Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/42546/2013
IA/42547/2013

THE IMMIGRATION ACTS

Heard at Field house
On 1 October 2015

Decision and reasons
Promulgated
On 5 November
2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MS SONIA MACAULEY
MR DERIS SESAY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Smith of Counsel
For the Respondent: Mr E Tufan, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Sierra Leone born on 10 October 1970 and 16 January 1996 respectively. They appealed against the decisions of the respondent made on 7 December 2011 to refuse to grant them further leave to remain in the United Kingdom based on their rights under the Immigration (European Economic Area) Regulations 2006. (hereinafter the 2006 Regulations) for Derivative Residence Cards.

2. Their appeals were dismissed by First-tier Tribunal Judge Wyle following a hearing in at Hatton Cross on 15 December 2014. Permission to appeal to the Upper Tribunal was initially refused by first-tier Tribunal Judge Andrew on 12 February 2015 and subsequently granted by Upper Tribunal Judge

Eshun on 20 May 2015 on the basis that it was arguable that the Judge misapplied the principle in **Zambrano and Sanade**.

3. Thus the appeal came before me.

First-tier Tribunal's findings

4. In his determination, the Judge made the following findings which I summarise. On 2 December 2011 the first appellant applied for a Derivative Residence Card as confirmation of a right of residence under the European Community Law as the primary carer of an EEA national exercising treaty rights in the United Kingdom. The first appellant now appeals against the decision dated 26 September 2013 refusing to issue her and her dependent Derivative Residence Cards. The second appellant's claim for a Derivative Residence Card and appeal was against the decision of the respondent dated 26 September 2013 as the dependent of the first appellant. The cases have been linked due to the family relationship.

5. The first appellant is the mother of a child named S who is a British citizen, born on 29 May 2008 and therefore aged six. Her father is also a British citizen. She has always been cared for by the first appellant, who is her mother. It is her mother who provides accommodation for her and looks after her on a daily basis. She takes decisions on education and her daily life.

6. The second appellant has always lived with the first appellant because he is her son. He has lived in the same household as S, his stepsister, since her birth. The first appellant does not work and the second appellant is undertaking an apprenticeship, working four days a week and attending college for one day a week. He supports the first appellant and S by contributing to the rent, paying council tax and paying bills. Before the second appellant started work, he sometimes collected S from school. The second appellant's former girlfriend is expecting a baby in February 2015 of which he is the father. His own father lives in Sierra Leone. He has three paternal half-sisters who live with their mother in Kent. He is in contact with them.

7. The first appellant has a former husband in Sierra Leone. She claims that she was subjected to violence and abuse from him and the second appellant also suffered abuse. She has not had contact with her former husband for six or seven years. The first appellant is in contact with her mother and brother in Sierra Leone. She speaks to them by telephone every three or four weeks. S and the second appellant speak to their grandmother during these calls.

8. S's father is employed as an immigration officer. He works at times in the United Kingdom, Belgium and in France. His mother lives in Croydon. When in the United Kingdom, he lives at his mother's address. He has contact with S. He sometimes picks her up from school. He sometimes goes to watch her swimming lessons. He sees S once a twice a month. He

telephone sometimes. He pays maintenance for her. Occasionally S sees her paternal grandmother.

9. The first appellant stated that she could not return to live in Sierra Leone because of fear of her former partner, concerns about the risk of Ebola virus, the loss of her contact with the support network she enjoys in the United Kingdom and wished not to be embroiled in traditional secret societies with which her mother is engaged. The first appellant states that were she required to return to Sierra Leone, S will have to come with her as there is no family member who could look after her in the United Kingdom. The second appellant stated that he was afraid of his former stepfather who was violent and abusive towards him. He has spent a big part of his life in the United Kingdom and has a close circle of friends here.

10. The first appellant's claim is under Regulation 15A of the 2006 regulations. It has been maintained by the first appellant that she shares responsibility for S's care with the child's father, a British citizen. She referred to a letter written in 2011 where Mr Lisk, S's father stated that due to the nature of his job he could not spend time with S every day and he finds the time to be with her on a regular basis and that "he may not be able to care for her full-time".

11. It was submitted on behalf of the Home Office that the implication was that S's father saw her most days, and certainly more than that once or twice a month as described in the first appellant's oral evidence. The handwritten letter was not consistent with the statement produced in the appellant's bundle. It was suggested that the statement was prepared to assist the first appellant's claim and that the information in the handwritten letter should be preferred. It was submitted that it appeared that the father was unwilling to share the care of S rather than that he was unable to do so. If the first appellant was required to leave, S would remain in the care of her father. He had not attended the hearing and his evidence could not be tested. There was insufficient evidence to support the claim that S's father was unable to adjust his working pattern. The paternal grandmother lived in Croydon in the house where her father lives when in the United Kingdom. The grandmother may well be able to care for the child when the father was at work. There was no information from her.

12. The appellant's representative relied on **Harrison v SSHD [2012] EWCA Civ 1736** and submitted that although the **Zambrano** principle did not apply in this case but the child's quality of life may be diminished if she remained in the United Kingdom without her mother and she could not be forced to leave the country, and it was only on that bases that the case of **Zambrano** would apply. The test was not met.

13. Mr Adedeji for the appellant referred to the case of **Hines [2014] EWCA Civ 660** at paragraph 19 to 23 and said, there should have been a full assessment of the child's father's ability or otherwise to care for the child. The welfare of the child had to be considered and the extent to which the

quality standard of a life would be impaired if her mother was required to leave. The child has never lived with her father. The evidence was that S's father could not look after her because of his work. He has not been unable to swap shifts to enable him to come to the hearing. There was no alternative care for S other than the appellant and thus the child would be compelled to leave the United Kingdom. Accordingly he submitted that the **Zambrano** principle applied.

14. It is for the first appellant to show that there is no alternative to the child being required to leave the country. The welfare of the child must be considered, and an assessment made if suitable alternative care is available for the child remaining in the United Kingdom. The Judge agreed with the Home Office Presenting Officer submissions that the information from the father is inconsistent, and he would be unable to care for S if she remained in the United Kingdom, after the appellants have left. Whilst he reasonably states that he would not want to give up work to rely on benefits in order to look after S, this would be possible and this is an option which would provide alternative care for the child. As such, I therefore find that the **Zambrano** principle does not apply, and accordingly the first appellant is not entitled to a Derivative Residence Card on that basis. As the claim of the second appellant is directly related to that of the first appellant, he also is not entitled to a derivative residence card. The appellants do not meet paragraphs 276 ADE of the Immigration Rules.

15. As the respondent's reasons for refusal letter rejected any consideration of any entitlement of the appellants' to live in the United Kingdom under Article 8, it is appropriate to consider this.

16. In respect of the Article 8 claim the appellants did not provide supporting evidence of the claimed abuse, such as medical reports from a hospital attendant, or any statements from witnesses. The first appellant confirmed that she had not been contact with her former husband for six or seven years. Both appellant refer to the risk the first appellant's Article 8 rights were refused in December 2011. Any fear of violence and abuse by the first husband's former husband are not genuine. There are no significant obstacles to the first appellant's integration into Sierra Leone. She has been in the United Kingdom for seven years but had spent most of her life in Sierra Leone. Her mother, brother and sister are there and she is in regular contact with them.

17. In considering the best interests of S, given her young age and the fact that she has always lived in family with the appellant's, I consider that her best interests would be safeguarded and promoted if she remains living with the first appellant.

18. Although it is accepted that S has contact with her father, there is little information as to the extent of contact and nature of their relationship. In his witness statement dated 7 December 2014 her father states "I try and see S whenever I get back to the UK. I visit her school and speak to her

teachers to ensure she is settling in and doing well". There is no evidence as to the strength of their relationship. In his letter of 15 March 2011, S's father speaks of loving his child and wanting her to be in the United Kingdom where he can have access to her as she is very dear to him and he provided parental guidance to her and he would always want to be involved in her upbringing. In oral evidence the first appellant said that he saw S once a twice a month and telephoned sometimes. There was no information on S's views. There is insufficient evidence of a close, genuine and subsisting bond with her father.

