



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

Appeal Number: OA/07767/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 29<sup>th</sup> July 2014**

**Determination  
Promulgated  
On 8<sup>th</sup> August 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FRENCH**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**S S  
(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer  
For the Respondent: Mr J Dhanji, instructed by UK Migration Lawyers Limited

**DETERMINATION AND REASONS**

1. S S is a citizen of India, currently living there, who was born on 3<sup>rd</sup> January 1980. In the interests of continuity I will continue to refer to him as “the Appellant” and to the Secretary of State as “the Respondent”, the titles by

which they were known before the First-tier Tribunal. The Appellant and his former wife have a daughter J who was born in the United Kingdom on 18<sup>th</sup> February 2008 and is thus now aged 6 years. The child is a British citizen. She is living with the Appellant in India.

2. The Appellant's immigration history so far as time spent in the United Kingdom is concerned appears to be that he first came to the United Kingdom in 2006 and claimed asylum in March 2007. Following refusal of that claim he did not leave. He had met his former wife in or about November 2006 and a relationship developed. J was born in early 2008. The Appellant left the United Kingdom in November 2008 accompanied by his then wife and J and the couple married in India on 25<sup>th</sup> November 2008.
3. Following his marriage the Appellant made an application for settlement in the UK as the spouse of a British citizen but that was refused. His former wife left India to return to the United Kingdom (the date is unclear). The Appellant's appeal against refusal of entry clearance was dismissed. The Appellant initiated divorce proceedings in India under the Hindu Marriage Act and a decree of divorce was granted in September 2012. The Appellant has formed a relationship with another British citizen who travels to India to meet him and sends funds. The Appellant made an application for entry clearance to exercise a right of access to a child in January 2013. The application was considered under paragraph 246 of the Immigration Rules and Appendix FM and was refused on 19<sup>th</sup> February 2013. The Appellant appealed.
4. The appeal was heard before First-tier Tribunal Judge Colyer at Nottingham Magistrates' Court on 12<sup>th</sup> March 2014. He dismissed the appeal under the Immigration Rules and upheld the refusal under paragraphs 320(7A) and 320(11) but went on to state in the decision:

“I find that the decision of the Entry Clearance Officer breaches the Appellant's derived rights under the community treaties conferring rights of entry and residence on the primary carer of a British citizen and I allow the appeal on that aspect.

I allow the appeal under Article 8 of the European Convention on Human Rights.”

5. The Secretary of State sought permission to appeal. The first basis was that the appeal should not have been allowed under Article 8 as the decision was at odds with the judge's findings. It was stated in the determination that the Respondent's decision was not a disproportionate interference with the Article 8 rights of the Appellant or members of his family. The second ground alleged a failure to give reasons or adequate reasons for his findings. It was said that the judge had failed to provide adequate reasons why refusing the Appellant entry to the UK would deprive J of the genuine enjoyment of the substance of the rights associated with her status as an EU citizen. It was submitted that in line with the case law in **Zambrano** it was the duty of the Appellant to provide

clear documentary evidence regarding the whereabouts of his child's mother and what had been done to find and locate her and obtain her views on the child's custody and living arrangements. The Appellant had failed to provide any adequate reason as to why he did not mention the child during divorce proceedings and there was no evidence that the child's mother had no interest in the child and no evidence that refusing the Appellant entry to the UK would deprive the child of the genuine enjoyment of the substance of the rights associated with her status as an EU citizen as there were family members in the UK who could care for her.

6. Permission was granted by Judge Plumptre on 13<sup>th</sup> May 2014. She commented that the determination was a detailed and thorough document but found it arguable that the judge had erred in his approach particularly when it was common ground that the Appellant had no contact with the child's mother and did not know her whereabouts and that her views on the child's custody and living arrangements had not been obtained. It was arguable that the refusal of entry clearance was proportionate because there was no evidence to suggest that the child had been deprived of rights associated with her status as an EU citizen.
7. At the hearing Mr Dhanji for the Appellant accepted that the judge had made a slip in stating that the appeal be allowed under Article 8. That is clearly right. The judge considered Article 8 issues at paragraph 73 to 79 of his determination and found that there was no breach of Article 8.
8. With regard to the other issue Mr Mills addressed me first. He accepted that the Immigration (European Economic Area) Regulations 2006 had been amended to take account of the judgment of the Court of Justice of the European Communities in **Zambrano [2011] EUECJ C-34/09**. The principle originally applied to expulsion of a parent but the Tribunal in **MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC)** had said there was no reason why it could not apply to exclusion also. He said that in a normal case where there was no record of past deception it might be reasonable to accept that there was no contact between a British child abroad and a UK parent but the starting point was that this Appellant had practised deception. Judge Colyer had accepted the findings of the earlier judge (Judge Telford) that the Appellant had been deceitful. That, he said, was the starting point. **Zambrano** was a hard case as was the subsequent case of **Dereci and Others (European citizenship) [2011] EUECJ C-256/11**. It was not enough that there might be economic hardship. With the mother in the United Kingdom there was an issue as to what contact there was between her and the child. He said if there had been no past credibility issues the judge would have been entitled to accept that there was no contact but in the circumstances he was not a credible witness without corroboration.
9. The divorce document, he pointed out, stated that the couple had no children. The Appellant had claimed that he had custody but the child had not been mentioned in the divorce proceedings which recited that there were no issue. He said it was perverse of the judge to accept the

