunal

Judge I A Lewis and on 9 January 2014 the decision was set aside for a material error of law. We now have to remake the decision.

2. Ms Smith was born on 12 October 1970 and is a citizen of Nigeria. Her evidence to the First-tier Tribunal was that she came to the United Kingdom in 2004 on her honeymoon with her husband on a visit visa but the relationship subsequently broke down. She returned to Nigeria and came back in 2007 with the intention of seeking employment in order to support her two children in Nigeria. She was arrested in 2007 and convicted of working here without permission. That resulted in a prison sentence of some five months.
3. She remained in the United Kingdom on her release and began a relationship with a man who is now the father of her 2½ year old son, Emmanuel. That relationship, she said, did not last and in fact the father left her before Emmanuel was even born, saying that he wanted nothing to do with her or the child. Despite that, he was registered as the father in due course and assisted with the registration. They also completed together a British passport application for Emmanuel. Ms Smith's evidence to the First-tier Tribunal was that was the last time she saw the father, that she no longer had his phone number and she had no idea where he was.
4. The First-tier Judge did not accept that evidence. He considered it significant that the father, Mr Adeyamo, had assisted with the registration of the birth over five months after it took place, which indicated some continuing contact. He considered that the fact of registration indicated at least that the father was prepared to have something to do with Ms Smith and their son. It was the doubt as to the extent of any such contact which led the First-tier Judge to refuse the appeal under Regulation 15A(4A)(a)-(c) of the EEA Regulations. He said that he was not satisfied to the necessary standard that, if Ms Smith had to leave, Emmanuel would be unable to reside in the United Kingdom or in another EEA country.
5. However, he found and the Secretary of State has accepted today that Ms Smith is the primary carer of Emmanuel who is a British citizen. He said that Ms Smith "is the person with primary responsibility for Emmanuel's care on the basis that she appears to take him to school, to the doctor and to church and that she deals with Lewisham Children's Social Care". He found also that Emmanuel, then aged 2½ and a British citizen born here, had spent his whole life here and had never been separated from his mother who took care of him. He attended pre-school and his mother wanted him to be brought up in the United Kingdom where he would have better opportunities than in Nigeria, whereas if he went to Nigeria he might well lose touch with his connection to this country of which he is a citizen.
6. On that basis the First-tier Tribunal Judge concluded, despite his decision under the EEA Regulations, that it was uncertain what contact there was with Emmanuel's British father. He was unable to say that there was no contact but he did not make

any finding as to the extent of any contact. He concluded on balance that it would be in Emmanuel's best interests to remain in the United Kingdom with his mother.

7. In the light of that finding he considered the question of proportionality under Article 8 and the position of Ms Smith, setting out the various factors which he had to weigh. Having done so, he concluded that the Secretary of State's decision was not proportionate when balanced against Emmanuel's interests which were a primary consideration. On that basis he found that the appeal succeeded under Article 8.
8. There has been no challenge to the determination that the requirements of Regulation 15A(4A) were not satisfied. This appeal has been concerned only with the position under Article 8. It is apparent and is realistically accepted by Mr Walker on behalf of the Secretary of State for whose assistance we are grateful, that in practical terms the choice is between sending both mother and child to Nigeria or allowing both to remain here. In circumstances where there are no findings as to contact with the father, it would not be realistic in our judgment to expect for the purpose of weighing up the position under Article 8 that it would be realistic or desirable for Emmanuel to live with his father.
9. In those circumstances Mr Walker accepted that Ms Smith is the primary carer for this young child; that as a British citizen he could not be removed from the United Kingdom; that pursuant to the Zambrano principle it would not be reasonable to require the child, as a citizen of the European Union to relocate outside the EU to Nigeria with his mother (Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC)); that any consideration of removal of the Appellant would therefore require to be premised on separation of mother and son; and that given those circumstances it is difficult to say that the judge reached the wrong conclusion under Article 8. That, as we have said, was realistic in the circumstances and on the findings made. Although there was some tension between the finding under the Regulation and the finding under Article 8 which gave rise to a lack of clarity (and hence an error of law) in the First-tier Tribunal decision, it is clear looking at the case overall in terms of Article 8 that the conclusion reached by the First-tier Judge was the right conclusion. That is so despite Ms Smith's poor immigration history and the public interest considerations identified in (the new) section 117B of the Nationality, Immigration & Asylum Act 2002.
10. Accordingly we remake the decision so as to allow Ms Smith's appeal under Article 8.
11. We understand that a new application has been made for a residence card under the Regulations which the Secretary of State has acknowledged by letter dated 23 February 2015. If Ms Smith wishes to pursue that application, it will have to take its course. That matter is not before us.

NOTICE OF DECISION

The appeal of Ms Smith is allowed on human rights grounds.

The appeal under the EEA Regulations remains dismissed.

No anonymity direction is sought or made.

Signed

Date 19 March 2015

Mr Justice Males

**TO THE RESPONDENT
FEE AWARD**

As we have allowed the appeal and because a fee has been paid, we have considered making a fee award and have decided to make no fee award. This is because the basis upon which the appeal has been allowed formed no part of the Appellant's original application.

Signed

Date 19 March 2015

Mr Justice Males