The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number:**
IA/25611/2014

IA/25615/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgations**
On 11th April 2016	**On 13th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

[STELLA D]
[L D]
(NO ANONYMITY DIRECTION)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
Appellant Mr Olawanle (Legal Representative)
Respondent Ms Brocklesby-Weller (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants are citizens of Nigeria. The appellants are related in that the first-named and second-named appellants are mother and daughter. The first-named appellant claimed to have entered the United Kingdom in 1999 and having married [Stephane D], an EEA national, she was granted a residence card as his dependant on September 3, 2002 which allowed her to remain in the United Kingdom until November 20, 2007.

2. The first appellant and her husband have two children namely [ND] who was born on [ ] 2004 and the second-named appellant born [ ] 2007.

3. After the first-named appellant's leave expired she remained in the United Kingdom as an overstayer. She lodged an application for leave to remain on human rights grounds on behalf of herself and her two children on July 5, 2012. This was refused, without a right of appeal, on July 22, 2013.

4. Following submission of a pre-action protocol letter on October 4, 2013 the respondent agreed to reconsider the application and on June 3, 2014 the respondent refused the application and issued the appellants with removal directions on June 3, 2014.

5. On October 28, 2014 [ND] was granted British citizenship under the British Nationality Act 1981 based on the fact she had lived in the United Kingdom for ten years.

6. The appellants appealed the decisions to remove them on June 17, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

7. The appeal came before Judge of the First-tier Tribunal Goodrich (hereinafter referred to as the Judge) on July 21, 2015 and in a decision promulgated on August 27, 2015 she refused the appeals under both the Immigration Rules and article 8 ECHR.

8. The appellants lodged grounds of appeal on September 14, 2015 submitting the First-tier Judge had erred in her approach to the issue of article 8 ECHR. Judge of the First-tier Tribunal Pooler refused permission to appeal finding the conclusions were open to the Judge.

9. The appellants renewed their grounds of appeal to the Upper Tribunal and Upper Tribunal Judge Plimmer gave permission to appeal on February 15, 2016 on the basis it was arguable the Judge had erred by failing to apply the principles in Sanade and others (British children-Zambrano-Dereci) [2012] UKUT 00048 (IAC).

10. In a Rule 24 letter dated March 16, 2016 the respondent opposed the appeal arguing the findings made were open to the Judge and it was wrong for Upper Tribunal Judge Plimmer to raise a new matter. .

11. The matter came before me on the above date and I heard submissions from both representatives after which I reserved my decision.

12. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I make no order.

SUBMISSIONS

13. Mr Olawanle submitted the first-named appellant had been in the United Kingdom since 1999 and had been here legally when she conceived her two children. She was now a single parent and the Judge found that the children's father, her husband, had no contact with the children and by implication the first-named appellant as well. He pointed out that the first-named appellant had never claimed in her application or statement to have any dealings with her husband and that information about her husband only arose following questions put to her by the Judge but the Judge had rejected her evidence on this point. Although not raised at the hearing Mr Olawanle submitted that the Judge had erred in failing to have regard to the principles in Sanade because she had failed to give sufficient weight to the fact the first-named appellant's other child was British citizen and it would be unreasonable to require that child to leave the United Kingdom. Mr Olawanle also referred to the recent decision of PD and others (Article 8-conjoined family claims) Sri Lanka [2016] UKUT 00108 and submitted the Judge failed to have regard to the principles set out in that decision.

14. Ms Brocklesby-Weller relied on the Rule 24 response and submitted that this was never a *Zambrano* appeal. The fact there was no contact between the children's father and the father did not mean he would be unable to care for them in the United Kingdom. The Judge was aware of all of the facts of the case including [ND]'s acquired nationality. The decision had been open to the Judge.

DISCUSSION AND FINDINGS

15. The appellants' original applications were brought under the Immigration Rules and article 8 ECHR. The grounds seeking permission to appeal did not challenge the Judge's rejection of the applications under the Rules but instead challenged her decision on general human rights grounds.

16. In giving permission Upper Tribunal Judge Plimmer raised a matter that apparently had not been argued before the Judge namely the principles of Sanade.

17. Ms Brocklesby-Weller accepted, contrary to the content of the Rule 24 letter, that permission to appeal could be given on any relevant point of law. The issue was whether the Judge's decision was reasoned enough in relation to the fact [ND], a child/sibling, was a British citizen.

18. The appellants were represented by the same representative in both the First-tier and at the hearing today. It is clear the Judge was alive to possible EEA issues because in paragraph [27] she considered the position of the first-named appellant's husband. The Judge was clearly considering whether the first-named appellant had retained rights of residence. The question of whether her husband had permanent residence was not something considered as there was no evidence he had exercised treaty rights. Having considered the first-named appellant's oral evidence and her written evidence the Judge concluded in both paragraphs [27] and [34] of her decision that the appellants' husband/father was not in contact with the appellants.

