



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/48544/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 11 March 2016**

**Decision Promulgated
On 8 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**BENEDICTA ADEDAYO OMOLAYOLE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Adewusi of Crown Law Solicitors

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge De Haney promulgated on 19 June 2015 which allowed the Appellants appeal against a refusal to issue a residence card .
4. On 30 November 2013 the Appellant had applied for a residence card as conformation of her right to reside in the UK. On 18 February 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:
 - (a) In order to qualify for a derivative residence card the Appellant had to meet the requirements of Regulation 15A(2) of the Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations') as the parent of an EEA national child who claims to be exercising Treaty Rights as a self-sufficient person.
 - (b) The Appellant had failed to provide sufficient evidence that her EEA national son was self-sufficient in defined by regulation 4 and 6 of the EEA Regulations. The evidence provided showed that the Appellants child was supported by Manchester City Council and therefore could not be self-sufficient.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge De Haney ("the Judge") dismissed the appeal against the Respondent's decision. The Judge :
 - (a) Set out the Law at paragraph 5 setting out Regulation 15A of the EEA Regulations.
 - (b) The Judge found that the Appellant had a child who was an EU citizen and if the Appellant were to be removed her 6-year-old child would have to leave the UK.
 - (c) He concluded that 'On the **Zambrano** principle therefore the appeal is allowed.'
6. Grounds of appeal were lodged arguing that:
 - (a) The Judge had not applied the correct law: the provision he applied, Regulation 15A(4A) applies to children who are British Citizens and the Appellants child is a German national.

- (b) There are no findings as to the employment status of the child's father or whether they have resided in the UK at the same time as required by the relevant section.
7. On 1 September 2015 Designated Immigration Judge Zucker gave permission to appeal.
8. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Respondent that :
- (a) The issue was a narrow one and the Judge had applied the wrong law to the facts.
- (b) The matter should be re heard as there were no findings on the relevant facts.
9. On behalf of the Appellant Mr Adewusi submitted that:
- (a) He relied on his Rule 24 response.
- (b) The Zambrano principles had not been properly transposed into the EEA Regulations as the principal f that case was that if a child was an EU citizen the parents should be allowed to live in the host country and care for them.

Finding on Material Error

10. Having heard those submissions, I reached the conclusion that the Tribunal made material errors of law.
11. The Appellant in this case made an application for a Residence Card claiming a derivative right of residence based on her child being a German national. Her application was considered under Regulation 15(2) of the EEA Regulations and refused as there was insufficient evidence to show that the requirements were met.
12. The Judge in setting out the law in this case set out the wrong provisions, those that applied to British Citizen children rather than those that applied to non British citizens. Mr Adewusi, who appeared in the First-tier, argued that the EEA Regulations did not comply with the ruling in Zambrano.

13. It is unclear from the Judge's decision whether the Judge applied those incorrect Regulations to the facts of the case as there is no finding whether he met the law as the Judge believed was applicable. The failure of the First-tier Tribunal to address and determine whether the Appellant met the requirements of Regulation 15A(2) of the EEA Regulations constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

14. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be redetermined afresh.

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

16. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure to make findings in relation to any of those matters that were relevant to the provisions of the EEA Regulations that applied in the Appellants case. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.

17. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed.

Signed

Date 21.3.2016

Deputy Upper Tribunal Judge Birrell