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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05767/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 December 2015	**On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Respondent: Mr Solomon, Counsel
For the Appellant: Mr Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Gambia. She applied in July 2014 for a residence card as confirmation of a right to reside in the UK under the *Immigration (EEA) Regulations 2006* ("the Regulations"). The application was refused on 26 January 2015. The appellant appealed to the First-tier Tribunal and her appeal was allowed by First-tier Tribunal Judge M Symes ("the FTTJ") in a decision promulgated on 14 July 2015.

2. Notwithstanding it is the Secretary of State who pursues this appeal I refer to the parties as they were in the First-tier Tribunal.

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3. Given my references to the appellant's child, an anonymity direction is appropriate.

4. The respondent sought permission to appeal. This was granted by First-tier Tribunal Judge Foudy on 12 October 2015 in the following terms:

> "2. The grounds argue that the Judge erred in his approach to Article 8 and his assessment of whether it was unduly harsh to expect the Appellant's Dutch child to live in the Netherlands. The grounds also argue that the Judge misapplied the law concerning EEA children.
>
> 3. The Judge allowed the appeal on "ZAMBRANO principles". It is not clear what factors weighed in the Judge's mind when he decided that that case applied to the Dutch child in this appeal such as to justify allowing the appeal. This lack of reasoning is an arguable error of law.
>
> 4. It is arguable that the Judge misdirected himself as to the law."

5. Thus the appeal came before me.

Submissions

6. Mr Duffy, for the respondent, submitted that there was a clear error of law. He relied on the grounds of appeal to the effect that Regulation 15, noted at paragraph 14 of the decision, incorporated the principles in **Zambrano** and specifically dealt with British children and the retained rights of their primary carers. The FTTJ had overlooked the fact the child was a Dutch citizen. There had been no evidence to indicate the child would not be entitled to reside in Holland with his mother and there was therefore no compulsion, per regulation 15A(4A)(c) that the child leave the EU. It was submitted that the child and her mother, the appellant, could reside in Holland within the principles in regulation 15, as derived from **Zambrano**. Mr Duffy submitted that the only issue at large before the FTTJ was whether the appellant fulfilled the criteria in the Regulations; Article 8 was not at issue because there had been no removal decision. The FTTJ, he submitted, had not engaged with Article 8; he had tried to give direct effect to **Zambrano** through the TFEU. He was wrong to do so because be had not considered the possibility of the child relocating within the EU. It also followed that, because there was no removal decision, the TFEU was not engaged. There was no mechanism to bring it in: in this case the only decision was the refusal of a residence card, i.e. a refusal to recognise an asserted right. Mr Duffy submitted that the decision should be set aside.

7. Mr Solomon, for the appellant, accepted on behalf of the appellant that, at the date of hearing in the First-tier Tribunal, the appellant did not qualify under the regulations. He submitted that the sole issue before the FTTJ was the direct application of Article 20 TFEU and Article 8. He submitted that the FTTJ had correctly cited the law, namely **Zambrano**, regulation 15A, **Sanneh v SSWP & Or [2013] EWHC 793 (Admin),** and **Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC)**. He submitted that, although it was not explicit, the FTTJ had not allowed the appeal under the Regulations because the child was not British. He suggested that the FTTJ's mistaken reference in paragraph 18

to the appellant being the primary carer of a British citizen was not determinative; the FTTJ had correctly referred, in the previous paragraph, to the child being Dutch. He submitted that, given the guidance in **Ahmed**, a case with similar facts, a removal decision was not necessary for a successful appeal applying Article 20 directly. The issue was whether the child would be required to leave if the mother has to do so. He submitted that the FTTJ's reasoning was adequate.

Discussion

8. I start with the decision of the respondent. This was to refuse a residence card to the appellant. Thus the respondent did not recognise the claimed right of the appellant to reside in the UK under the Regulations. No removal decision was made and it was noted in the reasons for refusal letter that if the appellant wished the respondent to consider a claim on the basis of her family and private life in the UK, she was invited to make an application, on the appropriate form, under Appendix FM and paragraph 276ADE of the immigration Rules.

9. The appellant pursued her appeal on the ground that the decision was in breach of the Regulations (a ground which is now conceded as unfounded) and on Article 8 grounds. The statement of additional grounds refers to the appellant's purported removal yet no removal decision had been taken.

