Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01356/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 February 2016	**On 26 February 2016**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J --- M--- M---
(anonymity direction made)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms M Knorr, Counsel instructed by Wilson Solicitors

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant (the present Respondent). This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I make this order because the case concerns the welfare of the Appellant's minor child and the child is entitled to privacy.

2. The respondent, hereinafter "the Claimant", is a citizen of Jamaica who was born in June 1970. She appealed successfully to the First-tier Tribunal a decision of the appellant, hereinafter "the Secretary of State", on 17 June 2013 to deport her under Section 32(5) of the UK Borders Act 2007.

3. The First-tier Tribunal allowed the appeal "under EU law". The Secretary of State was given permission to appeal on many grounds which will be considered in detail below. There is also a cross appeal from the Claimant because the First-tier Tribunal did not consider her case on Article 8 grounds.

4. At the risk of oversimplification and solely for the purpose of introducing my analysis of the decision, the First-tier Tribunal decided that deporting the claimant would require her daughter to leave the United Kingdom and that would be contrary to her rights as an EU national with the consequence that, on the particular facts of the case, the mother could not be deported.

5. The Claimant's immigration history is undistinguished. She first came to the United Kingdom as a visitor in December 1998 and returned to Jamaica in the currency of her visa. She returned to the United Kingdom in December 2002. Her child, T, was born in May 2003 and the Claimant made no effort to return after her visa expired in June 2003.

6. In June 2007 she was given a five year EEA residence card but that was based on a marriage later found to have been a marriage of convenience.

7. In 2007 she returned to Jamaica and accepted an offer to carry drugs into the United Kingdom. She was caught on arrival, pleaded guilty to appropriate criminal offences and was sentenced to seven years' imprisonment.

8. The child T became a British citizen in December 2013.

9. Paragraphs 33 to 37 of the First-tier Tribunal's decision are particularly apt and I set them out below:

> "33. In the light of the jurisprudence I have quoted from above, it is important for me to make findings in relation to the *practical* effect of the deportation of the [Claimant] in terms of the consequences for T. The [Secretary of State] has argued that the options available would include for T to accompany her mother to Jamaica, for T to remain in the UK in foster care, and for the [Claimant] to apply to accompany T to another EEA country.
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> 34. The [Claimant] herself has made it very clear in her own evidence and also in her conversations with Mr Horrocks [independent social worker] that if she were deported, her daughter would have to accompany her to Jamaica as she could not contemplate the prospect of renewed separation between the two of them. The letter from T herself (which the [Claimant] assured me were T's own words and not

what she had been told to say) makes clear that, whilst she would be 'upset' at having to relocate to Jamaica, she would be 'devastated' and heartbroken to be separated from her mother again. Although she is only 11 years old, her wishes and feelings would have to be taken into account by those with responsibility for making decisions about her future care. In his report Mr Horrocks refers to the vulnerability stemming from T's unsettled early childhood involving multiple carers, disruption of her education and separation from her mother and the impact of this on her emotional and behavioural state, which has in the past required the intervention of the Child Adolescent Mental Health Service (CAMHS). She is now in a far better state both emotionally and educationally but, in Mr Horrocks' opinion, if there were a further lengthy separation from her mother, this would all be put in jeopardy and would be likely to result in 'significant harm' to T.

35. In her latest witness statement, the [Claimant] referred in considerable detail to the difficulties that would arise in finding foster carers for T in the UK amongst her own friends, acquaintances or extended family. I accept from the evidence before me that the various persons who took care of T during the period of the [Claimant's] imprisonment are very unlikely to be able to resume such duties now and that there are no clear options for any such long-term foster placement for T during her minority. There is of course the possibility that the local authority could find professional foster carers for T but it seems to me highly unlikely that Social Services would take steps to arrange such a placement, given the opposition of both mother and child to a long-term separation and the likely harm that would result.

36. As for the possibility of T and her mother relocating to another EEA country, this strikes me as highly implausible. T and her mother, so far as I am aware, have no links with any EEA country and, as pointed out by Ms Knorr, in order to accompany her to another EEA country, the [Claimant] would have to show that she is economically self-sufficient under the *Chen* principles (which from the evidence before me she is unlikely to be able to show).

