



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/26522/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 10 May 2017**

**Decision & Reasons
Promulgated
On 24 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**G N
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D Ofei-Kwatia of Counsel
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. As this case involves young children I have decided to make an anonymity direction. 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 his 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.

2. The appellant is a citizen of Ghana born on 12 May 1966. She applied for a derivative right of residence under the Immigration (EEA) Regulations 2006. The appellant asserts that she has a derivative right of residence as the primary carer of two EEA citizen children. The appellant's two children are her son I born on 14 October 2001 who is a Dutch national, and E, born on 12 May 2004 who is a German national. The respondent refused to issue the appellant with a residence card on 8 July 2015. Initially the appellant had applied as a family member of an EEA national exercising treaty rights for a continuous period of five years. The sponsor, her husband, Mr TAA is a Dutch national. The respondent refused the application because it was not accepted that the appellant's husband was exercising treaty rights and/or that he had exercised them for a sufficient period of time. The appellant appealed against the respondent's decision to the First-tier Tribunal.
3. In a decision promulgated on 5 October 2016 First-tier Tribunal Judge Ruth dismissed the appellant's appeal. The First-tier Tribunal found that the appellant had not proved that her first son I was the son of her husband. On that basis the judge found that the appellant did not meet Regulation 15(a) of the EEA Regulations.
4. The appellant applied for permission to appeal to the Upper Tribunal. On 22 March 2017 First-tier Tribunal Judge Brunnen granted the appellant permission to appeal.

The Hearing Before the Upper Tribunal

5. There are essentially two grounds of appeal. Firstly it is contended that the First-tier Tribunal Judge erred in making the finding that the appellant has not proven that her husband is the father of I. It is submitted that the respondent has never taken any issue on this point that the judge was duty bound to put the matter to the appellant during the hearing. The second ground of appeal was that the judge failed to make a clear finding as to whether the appellant is the primary carer of her two children. The appellant's claim to be the primary carer remained unchallenged at the hearing and no issue has been taken with her supporting evidence on that issue. It is therefore unclear why the judge failed to make a finding on what is a principle question. It is submitted that the judge has failed entirely to consider the appellant's entitlement to a **Ruiz Zambrano (C-34/09)** right of residence because she has two EU national children who are both being educated in the United Kingdom. The appellant has no right of residence elsewhere in the EU so that if she was required to leave the UK both EU citizen children would be required to leave the EEA area.
6. Ms Fijiwala accepted that the judge had not considered the **Zambrano** point at all. She very helpfully indicated that therefore it was accepted that the case would need to be reconsidered and that the matter should

be remitted to the First-tier Tribunal. She also helpfully indicated that a Section 120 notice had been served on the appellant so that she would be able to raise Article 8 arguments at a rehearing.

7. I find that the judge has materially erred in law in failing to put to the appellant a point (that was determinative of the appeal) that had never been raised before, namely that the appellant's husband is not the father of her first son I. Further, the First-tier Tribunal materially erred in law in failing to consider the arguments that were put to the Tribunal that the appellant, as a primary carer of EEA children, is entitled to a derivative right of residence in accordance with the principles set out in the case of **Zambrano**, as recently considered in **Chavez-Vilchez and Others v Netherlands C-133/15**. In light of the Secretary of State's concession I set aside the decision.
8. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

Decision

9. The First-tier Tribunal's decision contained a material error of law. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'). The case is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before a judge other than Judge Ruth, to be heard on the next available date.

Signed P M Ramshaw

Date 22 May 2017

Deputy Upper Tribunal Judge Ramshaw