19. At a young age, S has very limited independent life. She attends school, but because they have recently moved house, she has already experienced a change of school. The first appellant no longer regularly attend St Peter's Church as she did when S was at St Peter's primary school and S is therefore no longer a part of that community. The first appellant said that he took S to visit her paternal grandmother occasionally, perhaps at Christmas. S's father comes from Sierra Leone and the first appellant met him when he was in that country. He is therefore able to travel there from time to time. He could maintain contact with S by social media or telephone. He could also visit her in Sierra Leone. "In my view the removal of S to Sierra Leone would not substantially interfere with her relationship with her father".

20. The fact of S's status as a British citizen must be taken into account. She cannot be compelled to leave the United Kingdom. It may be possible for her to be cared for in the United Kingdom by her father, although this not discussed it would appear that S's relationship with her father is limited.

21. The Judge took into account the provisions of section 117B and noted that paragraph 117B (4) states that little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully. The appellants' immigration status in the United Kingdom has been unlawful since their visitor's visa expired a few weeks after S was born. Section 117B (5) states that little weight should be given to a private life established at a time and the person's immigration status is precarious. S was conceived and born when the first appellant's immigration status was precarious.

22. S is a qualifying child as a British citizen. It is accepted that both the first and second appellant have a genuine and subsisting relationship with S. In considering whether it would be reasonable to expect the child to leave the United Kingdom, it was taken into account in particular the fact that S's father is a British citizen living at times in the United Kingdom and that she has British citizenship and is entitled to the benefits of British citizenship. He took into account the case of the **ZH Tanzania [2011] two AC 166** and **Zoumbas v SSHD [2013] UK SC 74.**

23. The Judge stated, "I have to consider whether it is reasonable for S be required to leave the United Kingdom to live in Sierra Leone. I have to look at the level of integration into the United Kingdom, where and with whom

she will live and the arrangements for care in Sierra Leone and the strength of her relationship with her father which may be severed if she has to move away". "It is in S's best interests that she remains in the care of the first appellant. At present the family unit comprises of her and her mother and brother. The Judge was satisfied that S will be well looked after by the first appellant in Sierra Leone as she has been in the United Kingdom. Although she has started school, she is still in the early stages of primary school, and has successfully experienced one change of school. She would be able to integrate into Sierra Leone, a country which was her mother and brother will now live. Her life in the United Kingdom is very much bound up in activities carried out with and arranged by her mother. As indicated, the relationship with her father would be significantly severed to her detriment if she were to move to Sierra Leone.

24. Although S is a British citizen she does not have sufficient contact with the father or his family, and because of her age limited social links with the community here. Her mother and brother will be able to easily reintegrate into Sierra Leone and she will be assisted by them to settle there. It would therefore not be unreasonable to expect S to leave the United Kingdom.

25. The Judge stated in his notice of decision "the appeal is dismissed on human rights grounds".

Grounds of appeal

26. The appellant's grounds of appeal state the following which I summarise. The appellant seeks to challenge the decision based on the following grounds, which are that no sufficient weight was attached to the appellant's circumstances and there was an erroneous approach to Article 8. The best interests of the child has not been properly considered and there has been an erroneous approach to assessment and application of **Zambrano** principles to the child's rights in the appellant's circumstances.

The hearing

27. I heard submissions from the parties as to whether there is an error of law in First-tier Tribunal's determination.

28. Mr Smith stated that he is not pursuing the Article 8 ground of appeal. He relies on the appellants rights under the 2006 regulations for Derivative Rights as the first appellant is the primary carer of an EEA national child. The second appellant is a dependent of his mother.

29. Having considered the determination I find that there is a material error in the determination because the findings blurs the distinction between the 2006 Regulations and Article 8. At paragraph 44 the Judge found that there is no evidence of the extent of the relationship with S's father. The Judge also found that there is a close and genuine subsisting bond with her father. These are contradictory findings. The Judge did not make explicit findings as to whether responsibility for S was shared with S's father. The **Zambrano** principle has been misunderstood by the Judge. The Judge

concludes that it would not be unreasonable for the British child to leave the United Kingdom. This may be relevant to Article 8 but not EU law. Requiring the child to leave the United Kingdom with her mother contravenes European Law.