37. It is for the above reasons that I reach the clear conclusion that the *practical* consequence of the [Claimant's] deportation of the [Claimant] would be that her British national daughter would be compelled to join her in Jamaica and thus leave the territory of the EU. This would constitute an interference with her rights as an EU citizen under Article 20 of the TFEU. I find that it would therefore infringe the *Zambrano* principle for the [Claimant] as her daughter's primary carer, to be deported from the UK to a non-EEA state, thus amounting to a breach of EU law."

10. I remind myself that it is not my function to decide if the Claimant should be deported but to decide if the Secretary of State has shown that the

First-tier Tribunal erred in concluding that her deportation would be unlawful for the reasons given.

11. The Secretary of State's grounds run to 34 paragraphs. I will endeavour to summarise them.

12. Ground 1 is headed "Making a material misdirection of law". It complains that the sentence of seven years' imprisonment was so long that it did not qualify for an exception to deportation on the basis of a parental relationship with a child in accordance with 399(a) of the Immigration Rules and there was no finding of "very compelling circumstances, over and above the requirements of 399(a)".

13. The grounds also contend that the offending was so serious that deportation was "overwhelmingly in the public interest" and so was a justifiable consequence. The same ground contends that **Case-34/09 Zambrano v Office national de l'emploi** [2012] QB 265 does not apply directly to cases of deportation. They prayed in aid of this contention Regulation 21A of the EEA Regulations which provided that a person who would ordinarily have a derivative right of residence following **Zambrano** can be denied that right when deportation is conducive to the public good. The same ground also said that the Tribunal erred in finding that the Claimant's daughter would be compelled to join her in Jamaica.

14. Ground 2 is headed "Failing to give adequate reasons for findings on a material matter". The grounds are not as clear as they might be but the point being made is that, according to the Secretary of State, the First-tier Tribunal did not ask itself if the child could not be cared for in the EU and that the Tribunal had wrongly elevated the claimant's intention of taking her child with her to Jamaica to a decision requiring the child to leave the EU.

15. Ground 3 is headed "Making a material misdirection in law – failure to apply the Immigration Rules". There is a clear complaint that paragraph 399(a) was not followed.

16. The ground also maintains the First-tier Tribunal did not have proper regard to the strong public interest in deporting people such as the Claimant.

17. Ground 4 is headed "Failing to give reasons or adequate reasons for findings on a material matter – '**Zambrano** principle'". Here the Secretary of State drew attention to the awaited decision of the European Court of Justice in referrals known as "**Marin v Administracion del Estado and Secretary of State for the Home Department v CS (Articles 20 TFEU and 21 TFEU – Directive 2004/38/EC) Joined Cases C-165/14 and C-304/14**".

18. The decisions in those referrals are still awaited but on 4 February 2016, the day before the hearing, the opinion of Advocate General Szpunar was published.

19. Mr Whitwell asked me to adjourn the hearing of this appeal for two reasons; to await the decision of the European Court of Justice in those cases and to digest the opinion of the Advocate General.

20. I declined to adjourn. In my experience adjourning decisions awaiting decisions of other courts rarely work smoothly. I must apply the law as I understand it to be. I will endeavour to do that in a way that at least lends itself to easy correction if it turns out that I have got it wrong. The decision in CS does not change the law. It clarifies it and I respectfully adopt and apply the reasons of the Advocate General.

21. The Claimant's grounds of appeal are much more straightforward. She raised a claim under Article 8 of the European Convention on Human Rights and this was not determined by the Tribunal. She says that as a matter of law it should have been determined.

22. I have in the papers a notice of decision dated 19 June 2013 which is a "decision that Section 32(5) of the UK Borders Act 2007 applies". I also have a supplementary letter maintaining our decision to deport dated 19 June 2013 which is dated 29 January 2015. That letter is written in acknowledgement of the fact that the claimant's daughter had become a British citizen and therefore could not be removed. The letter purported to deal with Section 55 of the Borders, Citizenship and Immigration Act 2009, Article 8 of the European Convention on Human Rights and a series of passages headed "Consideration of **Zambrano** and **Sanade**". These paragraphs deal with the Secretary of State's decision that the claimant does not have a derived right of residence by reason of being the parent of an EU national. It is not clear to me how this decision resulted in an appeal or what grounds are permissible but that is what has happened. I can only assume that any irregularity has been waived.