Appellant's evidence. If I did not agree with him on that regard he said there was a lack of reasoning. The judge was of the view that the Appellant could have made contact with his former wife. The important point was whether the child could be in this country without the Appellant. There had been no consideration of the position of the mother caring for the child. It was not a question of preference. With regard to the Regulations, which he said should be interpreted in the light of the judgment in **Zambrano**, the Appellant might be the primary carer at the moment of the child but it was clear from Regulation 11(5)(e) read with Regulation 15A(4)(c) that the crucial issue was whether the child would be able to live in the United Kingdom if the Appellant were denied entry. The Appellant had not discharged the burden upon him.

10. In response Mr Dhanji said the starting point was the refusal notice. The ECO had accepted that the Appellant had sole responsibility and that, he said, had coloured the judge's approach. It appeared to be common ground that there was no contact with the child's mother. The question had been whether the Appellant had shown, on the balance of probabilities that the child could not live in the United Kingdom or a different EEA state without him entering with her. He said there was sufficient evidence to that effect notwithstanding the previous adverse findings. The judge was not blind to those findings to which he had referred. The ECO had accepted that the daughter had been abandoned and that the Appellant had sole responsibility. Without the Appellant being in the United Kingdom the child could not be here either.
11. Finally Mr Mills said that it was not common ground that the Appellant had sole responsibility. The refusal notice referred to there being a lack of evidence and there had been no mention of the child in the divorce proceedings; there was therefore an issue. If there was no evidence save oral evidence and the witness had previously practised deception the matter required looking at with great circumspection.
12. There is only one live issue in this appeal. It was accepted that the judge had erred in allowing the appeal under Article 8 ECHR when clearly that had not been his intention. The live issue is whether he erred in law in allowing the appeal on the basis that the Appellant is the primary carer of the British child J who could not live in the United Kingdom or any other EU state without the Appellant being granted entry.
13. Regulation 11 relates to right of admission to the United Kingdom. The relevant part reads as follows:
  - (5) A person ("P") meets the criteria in this paragraph where - ...
    - (e) P is accompanying a British citizen to or joining a British citizen in the United Kingdom and P would be entitled to reside in the United Kingdom pursuant to Regulation 15A(4A) were P and the British citizen both in the United Kingdom.

Paragraph 15A relates to derivative rights of residence and states:

(1) A person (“P”) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this Regulation is entitled to a derivative right to reside in the United Kingdom so 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 any other EEA state if P were required to leave.

14. The refusal notice is lengthy and concerns several issues. Although at one point it refers to the Appellant holding sole responsibility for the child, shared with his own family in India, it is also noted that the divorce document made no mention of the custody of the child and what arrangements had been made. Nothing had been provided to indicate the child’s mother had given her agreement to his having sole custody. The Appellant had stated that the reason for the divorce was because he did not want to go to the UK to reside yet he had submitted a settlement application with a view to doing that. The role of the mother was clearly raised at the hearing as at paragraph 18 it is recited that the Presenting Officer on that occasion contended that it was wholly unlikely that the mother would have abandoned the child.

15. The judge considered the Regulations and also the case of **Zambrano** and **MA and SM**. He noted (at paragraph 66):

“The relevant question that is posed by these Regulations is whether J would be unable to reside in the UK or another EEA state if the Appellant was unable to accompany her to the UK. It is said that Jessica has no contact with her mother or with any other members of her mother’s family. However there is reference to the mother’s address being in Leicester in the United Kingdom.”

It went on in the next paragraph to refer to the judgment of the Court of Appeal in **Harrison (Jamaica) v SSHD [2012] EWCA Civ 1736**, quoting Lord Justice Elias (at paragraph 19) stating

“In my judgment by referring to action which deprives children of the ‘substance of the right’ the Court is intending to say that the right may be infringed if in practice the children will be forced to leave with their ascendant relative even though they could in theory, as a matter of strict law, remain in the state of which they are nationals. It would be no answer for the state to say that the parents should be denied the right to remain because the children can be adopted, for example.

