IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20181/2014
IA/20184/2014
& IA/20187/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 May 2015 and 9 November 2015	**On 14 December 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS MAYRA ELIZABETH CANIZARES RUIZ
MR FREDY RAMIRO LUDENA NARVAEZ
CLC
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr René, Counsel instructed by Thoree & Co Solicitors
For the Respondent:	Mr Whitwell, Home Office Presenting Officer (8/5/15)
	Ms A Holmes, Home Office Presenting Officer (9/11/15)

DECISION AND REASONS

1. The first and second appellants are the parents of the third appellant. All are citizens of Ecuador. They appeal with permission against the determination of First-tier

Tribunal Judge Jackson promulgated on 15 January 2015 in which he dismissed their appeals against the decisions of the respondent made on 15 April 2014 to refuse to grant them leave to remain in the United Kingdom under Appendix FM and paragraph 276ADE of the Immigration Rules. Subsequent to the decisions of 15 April 2014, the older child of the first two appellants was registered as a British citizen. His appeal was therefore deemed to be abandoned.

2. The first appellant entered the United Kingdom clandestinely on 12 February 2001; the second appellant had entered in a similar fashion, somewhat earlier on 21 December 1999. They remained in the United Kingdom since that date and their two children were born here, J in 2004 and C in 2007. On 29 September 2008 the second appellant applied for indefinite leave to remain in the United Kingdom outside the Immigration Rules. The other appellants (and J) were added as dependants. That application was refused and the appeal against that decision was dismissed. On 27 February 2013 the first appellant applied for further leave to remain pursuant to Article 8 of the Human Rights Convention listing his wife and children as dependants. That application was refused without a right of appeal but on reconsideration, a decision giving a right of appeal was made on 15 April 2014. It is against that decision that the appeals to the First-tier Tribunal were brought.

3. In summary, the respondent concluded that the first and second appellants were not entitled to remain under the partner route or the parent route of Appendix FM as neither was present lawfully and neither was entitled to leave under the parent route as paragraph EX.1 did not apply (as at the date of decision), neither was the parent or carer of a child who is a British citizen or settled in the United Kingdom. The respondent also concluded none of the appellants were entitled to leave pursuant to paragraph 276ADE, the respondent concluding that they did not fall within the relevant age limits and had not shown that they had lost ties to their home country. The respondent also concluded that their children would be able to adapt to life in Ecuador and it would be reasonable for them to return as a family unit. Further, having had regard to Section 55 of the Borders, Citizenship and Immigration Act 2009, she considered that whilst there might be a degree of disruption to their private lives, it was proportionate to the aim of maintaining effective immigration control and is in accordance with the duty pursuant to Section 55 and thus a grant of leave outside the Rules was not appropriate.

4. At the appeal before First-tier Tribunal Judge Jackson on 1 December 2014 the appellants were represented by Mr P Thoree, Solicitor; the respondent was represented by Mr S Vaghela, Presenting Officer.

5. Judge Jackson found that:-

   (i) Paragraph R-LTRPT.1.1(d) required as a condition of obtaining leave as a parent, a person to satisfy paragraph E-LTRPT.2.3 in addition to paragraph EX.1. As paragraph ELTRP.2.3 require the person to have sole responsibility for a British citizen or settled child, as the care of the children is shared between them, they could not meet this requirement even if paragraph EX.1 was met.

(ii) The Secretary of State did not undertake anything more than a cursory assessment of the children's best interests [48] which was not, in light of **TO and Others (section 55 duty) Nigeria** [2014] UKUT 00517 (IAC) sufficient to meet the duty upon her to do so but that it was not appropriate to allow the appeal outright as an assessment of the Immigration Rules was required to determine the appeal and the First-tier Tribunal was able to undertake the assessment of best interests;

(iii) It was in C's best interest to remain with her parents and within the family unit and, if all else was equal (which it was not), it would be in her best interests to continue her education in the United Kingdom [50];

(iv) The best interests of C were a primary but not a paramount consideration [51] and that although not culpable for her parents' actions neither she nor her parents nor until recently her brother had any right to remain in the United Kingdom and when the previous application and appeal failed they did not comply with the findings and return to Ecuador [51];

(v) There were no significant factors in C's circumstances such that it would not be reasonable for her to return to Ecuador with her parents [52] and it would not be unreasonable to expect C to leave the United Kingdom.

(vi) The first and second appellants had not shown that they had no ties remaining in Ecuador [53] or that there would be very significant obstacles to their integration back into Ecuador [54];

(vii) Although there was family life between the appellants there was no family life beyond that [56] and that although the first and second appellants had established some degree of private life in the United Kingdom [57] it is relatively limited and there is no element of it which could be maintained from Ecuador or could be re-established and enjoyed from there [57];

(viii) The appellants' removal to Ecuador would not amount to an interference with their family life as they would be removed as a unit [58] there being no evidence that J could or would stay behind in the United Kingdom; although a British citizen, it was reasonable for him to go with them [58]; that he would effectively be required to leave the United Kingdom and go to Ecuador, such that he would not be able to enjoy the benefit of British citizenship at least until age where he may wish to live here independently [59].