23. I am not impressed by the Secretary of State's grounds. The First-tier Tribunal Judge's finding that the claimant's daughter would have to leave the United Kingdom to be with her mother is unimpeachable. He has given reasons for accepting the evidence about this. The core reasons are that he believed the evidence of those who said that although they had offered such support as they could when the claimant was in prison they could not carry on doing that throughout her daughter's minority, that the claimant's daughter wanted to be with her mother and it was important that she should be with her mother and if it was necessary for there to be evidence to support that very uncontroversial proposition it was found in the expert evidence that the claimant's daughter risked harm if she was parted from her mother.

24. First-tier Tribunal Judge Talbot applied a practical test by which he meant he had to decide what will happen to the daughter in the event of the

Claimant's deportation and he decided that the claimant's daughter would leave the United Kingdom and therefore the EU.

25. The grounds hunt to find differences on the facts between the present case and the decision in **Ruiz Zambrano (C-34/09)**. They do not change the ratio of the decision which is that the EU citizen cannot be compelled to leave the Union. Judge Talbot considered the possibility of the claimant living in a different part of the EU and rejected that possibility for good reasons.

26. Contrary to the grounds he gave reasons for his decision and his decision is clear. The ruling in **Zambrano** does not permit any decision which has the effect of requiring an EU national to leave the union. Regulation 21A of the EEA Regulations cannot operate to prevent that fundamental right.

27. There is a technical error on the part of the First-tier Tribunal Judge in failing to explain the operation of the Immigration Rules. I do not agree that the judge failed to apply them. The Secretary of State refers to paragraph 399(a) of HC 395 but this Rule applies when Article 8 is considered in the context of deportation. The judge did not do that. This requires that there are "very compelling circumstances over and above those described in paragraphs 399 and 399A". However this is something for the Secretary of State to decide. Where a court or Tribunal is required to determine an Article 8 breach in the case of a person sentenced to at least four years' imprisonment there must be "very compelling circumstances, over and above those described in Exceptions 1 and 2". Exception 1 relates to integration and residence in the United Kingdom, and Exception 2 applies where there is a genuine and subsisting parental relationship with a qualifying child.

28. Here the "very compelling circumstances, over and above those described" is the finding that deportation will interfere with the child's EU rights. The judge chose not to consider an Article 8 claim because, in his view, there was no need because the appeal had been allowed for more compelling reasons. I cannot avoid finding that the judge was wrong not to decide the point because all grounds of appeal have to be decided. However if the judge had considered Article 8 outside the Rules he would have stopped early on in his analysis because his decision meant that removal was not in accordance with the law. His clear findings would have meant that he would have allowed the appeal on this point if he had considered the ground. No material error is unearthed there.

29. I considered Mr Whitwell's submissions along with the other material before me. They do not get round the clear finding of the consequences of removal on the EU national and therefore they do not undermine the decision.

30. I did, of course, consider the decision in **CS**. It may be that that does not go quite as far as the decision in **Zambrano** but there is nothing there to assist the Secretary of State.

31. We will have to see if the final decision accepts the Advocate General's contention that removal of the non-EU national should be taken with strict regard to the Rules as if the person to be removed was in fact an EU national.

32. Here the Claimant has been praised for her resolve to live industriously and without committing criminal offences in the future. Given that the counterbalance to the public interest in removing a serious criminal is the right of a British citizen child to live with her mother in her country of nationality I can see no basis for finding that the Claimant's removal is necessary even if the Advocate General has gone too far in codifying the non EU national's rights as clearly as been done in the opinion.

33. Clearly if the opinion is followed then the Secretary of State's case is entirely hopeless. There is no way that the evidence relied upon would support a finding the claimant was a present threat but even if a lesser test applies the Secretary of State cannot get round the decision in **Zambrano**.

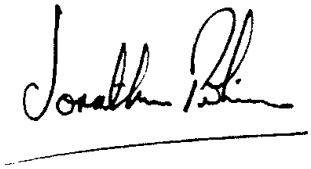
34. It should be remembered that this appeal was not allowed because of the conduct of the claimant but because the judge found, I find correctly, that EU law recognises the right of this EU national child in her particular circumstances to live with her mother in the EU. The decision does not mean that the claimant can never be removed but it is hard to see how she can be removed lawfully in the minority of the claimant's daughter unless the law changes.

35. In all the circumstances I dismiss the Secretary of State's appeal and I dismiss the cross appeal because it shows no material error.

Decision

36. The Secretary of State's appeal is dismissed. The claimant's cross appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 24 February 2016