That approach of the Court is consistent with a fundamental tenet of EU jurisprudence which is that it always looks at substance rather than form.”

16. The judge went on to refer to **Zambrano** and to quote from **MA and SM**. He concluded “on the exceptional facts of this case I find that a refusal to admit the Appellant to the United Kingdom would deprive his child of the genuine enjoyment of the substance of the rights associated with her status as an EU citizen. Consequently, denying the Appellant a right of entry and residence to the United Kingdom would lead to a breach of Article 20 of the Treaty on the Functioning of the European Union. The appeal is therefore allowed on the basis that the decision of the Entry Clearance Officer breaches the Appellant’s derived rights under the community treaties in respect of entry to and residence in the United Kingdom.”
17. The first challenge (which had not been made in the grounds) was that the judge’s conclusion was irrational bearing in mind the poor immigration history and previous deceit of the Appellant. That history is not disputed but I find that the conclusion was not irrational or perverse on the basis that a judge could not possibly have come to that conclusion. I do however find that the conclusion was not reasoned in such a way that the Respondent would be able to understand why she had lost. The judge thereby erred in law.
18. The Regulations make it clear that the derivative right in respect of a non-EEA national caring for a British citizen is on the basis that the relevant British citizen would be unable to reside in the UK (or in another EEA state) without the presence of the non-EEA national. The quotation above from Harrison makes it clear that the right for the British national must not be illusory. Lord Justice Elias went on to state (at paragraph 63) “I agree with Mr Beale QC Counsel for the Secretary of State that there is really no basis for asserting that it is arguable in the light of all of the authorities that the **Zambrano** principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if a non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the court recognised in **Dereci**, but that is an entirely distinct area of protection.”
19. The judgment of the Court of Justice of the European Union in **Dereci** put the matter this way:
 

“European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the

Member State of which he has nationality, who has never exercised his right of freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.”

20. The live issue which was not addressed by the judge (and which had been raised by the Presenting Officer) was connection with the child’s mother and her role or potential role. The Indian divorce document dated 25<sup>th</sup> September 2012, brought at the Appellant’s suit, refers to two addresses for the wife in Leicester. The basis of the divorce was desertion and it is stated in the petition that the cause of the marriage breakdown was that the Appellant’s wife wanted him to live in England but he did not wish to do so. He had requested her to come back to him but she had refused. It is stated that the wife had put in an appearance and contested the petition so the address given for service must have been one at which at least at that time she could be found but she had not appeared at the actual hearing. The document expressly sets out that there were no children of the union.
21. The judge did not approach in a reasoned and adequate way the question of whether the mother of the child would be prepared to have the child live with her. There was no evidence of any attempt having been made to contact the mother by or on behalf of the Appellant. The burden of proof rests upon him. Given the Appellant’s previous deceit, and apparent wilful reluctance to contact the mother to obtain her views the judge did not adequately reasons why it was that he found that the child would not be able to live in the United Kingdom without the presence of the Appellant. The current partner in the UK said that there was no contact between the child and the mother but that would only be so far as she was aware and it does not establish that if the mother were contacted she would not be prepared to have the child live with her. This is quite distinct from the scenario posed by Lord Justice Elias that a British child could live in the United Kingdom if it were adopted or cared for by Social Services. This child has a mother in the United Kingdom who appears capable of being contacted to ascertain her views. Without those views being clearly known (or it being established that the mother could not be traced despite efforts) the Appellant had not shown that the decision deprived the child of the genuine enjoyment of the substance of the rights attaching to the status of a European Union citizen.
22. I accordingly find that Judge Colyer erred in law in this respect. No purpose could be served by a further hearing as it was clear that the Appellant had no evidence which might lead to a different conclusion. He is of course free to make a further application if further evidence is available. I set aside the judge’s decision and substitute a decision that the appeal is dismissed on the evidence available.

23. As this determination concerns a child and as an anonymity direction was made previously I propose to make an anonymity order as follows below.

### **Decisions**

24. The original determination contained an error on a point of law. I have set aside the decision and substitute a decision that the appeal is dismissed on all grounds.
25. Pursuant to Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 I order that the disclosure or publication of any matter unlikely to lead members of the public to identify the Appellant or members of his family is prohibited. Failure to comply with this order may lead to proceedings for contempt of court.

Signed

Date: 06 August 2014

Deputy Upper Tribunal Judge French