(ix) J's best interests are in remaining in the United Kingdom and to be able to benefit from the advantages of British citizenship [60].

6. The appellant sought permission to appeal on the grounds that:-

(i) the refusal of the respondent to grant leave to remain in the United Kingdom is contrary to her duty pursuant to Section 55 of the 2009 Act and Article 8 of the Human Rights Convention [18];

(ii) having found [48] and that as the Tribunal emphasised in **TO and Others**, that the best interests of the child must be considered first it being apparent that the judge had not done so [25];

(iii) the judge made a clear error of law when not considering the children's best interests as paramount in line with **ZH (Tanzania) v SSHD** [2011] UKSC 4 and misapplied the principles set out in **EV (Philippines)** [2014] EWCA Civ 874;

(iv) the judge had put the appellants' British citizen child in this position to have to choose between furthering his education and life in the United Kingdom thus enjoying his right as a British citizen to which he is clearly entitled or being with his family; this is not permissible;

(v) the judge erred in concluding that there would be no breach of family life given that the decision to remove the other family members is an interference with the appellant's right to family life and in failing to have proper regard to his rights as a British citizen.

7. On 3 March 2015 First-tier Tribunal Judge Colyer granted permission including that it was arguable that the judge failed to give due consideration to the issue of proportionality and Section 55 of the 2009 Act insofar as it applies to safeguarding the third appellant's welfare as a paramount consideration [6]; that the judge erred in concluding that the children's best interests were not paramount [7]; and that the judge's decision, in effect putting J in a position to choose between furthering his education and life and enjoying rights as a British citizen to which he is clearly entitled or being with his family were not acting in the child's best interest [9].

Hearing on 8 May 2015

8. Mr Rene submitted that the First-tier Tribunal Judge had, although directing himself in line with **EV (Philippines)**, erred in respect to his application of the principles in his findings at in what he had said with regard to J was contradictory, in particular paragraphs [59] and [61]. He submitted further, following **Tinizaray** [2011] EWHC 1850 that the judge had erred in approach to Section 55 of the 2009 Act in that having gone on to consider the content of the Section 55 duty had not made a full assessment of the claim, in particular failing to have regard to the children's feelings as to where they wished to be, contrary to the guidance in "Every Child Matters".

9. Mr Whitwell submitted it is clear from the determination at [46] and [48] that the judge had directed himself properly and had taken account of all the relevant evidence (see paragraphs 49-50) and had assessed properly the issue of whether it was proportionate to remove the appellants given the effect there would be on the child, J. He submitted that having directed himself properly in line with **EV (Philippines)** [11]-[12] and to properly apply these in his decision at paragraphs 51 and 52. He submitted that in reality the argument being put by the appellant was that J's nationality was determinative of the issue of proportionality and reasonableness of requiring the appellants to leave the United Kingdom but in this

case the judge had had proper regard to the Rules and whilst the decision might have been generous in the respondent's favour, it was one open to the judge.

10. Mr Whitwell submitted further that at paragraph 50 the judge was entitled to refer to all factors being equal and that they were not, this being a clear reference to the decision in **Zoumbas** [2013] UKSC 74. He submitted that the decision in **Tinizaray** was no longer good law and challenges to the judge's assessment of J's British citizenship were simply arguments about weight.

11. It is not in dispute that J is a British Citizen. Given his age, he is inevitably dependant on his parents, and the factual citizen bears a very close relationship to that in **Zambrano**. In the circumstances, and given the decision in **Sanade and others (British children – Zambrano - Dereci)** [2012] UKUT 00048(IAC) as well as the respondent's Policy Guidance "Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0(b) at Section 11.2" that the judge did not give sufficient weight to the fact that the older child is a British citizen.

12. For these reasons, I was satisfied that the decision of the First-tier Tribunal as it relates to the consideration of article 8 involved the making of an error of law and must be set aside. The grounds did not challenge the decision under the Immigration Rules.

