



IAC-FH-AR-V1

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

Appeal Number: IA/02266/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 July 2015  
Prepared 1 August 2015**

**Decision & Reasons Promulgated  
On 16 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY  
UPPER TRIBUNAL JUDGE C G WARD**

**Between**

**K M  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M Harris, counsel, instructed by Longfellows Solicitors

For the Respondent: Miss J Isherwood, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of St Vincent and the Grenadines, date of birth 13 March 1983, appealed the Respondent's decision, dated 16 December 2013, to refuse a combined application for further leave to remain in the United Kingdom as a Tier 2 (General) Migrant and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Secretary of State also concluded that the Appellant did not meet the requirements of eligibility under Appendix FM on the basis that

the Appellant was not in a subsisting relationship with Mr Aberdeen, a British national, and the father of K M M (the child).

2. The Secretary of State considered that the Appellant did not come within the requirements of private life considerations under paragraph 276ADE of the Rules and also took the view that the return of the Appellant with her child to St Vincent and the Grenadines did not, with reference to Section 55 of the BCIA 2009, mean that the Appellant should not be removed.
3. The appeal against that decision came before First-tier Tribunal Judge Ruth (the judge) who, on 19 January 2014, accepted that the Appellant withdrew her appeal against the adverse decision under Tier 2 of the PBS and dismissed the appeal on Article 8 ECHR grounds. There was no argument put before the judge on the basis of either her private life under the Immigration Rules or in relation to her role, which the judge found was as the sole/primary carer of her child. The child's father, Mr Aberdeen was not the primary carer nor did he share care of the child but he had occasional visiting contact. The judge concluded that there was no genuine and subsisting relationship between the Appellant and Mr Aberdeen.
4. It was not put to the judge that the Appellant's circumstances fell to be considered under the requirements of limited leave to remain as a 'parent' under Appendix FM, nor that there was any valid application made for limited or indefinite leave to remain as a partner.
5. It was also clear that no point was raised with the judge upon the issues in either **Zambrano** C-34/09 [2011] ECR I-0000 or **Sanade** [2012] UKUT 48. The judge acknowledged that the child was a British national, entitled to the rights and entitlements that come with citizenship and the judge was unequivocal that the child was entirely dependent on its mother for its care and wellbeing. The judge was not addressed on whether the Appellant might have **Zambrano** style derived rights of residence based on the position of her EEA national child or whether the Appellant fell within derived rights of residence under Regulation 15A of the Immigration (European Economic Area) Regulations 2006.
6. We did not find the judge made any error of law in failing to consider the potential position that might arise in an application, if made, under paragraph R-LTRPT of Appendix FM or eligibility for indefinite leave to remain as a parent. Such considerations were dependent upon a valid application being made which addressed all material considerations under Appendix FM: Which was not the enquiry the judge was invited to consider, nor was he addressed upon the matter, nor did he address the issue of the financial provision or security of the child.
7. As such the judge did not in our view demonstrate any arguable error of law in failing to consider those matters under Appendix FM.
8. The absence of an application made under Regulation 15A of the 2006 Regulations meant that the matter has never been considered by the Secretary of State under the 2006 Regulations. We did not think the judge

should have considered, for his part, the issues arising from **Zambrano** nor that it was a Robinson obvious point. Ultimately, there being no application for such derivative rights, Article 8 should not generally be used as a means to avoid either an application under the Rules, if appropriate, or under the 2006 Regulations.

9. No evidence had been given with regard to the derivative rights guidance provided by the Home Office and it is difficult to see how it would have been appropriate for the judge to proceed to determine the matter.
10. Nevertheless whilst it would have been better if the judge had addressed the matter of **Zambrano** and its potential implications we do not find it was a material error of law to decide the appeal on the arguments advanced. Rather it seemed to us the judge had done enough to show there were considerations that could arise and be material to such issues. However, he should not have concluded that the Appellant as a British nationality could be required to leave the United Kingdom for an indefinite period of time or in order to accompany the Appellant to make an out of country application for entry clearance on whatever basis might be thought appropriate.
11. Accordingly we do not think that the judge's assessment of proportionality in consideration of an Article 8 claim outside of the Rules properly took into account relevant considerations. However, in this case, because no application had been made under the 2006 Regulations or indeed under Appendix FM, we take the view that Article 8 should not be used as a means in effect to avoid the need to make a proper application for a derivative rights based residence permit nor under the Immigration Rules. Thus the judge's decision on Article 8 ECHR would not make a difference because it did not fall to be considered.
12. In our view the appropriate course would be for the Appellant to make the application to remain and to submit the relevant information either with reference to Appendix FM or in relation to the 2006 Regulations to show a proper basis to remain.

### **Decision**

The appeal is dismissed

### **Anonymity**

It did seem to us that the circumstances of the Appellant and child justify an anonymity order.

### **Fee Award**

The appeal has failed and accordingly no fee award is appropriate.

Signed

Date 12 August 2015

Deputy Upper Tribunal Judge Davey