Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/17976/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th September 2015	**On 14th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Miss XIAOWEI YANG

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Aihe, of Wisestep, Immigration Specialists
For the Respondent: Mr C Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the appellant against the decision of First Tier Tribunal Judge Stokes promulgated on 11 February 2015 which dismissed the appellant's appeal against the respondent's decision of 7 April 2014 to refuse the appellant leave to enter the UK and to cancel existing leave.

Background

3. The appellant is a citizen of China and was born on 8 May 1985.

4. On 7 April 2014, the appellant arrived at London Heathrow Airport but was refused leave to enter. When she attempted to enter the UK, she had a visit visa valid from 24 March 2014 to 24 September 2014. The respondent cancelled the leave to enter confirmed by that visit visa.

The Judge's Decision

5. The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge Stokes ("the Judge") dismissed the appellant's appeal under the Immigration Rules and dismissed the appellant's appeal on Article 8 ECHR grounds.

6. Grounds of appeal were lodged and on 14 April 2015, First Tier Tribunal Judge Simpson granted permission to appeal, stating *inter alia*:

> "However, it is arguable that when discussing Article 8 issues the judge failed to consider the most recent relevant decisions ... even more surprisingly the only reference to **Ruiz Zambrano** in [54.2] suggests that it does not apply "since Mario is an adult British citizen" but the appellant's daughter is not an adult and as the child is a British "citizen" **Zambrano** does apply. It is also arguable that the judge has not given adequate consideration to whether there would be unjustifiably harsh consequences for the sponsor or their daughter if the appellant were to be removed."

The Hearing

7. For the appellant, Mr Aihe adopted the terms of the grounds of appeal and told me that the decision contains material errors in law and that the judge carried out an inadequate balancing exercise when assessing the proportionality of the respondent's decision in terms of Article 8 ECHR.

8. Mr Tarlow, for the respondent, relied on the respondent's Rule 24 response dated 23 April 2015 and argued that the decision does not contain a material error of law and that between [38] and [58], the judge carefully considered the circumstances of the child and discussed Article 8 case law before coming to a conclusion that he was entitled to reach. He argued that the appeal should be dismissed and the decision should stand.

Analysis

9. In granting permission to appeal, First Tier Tribunal Judge Simpson notes that the judge "…*failed to consider the most recent relevant decisions*" when considering Article 8. No appeal lies against the decision to dismiss the appeal under the Immigration rules. Even though the judge does not rehearse the cases of MM(Lebanon) and others 2014 EWCA Civ 985 & R (on the application of Ganesabalan [2014] EWHC 2712 (Admin) he does mention R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC)**.** It is clear that the process that he followed in reaching his decision took account of whether or not there were adequate grounds for considering the Article 8 ECHR rights of the appellant and her family out-with the Immigration

Rules. He then goes on to carry out a detailed analysis of the proportionality of the decision, weighing factors for and against the appellant.

10. It is, when considering those factors that the judge makes an error in law, which I find to be material.

11. At [54.2], the judge refers to the case of Ruis Zambrano but only in relation to the appellant's partner (who is a British citizen) and not to the appellant's daughter. The judge found that the appellant's daughter is a British citizen (at [39]) but did not go on to consider the impact of the respondent's decision on a British citizen child.

12. The failure of the First Tier Tribunal to adequately address the impact of the respondent's decision on a British citizen child constitutes a clear error of law. I consider this error to be material because had the Tribunal conducted this exercise, the outcome could have been different. That, in my view, is the correct test to apply. I therefore find that the judge's determination cannot stand and must be set aside.

13. Although I set aside the decision promulgated on 11 February 2015, I preserve the judge's findings in fact and proceed to remake the decision myself on the basis of those findings in fact.

14. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that "*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child".*

15. In AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88 it was held that there was no error where significant weight had been accorded to the Claimant child's British nationality because nationality was not a trump card. It was necessary to take account of the whole circumstances which included the availability to the child of family life with parents in one of their countries of origin, and the extent to which the Claimant's immigration history involved dishonesty. In AF v SSHD 2013 CSIH 88 it was re-iterated that nationality is not a trump card and the tribunal is required to take into account the full circumstances.

16. The impact of the respondent's decision would tear this family apart. Either the appellant will be separated from her young daughter or partner, or the appellant will take her daughter with her to China and be separated from her partner. In either alternative, some degree of separation will be forced on this family.

17. The third alternative is that the appellant goes to China and that her daughter & her partner, Mario (the appellant's daughter's father) follow her to China. I have to consider whether it is in the public interest for two British citizens to be forced to leave the UK in order to continue established family life.

18. The respondent's own guidance states (numbered paragraph 13) "*save in cases involving criminality, it will not be possible to take a decision in relation*

to the parent of a British citizen child where the effect of that decision would be to force the British citizen child to leave the EU – This is consistent with the ECJ judgement in Zambrano".

19. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) the Tribunal held that Case C-34/09 Ruiz Zambrano , BAILII: [2011] EUECJ C-34/09 "*now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so*".

20. I remind myself of the terms of Section 55 of the Borders, Citizenship and Immigration Act 2009 and the dicta in the cases of **Zambrano, Sanade** and **ZH (Tanzania).** The effect of implementation of the respondent's decision would be to remove the appellant from family, both of whom are British Citizens.

21. The appellant might be able to make an application to re-enter the UK from abroad. There is no guarantee that the appellant would be granted entry clearance when he applies to re-enter the country from abroad. The respondent's decision would separate the appellant from her daughter, who is only 15 months old. The respondent's decision will force separation on the appellant & her partner.

22. In EB (Kosovo) (FC) v SSHD 2008 UKHL 41 the House of Lords said the Tribunal should "*recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal or if the effect of the order is to sever a genuine and subsisting relationship between parent and child".*

23. In Chikwamba (FC) v SSHD 2008 UKHL 40 the House of Lords said that in deciding whether the general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "*comparatively rarely, certainly in family cases involving children*" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

24. In Beoku-Betts (FC) v SSHD 2008 UKHL 38 the House of Lords accepted that the Tribunal is concerned with the effect of the decision on all members of the family. I consider not just the interests of the appellant, but the interests of the appellant's partner and their daughter. I weigh those interests against the need for the respondent to preserve fair and effective immigration control and to keep a watchful eye on the fragile economy of this country. When I consider

the interests of an infant and the appellant's partner, and when I find that there is no reason why two British citizens should be forced out of the UK, I can only come to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for family life, not just for the appellant, but for his partner and their son.

25. I therefore find that Article 8 is engaged. The right of the appellant and her young family for respect to their family life in terms of Article 8 would be breached in a disproportionate manner by the implementation of the respondent's decision.

Decision

26. The making of the decision of the First-tier tribunal is tainted by a material error on a point of law in relation to Article 8.

27. I set aside the decision. I substitute the following decision.

28. I dismiss the appeal under the Rules; **the decision of the First-tier tribunal in that regard stands.**

29. I allow the appeal under Article 8 of the ECHR.

Signed Date

Deputy Upper Tribunal Judge Doyle