Remaking the decision

13. When this matter came before me on 8 May 2015 I gave reasons set out in a decision issued on 2 July 2015 why this matter needed to be remade. Subsequent to that I gave directions as to how this matter was to proceed given the issues identified. In short, it was my preliminary view that the facts of these appeals are such that the appellants may be entitled to residence cards as confirmation of the derived right of residence pursuant to Regulation 15A(4A) of the Immigration (EEA) Regulations 2006 and I gave directions for the parties to provide skeleton arguments addressing those issues. It is noted that the grounds of appeal to the Upper Tribunal did not

14. The issue as distilled in the skeleton arguments which both parties have provided to me is such that the issue is narrow and that is it is accepted that the older child is a British citizen but it was submitted by the Secretary of State that as he could be looked after by his relatives in this country, that is aunts and uncles who are referred to in the decision of the First-tier Tribunal, then he would not be compelled to leave the United Kingdom. Miss Holmes relied on a policy document issued by the Secretary of State entitled "Derivative rights of residence – **Ruiz Zambrano** cases" which was issued on 12 December 2012.

15. The Secretary of State's case is that where there is a direct relative who can care for a child then the **Zambrano** principle does not apply as the child would not be compelled to leave the United Kingdom.

16. The first difficulty the respondent faces in this submission is that "direct relative" is not defined in the EEA Regulations. It does bear echoes of the definition of family member which refers to the direct ascending line but equally, it has been put to me in other cases regarding reg. 15 (7A) that "direct relative" is such that it excludes, for example, uncles and aunts and on that basis they do not have appeal rights because that person, who is not either a legal guardian or a direct relative which appears to be construed as in the ascending or descending line, is not a direct relative and therefore as there is inevitably no proof of being a direct relative there is no right of appeal. The position adopted by the Respondent's guidance on "Derivative Rights of Residence" of April 2015, at page 55, is that direct relative for the purposes of reg. 15 (7A)(a) confined to parents, grandparents, spouses, children and grandchildren.

17. In **Hines v Lambeth** [2014] EWCA Civ 660, the issue of what kind of alternative care might avoid the conclusion that a child would be forced to leave. At [24] Vos LJ held:

18. It would be undesirable, I think, for the court to lay down any guidelines in this regard, but it was, as I have said, common ground that an available adoption or foster care placement would not be adequate for this purpose. That is because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. I do not, however, think that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK. Apart from anything else, he would, even if he did leave, still only have the care of one of his previously two joint carers

19. It is evident that the child in this case cannot be compelled to leave the United Kingdom because he is a British citizen. The question is then whether the child would effectively be compelled. In this case, the respondent proposes that a fostering relationship, albeit by a relative, would avoid the child being compelled to leave.

20. That alternative is quite stark. He would have to live with relatives, would be separated from his parents and would be separated from his sister because although she was born here she has not yet lived here for ten years and is not yet entitled to apply for British citizenship and she has no leave to be here.

21. I consider that whilst a minor child can survive without his parents in that adoption, foster care or a children's home offer an adequate level of care, such an alternative to the care by parents is only likely to be considered where there are serious reasons for interrupting the relationship between a child and his parents. In the ordinary course of events, a court would need very serious reasons relating to the child's safety and well-being to make an order taking that child from his parents. This reflects the position acknowledged in the UN Convention on the Rights of the Child 1990 that children should grow up in the family environment and they are in need of specific forms of protection. Article 9(1) of the Convention provides that the United Kingdom nominally provides that a child shall not be separated from his parents

against their will, except in defined and limited circumstances. There is here a significant difference from adults who have capacity to make decisions for themselves which is not the case with children.

22. I consider that in this case the older child of the appellants would effectively be compelled to leave the United Kingdom to remain with his parents and that bearing in mind what was said in **Hines v Lambeth** that decision would be contrary to the ruling of the Court of Justice in **Zambrano** in that he would, in effect, be compelled to leave the United Kingdom and thus would be unable to exercise his rights as a citizen of the EU.

23. For these reasons I am satisfied that in the case of the two principal appellants the requirements of Regulation 15A (4A) and (7) are met and that accordingly they are entitled pursuant to Regulation 18A to derivative residence cards.

24. In respect of the remaining appellant, who is a child, I am satisfied that she is also entitled to a residence card as she is entirely dependent on her parents who are persons entitled to a derivative residence card and thus she would meet the requirements of Regulation 15A(5).

25. The consequence of this is that, as was noted in **Amirteymour and others (EEA appeals; human rights)** [2015] UKUT 466 (IAC) at [25]-[27], those such as the appellants who have rights of residence under EU law do not require leave to remain by virtue of section 7 of the Immigration Act 1988. Further, those rights arose or crystallised once the first two appellants' son acquired British Citizenship and thus, they (and their daughter) could not be removed. The decision to remove them is in consequence a nullity, as it is not in accordance with the law. It follows therefore that as there is no decision to remove them, article 8 is not engaged.

26. For these reasons I allow the appeal under the EEA Regulations.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeals under the EEA Regulations.

Signed Date: 3 December 2015

Upper Tribunal Judge Rintoul

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as the basis on which the appeals have been allowed arose only out of a change of circumstances arising post-decision.

Signed Date: 3 December 2015

Upper Tribunal Judge Rintoul