19. The Judge therefore had to approach the appeals from the starting point that the children were living with their mother who was their sole parent and with sole responsibility. As stated above Mr Olawanle did not appeal the decision on the grounds the decision under the Rules was incorrect but instead argued that following the decision of ZH (Tanzania) [2011] UKSC 4 the Judge had erred by punishing the second-named appellant for the first-named appellant's poor immigration history and should have concluded it was unreasonable to expect the second-named appellant and her sister (now a British citizen) to leave the United Kingdom for a country they had never been to in their lives.

20. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) the Tribunal held that Ruiz Zambrano [2011] EUECJ C-34/09 "now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so". The respondent's most recent IDI's dated August 2015 also state that it is never reasonable to expect a British citizen child to accompany a parent outside of the EU.

21. Mr Olawanle agreed that being a British citizen was not a "trump card" and this must be correct in light of the Tribunal's decision in Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC) where it found

that UKBA continues to accept that EU law prevents the state requiring an EU law citizen from leaving the United Kingdom, although contends with good reason, that this is to be distinguished from a case where an independent adult can choose between continued residence in the United Kingdom or continued cohabitation abroad.

22. The Judge had in mind the family matrix and in considering the issue of immigration control reminded herself about part 5A of the 2002 Act (as inserted by the Immigration Act 2014) and in particular section 117B. She was also clearly aware that [ND] had acquired British citizenship as she considered the implication of this in paragraph [52] of her decision and the effect of Section 117B(6) of the 2002 Act.

23. Section 117B(6) states ."… the public interest does not require the person's removal where (a) the person has a genuine and subsisting relationship with a qualifying child and (b) it would not be reasonable to expect the child to leave the United Kingdom."

24. Ms Brocklesby-Weller effectively invited me to find that the Judge's consideration in paragraph [52] had regard to the point made in Sanade. In paragraphs [48] and [49] the Judge had noted:

    a. The children's best interests were a primary but not a paramount consideration.
    b. Their best interests were best served being with their mother.
    c. Both children were born here and [ND] was now a British citizen.
    d. The children wish to continue living in the United Kingdom.
    e. A key issue was whether [ND]'s interest in being able to exercise the rights that attach to her status as a British citizen mean that the removal of her sister and mother is disproportionate.

25. The Judge's key findings in paragraph [52] were:

    a. The person liable to be removed was the first-named appellant.
    b. [ND] was a British citizen and whilst this was a highly relevant consideration it was not a trump card.
    c. The fact [ND] was a qualifying child did not mean other public interest considerations are defeated.
    d. Section 117B(6) does not overrule other considerations under section 117B.

26. Mr Olawanle's original argument to the First-tier Tribunal rightly centred on the children because the first-named appellant's

atrocious immigration history would clearly have counted against her if she was the only appellant.

27. The Judge had regard to the fact the children's lives had been shaped by United Kingdom culture, values, pastimes, living standards, language and the prevailing education system with both the second-named appellant and her sister having participated in the education systems their whole lives. The Judge was aware of the stages both children were in at their schools and that both had established a private life. The Judge also accepted that having been born here neither child had any connection with Nigeria and for all intent and purposes the United Kingdom was their home albeit she recorded at paragraph [29] that the first-named appellant's parents and possibly extended family continued to live in Nigeria despite her claim not to have kept in contact.

28. It is against this background that I have considered the permission to appeal and the arguments advanced by both representatives.

29. I am satisfied that the Judge considered the issue of reasonableness for the purposes of article 8. However, the issue I have to decide is whether the Judge's assessment had regard to the principles of Sanade and in particular to the fact that [ND] lived with her mother and her father was not in contact with them.

30. I conclude that whilst the Judge carried out a detailed assessment of the appellants' circumstances she did not attach any weight to the principle that "where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

31. Whilst the Judge reminded herself British citizenship was not a trump card I am satisfied that as the Judge found that the children had no contact with their father the fact [ND] was a British citizen should have been given greater weight than merely a consideration of it being a trump card. For the reason identified by Upper Tribunal Judge Plimmer I do find an error in law and I set aside the decision under article 8 ECHR. In doing so I make it clear that save for this issue I would not have found an error in law.

32. I considered whether further evidence would assist me in remaking the decision but as the Judge's finding about the father has not been challenged it remains a finding of fact that I must carry forward and no further evidence is needed because nothing has changed since this decision was issued.

33. I therefore remake this decision and in doing so I have regard to the same matters that the Judge did but I also must take into account the principle of Sanade and in light of [ND]'s citizenship and the guidance both in Sanade and the respondent's own IDI's I find that removal of either appellant would make removal disproportionate and a breach of their article 8 rights.

DECISION

34. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in respect of the article 8 ECHR decision only. I set aside that decision and allow both appeals under article 8 ECHR.

35. I uphold the decisions under the Immigration Rules. .

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

A fee was paid I make no order as the appeals were granted on matters not raised by the appellants.

Signed: Dated:

Deputy Upper Tribunal Judge Alis