10. Whilst the FTTJ allowed the appeal "against refusal of a residence card", it is not clear on what basis he did so. He has correctly cited the provisions of Regulation 15A which incorporates the guidance in **Zambrano** and which refers to the requirement that the applicant must be the primary carer of a British citizen. The appellant's child is Dutch and the appellant could not therefore fulfil the criteria in that Regulation (as has been conceded by Mr Solomon). It is implicit from the FTTJ's decision that the FTTJ found that the appellant did not fulfil the criteria in the EEA Regulations because he then went on to consider whether Articles 20 and 21 of the TFEU were engaged. In this respect he noted the guidance in **Sanneh** to the effect that "nothing less than … compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working …".

11. In the present case the respondent has made no removal decision; she has not served a s120 notice and she has invited the appellant to make a human rights claim based on her family and private life (and implicitly that of her child also). The FTTJ makes no reference to this and I find therefore that he did not take this into account, despite their relevance to the issues before him.

12. At paragraph 15 the FTTJ notes that the child "has been cared for by his mother [the appellant] and has had minimal contact with his father."

However, at paragraph 8 he states that "since they separated they no longer had contact in order to ensure her son's safety". Thus the nature and degree of contact (if any) between father and son is not clear from the decision. I do not consider this is necessarily a material error, without more, but, taken with the reference to the child being British (paragraph 18) it does call into question the reliability of the findings.

13. More critically, it is wholly unclear on what basis the FTTJ found the appellant's child would be forced to leave the EU as a result of the refusal of a residence card to his mother. As the respondent rightly says, the FTTJ has not addressed this issue at all. Nor was there any evidence on this before the FTTJ: the appellant makes no reference to it in her appeal statement and there is no suggestion in the decision of the FTTJ that it was raised in oral evidence. Notwithstanding the lack of evidence, the FTTJ concludes that, if the appellant "went abroad, [the child] would surely be forced to depart with her given that he is under five years of age. There is no source of alternative care suggested in the papers. There is no evidence to suggest that there are other relatives who might be available. It is not likely on balance of probabilities that his father, who is described by damning reports from social services as an unsuitable parent, would be willing to take up the care of a child that he has long effectively abandoned". These findings are focussed entirely and wrongly on the appellant's purported departure from the UK, rather than the issue of whether her child would be compelled to leave the UK as a result of the respondent's decision to refuse his mother a residence card. It is also relevant, in this respect that the respondent had invited the appellant to make a human rights claim on the basis of her family and private life, a matter which the FTTJ has ignored. Thus the FTTJ has not considered at all the principal issue of whether the appellant and her son could relocate to the Netherlands, where the child has the right of residence, being a citizen of that country. Nor did he have any evidence on the issue. It is a material error of law for the FTTJ to have made a finding which is not sustainable on the evidence. The error is further compounded by the concerns I have identified above with regard to the child's circumstances and nationality (paragraph 18).

14. Given that this error is a fundamental flaw in the decision of the FTTJ, and given also my concerns about the apparent inconsistencies in the fact finding, the FTTJ's decision must be set aside in its entirety.

15. There is insufficient evidence before me on the issue of whether or not the child would be compelled to leave the EU as a result of the refusal of a residence card, no further evidence having been adduced on that issue. I was also told by Mr Solomon that, since the decision under appeal was made and since the appeal in the First-tier Tribunal, the child's circumstances have changed. Mr Duffy indicated in response that the appropriate course was for the appellant, through her solicitors, to update the respondent as to her own and her child's current circumstances: the respondent would then review the matter.

16. Given that situation, I consider that the matter should be remitted to the First-tier Tribunal for a fresh decision to be made. This will enable the First-tier Tribunal to take into account the child's current circumstances and the anticipated guidance of the Court of Appeal on the application of Article 8 in EEA appeals where no s120 notice or removal decision has been taken (**Amirteymour and Others (EEA Appeals: Human Rights) [2015] UKUT 00466 (IAC)**).

Decision

17. The making of the decision of the First-tier Tribunal involved the making of a material error on a point of law. The decision is set aside.

18. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ M Symes.

A M Black
Deputy Upper Tribunal Judge Dated:

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (UT) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black
Deputy Upper Tribunal Judge Dated:

DIRECTIONS

1. Any further documentary evidence relied upon by either party is to be filed with the Tribunal and served upon the other party by no later than 14 days before the date of the hearing in the First Tier Tribunal.

2. The appeal is listed at Taylor House with a time estimate of three hours to be heard at 10.00 am on ……………………….

3. An interpreter is not required.

4. Time estimate 2 hours.

A M Black
Deputy Upper Tribunal Judge Dated: