



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/17756/2015
IA/17759/2015

THE IMMIGRATION ACTS

Heard at Field House
On 1 June 2017

Decision & Reasons Promulgated
On 14 September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ESTHER [B]
[E B]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Aborisade (OA Solicitors)
For the Respondent: Mr P Singh (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. These are the appeals of Esther [B] and her daughter [EB] (born in Nigeria, on [] 2008) against the decision of the First-tier Tribunal of 27 September 2016 dismissing their appeals, themselves brought against the decisions of 16 April 2015 to refuse their applications for leave to remain on human rights grounds.

2. On 9 January 2015 the Appellants applied for leave to remain, explaining that they lived in privately rented accommodation and were maintained from the proceeds of sales of property in Nigeria. The applications were provoked by the kidnapping of their relatives in Nigeria, by the religious extremists of Boko Haram.
3. The applications were refused on the basis that there were no very significant obstacles to the mother's integration back in her home country of Nigeria where she had long lived, and it would not be contrary to the best interests of [EB], or unreasonable with respect to [E], for the children to relocate. The immigration history provided in the refusal letter set out that Esther had entered the UK on multiple visit visas that had been valid for lengthy periods from 4 May 2004 onwards, most recently on one valid from 20 May 2011 to 20 May 2016.
4. An adjournment application was made on the Appellant's behalf below, on the basis that Esther wished to make an asylum claim based on her fears of Boko Haram; additionally her HIV status had not been considered by the Home Office. The First-tier Tribunal refused to adjourn proceedings, and the Presenting Officer indicated that she would forego cross examination on the Boko Haram dimension of the case, noting that any health claim would have to face the high hurdle identified in *N v United Kingdom* 2008 47 EHRR 885.
5. The evidence before the First-tier Tribunal was that the father of both daughters was [CO], from whom the Appellant is now separated. He became a British citizen, before the birth of their second daughter [E], who is now a British citizen. A rather vague letter from [CO] of May 2015 appeared to indicate that he played some part in their lives but the mother was their primary carer.
6. The First-tier Tribunal dismissed the appeal on the basis that the evidence as to [CO]'s present circumstances was so vague as to cast doubt on the claim that he no longer provided care to the children. There was an inconsistency in her account of the abduction of family members by Boko Haram: she had stated that all of her family had been taken, but also and that her mother and brother had fled to the mountains for safety. Approaching the Boko Haram question as a disguised asylum claim, there was nothing to prevent her from relocating to another part of the country. She had shown herself to be resourceful and her HIV status had apparently been managed over the decade she had visited the UK; she was clearly a resourceful woman who had been involved in trading before coming to this country. It was not accepted that there were problems with the quality of education in Nigeria, but even if that was true it would not render return disproportionate. The British citizen child was in fact a dual national and were it true that there was no contact from the father, then her interests would point in favour of living with the Appellant.
7. Grounds of appeal contended that the best interests of the child had been given only the most rudimentary consideration, inconsistently with *MA Pakistan*, and

without regard to section 117B(6) of the Nationality Immigration and Asylum Act 2002, and failed to have regard to the stated Home Office policy on the approach to the cases of British citizen children.

8. The First-tier Tribunal granted permission to appeal on 13 March 2017 on the basis that the grounds showed arguable errors of law.
9. Before me, Mr Singh pragmatically accepted that there was a material error of law in the decision below, on the basis that a positive case had been put before the First-tier Tribunal that the Appellant was the sole carer for both her children, including the British citizen child [E], and the First-tier Tribunal's rather equivocal acceptance of that possibility demanded that the appeal be evaluated with the *Zambrano* principle in mind.

Findings and reasons

10. Appendix FM provides:

“Section R-LTRPT: Requirements for limited leave to remain as a parent

R-LTRPT.1.1. The requirements to be met for limited leave to remain as a parent are-

- (a) the applicant and the child must be in the UK;
- (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
- (c)
 - (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
 - (ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or
- (d)
 - (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
 - (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1-3.2; and
 - (iii) paragraph EX.1. applies.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be-

- (a) under the age of 18 years at the date of application ...;
- (b) living in the UK; and
- (c) a British Citizen or settled in the UK; or
- (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

- (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent

(who is a British Citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or

- (b) the parent or carer with whom the child normally lives must be-
 - (i) a British Citizen in the UK or settled in the UK;
 - (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
 - (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

- (a) The applicant must provide evidence that they have either-
 - (i) sole parental responsibility for the child, or that the child normally lives with them; or
 - (ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and
- (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent

EX.1. This paragraph applies if

- (a)
 - (i) the applicant has a genuine and subsisting parental relationship with a child who-
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
 - (ii) it would not be reasonable to expect the child to leave the UK ..."

11. The parent route operates thus:

- (a) The possession of leave is not a prerequisite of this route where the exception at Ex.1 is relied upon (E-LTRPT.3.2(b));
- (b) There are various relationship requirements which must each be satisfied by an applicant:
 - they must be the parent of a child who has been resident here for seven years if not a British citizen or settled here (E-LTRPT.2.2);
 - sole responsibility for a child is one of the gateways to satisfying the Rule (E-LTRPT.2.3);

- they must show that they have sole parental responsibility for the child, or that the child normally lives with them (E-LTRPT.2.4).

12. It would appear that those requirements are potentially met in this case, subject to evaluation of the Ex.1 element of the Rules. The Nationality Immigration and Asylum Act 2002 provides:

“PART 5A

Article 8 of the ECHR: public interest considerations

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person’s right to respect for private and family life under Article 8, and
- (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

- (a) in all cases, to the considerations listed in section 117B ...

117B Article 8: public interest considerations applicable in all cases

...

(6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part

(1) In this Part – ...

“qualifying child” means a person who is under the age of 18 and who –

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;”

13. *Zambrano v Office National de l'Emploi (ONEm)* [2011] All E R (EC) 491 establishes that Article 20 of the Treaty on the Functioning of the European Union “is to be interpreted as meaning that it precludes a member state from refusing a third country national upon which his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen”.

14. That principle is given expression in The Immigration (European Economic Area) Regulations 2006

“15A. Derivative right of residence

(1) A person (“P”) who is not [an exempt person] 2 and who satisfies the criteria in paragraph (2), (3), (4) [, (4A)] 3 or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria. ...

(4A) P satisfies the criteria in this paragraph if –

- (a) P is the primary carer of a British citizen (“the relevant British citizen”);
- (b) the relevant British citizen is residing in the United Kingdom; and
- (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(7) P is to be regarded as a “primary carer” of another person if

- (a) P is a direct relative or a legal guardian of that person; and
- (b) P –
 - (i) is the person who has primary responsibility for that person's care;”

15. *Agyarko* [2017] UKSC 11 §67 demonstrates the potential relationship between the *Zambrano* principle and the considerations identified in the Immigration Rules, Lord Reed stating

“In the event that a situation were to arise in which the refusal of a third-country national's application for leave to remain in the UK would force his or her British partner to leave the EU, in breach of article 20 TFEU, such a situation could be addressed under the Rules as one where there were "insurmountable obstacles", or in any event under the Instructions as one where there were "exceptional circumstances". Typically, however, as in the present cases, the British citizen would not be forced to leave the EU, any more than in the case of *Dereci*, and the third-country national would not, therefore, derive any rights from article 20.”

16. As recently stated by the Court of Justice of the European Union in *Chavez-Vilchez* [2017] EUECJ C-133/15, the fact that the other parent is able and willing to assume sole responsibility for a child's primary care is a relevant factor but not a sufficient ground to conclude that the child would not be compelled to follow the parent who present holds that responsibility: the best interests of the child must be assessed having regard to all the specific circumstances, including their age, physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.
17. Given Mr Singh's pragmatic stance, I can shortly state my reasons for finding that the Appellant's appeal must succeed. Although *Zambrano* was not directly relied upon, that authority raises an issue of fundamental rights which should be taken into account by the Upper Tribunal once alerted to it.

18. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, Ex.1 “establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary”; albeit that §73: “It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.” Accordingly it was incumbent on the First-tier Tribunal to fully engage with the best interests of the British citizen child, having regard to the starting point that it was necessary to identify powerful reasons justifying the reasonableness of her departure.
19. The importance of that principle is greatly magnified by the *Zambrano* factor, given that it is difficult to see, if it is accepted that the Appellant is the sole carer of the child [E], how her departure would have any consequence other than the forced departure of a British citizen child. In the event that the father was willing to take over [E]’s care, then the consequences for the young girl’s equilibrium and development would have to be considered, applying *Chavez-Vilchez*.
20. Mr Aborisade sought to persuade me that the appeal could be allowed outright, on the basis that the refusal of leave to the Appellant necessarily involved the constructive expulsion of a British citizen child. However, the First-tier Tribunal did not make any clear finding as to the role of the Appellant's father in her life. Given the lack of clarity as to that issue shown in the witness statements and supporting evidence, that is unsurprising. Accordingly the matter must be reheard. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Decision

The appeal is remitted to the First-tier Tribunal for hearing afresh.

Signed

Date 1 June 2017

A handwritten signature in black ink, appearing to read 'MAS' followed by a flourish.

Judge Symes
Deputy Judge of the Upper Tribunal