30. Mr Tufan submitted that the appellant is a British citizen and therefore cannot be compelled to leave the United Kingdom and there is no issue of compulsion. The Judge said at paragraph 27 that the father will not be able to care for S. The child's father is another relative who could care for the child. The father is involved with S's upbringing. If the husband has to give up working to look after the child, so be it.

31. Mr Smith stated that the best interests of the child plays no consideration in respect of Regulation 15A. In **Haines**, the Court of Appeal endorsed the test that the appellant should not be compelled to leave.

Decision as to whether there is a material error of law

32. I found that there is a material error of law in the determination of the First-tier Tribunal which involved the Judge's assessment of the 2006 regulations. The Judge also fell into error by misunderstanding the case of **Zambrano** and the application of the case to this appeal. The Judge has made confusing and contradictory findings about S's father's ability to care for S. The Judge found that the first appellant's mother was the primary carer for S and her best interests lie with being with her mother. The Judge then said that S can remain in this country with her father. The Judge also found that there is insufficient evidence of a close, genuine and subsisting bond with her father. She also said that S can leave the country and accompany her mother and step brother to Sierra Leone and the family could integrate into life in that country. These are not sustainable findings.

33. Regulation 15A (4A) of the Immigration (European Economic Area) Regulations 2006/1003 (the "Immigration Regulations"), which was inserted with effect from 8th November 2012 by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012/2560, provides for a derivative right of residence for primary carers of British citizens as follows.

34. Regulation 15A(4A) was inserted to comply with the interpretation of the Court of Justice of the European Union ("CJEU") of article 20 of the Treaty on the Functioning of the European Union ("TFEU") in Ruiz Zambrano v. Office National de l'Emploie [2012] QB 265 ("Zambrano"), where the Grand Chamber of the CJEU held that:- i) Article 20 of the TFEU "precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the European Union" (paragraph 42); and ii) A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside has such an effect (paragraph 43), because "[i]t must be assumed that such a refusal would

lead to a situation where those children, citizens of the European Union, would have to leave the territory of the European Union in order to accompany their parents". 8. In Harrison v. Secretary of State for the Home Department [2012] EWCA Civ 1736 ("Harrison"), to which I shall return, Elias LJ (with whom Ward and Pitchford LJJ agreed) held at paragraph 63 that the Zambrano principle did not cover anything short of a situation where the EU citizen is forced to leave the territory of the EU

35. I have therefore to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child.

36. The evidence before the Judge was that S's father is an immigration officer and works in the United Kingdom, Belgium and France. He is away much of the time from the United Kingdom and when he is in the country he lives with his mother. If S cannot live with her father, who could be her alternative care provider, she would be effectively forced to leave the United Kingdom and accompany her mother to Sierra Leone. Mr Tufan suggested that the father could give up his employment to look after S. I do not think that that is the answer.

37. The Judge found that S has always lived with her mother and her brother. The judge did not find that there was sufficient evidence of a close, genuine and subsisting bond with her father and therefore S's relationship with her father is tenuous at best. The Judge found that the best interests of S, lies with her remaining with her mother. I also take into account that she is a girl child and requires a mother's care over the care of a semi-absent father. Exclusion of the appellants from this country will seriously impair the quality of S's standard of life and she will effectively be forced to leave the United Kingdom to be with her mother.

38. I emphasise that I do not consider S's interests as paramount, though S's interests must be taken into account. The law is clear from **Zambrano** and **Derici** as applied in **Harrison.** I take into account that the decision to exclude S's mother from the United Kingdom will to infringe the right of residence of S because she will have to give up residence and travel with her mother to Sierra Leone. It is for this reason that the welfare of S in this case comes into play.

39. The appellant's application for a derivative residence card was as S's primary carer under EEA law and the second appellant's application was as his mother's dependent. Therefore the question I have to answer is whether S would be unable to reside in the United Kingdom if her mother was required to leave. I answer that question in the affirmative taking into account all the evidence in the round.

40. I find that there is an error of law in the determination of the First-tier Tribunal Judge and I set it aside. I remake the decision and allow the appellant's appeal for them to be issued with Derivative Residence Cards by the Secretary of State according to the 2006 Regulations.

Decision

Appeal allowed

Signed Date 3rd day of November 2015

Ms S Chana
A Deputy Judge of the Upper Tribunal