Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01488/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2015	**On 28 January 2016**

Before

Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

S. A. C.

(Anonymity Order made by First-tier Tribunal)

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr M. K. Mukulu of counsel, instructed by Just & Brown, solicitors

DECISION

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Robertson who, following a hearing on 16 March 2015, allowed SAC's appeal against a deportation order made as a consequence of her conviction on 18 July 2013 of two counts of possession Class A drugs with intent to supply and other offences for which she was sentenced to 30 months' imprisonment.

2. It is common ground and agreed between the parties that the decision of the judge discloses legal error. Therefore, the nature of that error can be identified briefly.

3. The judge has applied the wrong version of the immigration rules, the consequence of which being that she applied the wrong legal test. At paragraph 31 of her decision the judge said this:

> "At the date of the decision, the version of paragraph 399(a) that was in force at the time required the Appellant to establish that she had a genuine subsisting parental relationship with a child who is a British citizen and that it was unreasonable to expect the child to leave the UK. It is accepted by the respondent that there is a genuine and subsisting relationship between the Appellant and C, and the question that remains is whether it is reasonable to expect him to leave the UK..."

However, as has been made clear by the Court of Appeal in *YM (Uganda) v SSHD* [2014] EWCA Civ 1292, the rules that should have been applied were those in force at the date of the hearing. Therefore, the question for the judge was not the one that she addressed but whether the effect of SAC's deportation upon her child would be unduly harsh.

4. Mr Mukulu sought to argue that the error was not material to the outcome because the judge held also that:

> "... However, C is not only a British national, but a citizen of the EU by virtue of his British citizenship. Bearing in mind that the Appellant is his primary carer and, on my findings of fact, primary care is not shared with C's father, the consequence of deporting the appellant will be that C will be unable to continue to live in the UK. This infringes the Zambrano principle (see Sanade and others (British children – Zambrano – Dereci [2012] UKUT (IAC), and makes it unreasonable under paragraph 399(a)(ii) to expect C to leave the UK with his mother, which will occur because he will be unable to continue to live in the UK without her. The Appellant's appeal is therefore allowed under paragraph 399(a) of the Immigration Rules."

It is plain that legal error is disclosed by this reasoning also, which compounds the first error. The judge has impermissibly conflated an assessment under the rules, and the wrong version of the rules, with European law. In any event, the child's father, who had been said to have played "a vital role" in the life of the child had, with assistance from another relative a sister, provided care for the child while SAC was in prison. Further, once again, in this reasoning the assessment is made, wrongly, through the prism of reasonableness rather than asking the correct question, which was whether the effect upon the child would be unduly harsh.

5. For these reasons I am unable to accept Mr Mukulu's submission that the outcome of the appeal would have been the same even if the judge had applied the correct legal test. That is enough to establish that the decision of Judge Robertson cannot stand and must be set aside.

6. It might be observed that there are other difficulties with this decision of the First-tier Tribunal. At paragraph 16 of her decision, under a heading "Legal Provisions and Burden and Standard of Proof" the judge said:

> "… (SAC's representative) referred to the provisions of s117C of the 2002 Act, but this would only be relevant where a person has been convicted of an offence for which he has received a prison sentence which is in excess of 4 years."

If the judge proceeded upon the basis that S117C of the Nationality, Immigration and Asylum Act 2002, as amended, applied only to foreign criminals sentenced to more than 4 years' imprisonment then she was wrong to do so. That may explain why the judge made no reference to s117 in arriving at her conclusions.

Summary of decision:

7. The First-tier Tribunal Judge made a material error of law such as to require that it be set aside.

8. The Secretary of State's appeal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed

Upper Tribunal Judge Southern
Date: 15 December 2015