



IAC-FH-NL-V1

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

Appeal Numbers: IA/23908/2014  
IA/27608/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 January 2016**

**Decision & Reasons Promulgated  
On 29 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS BRIGID OLUWAFUNMILAYO ADENIRAN  
MISS CYNTHIA ADENIKE ANJOLAOLUWA ADENIRAN  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr S Staunton, Senior Home Office Presenting Officer

For the Respondents: Mr L Doyle, Solicitor from M & K Solicitors

**DECISION AND REASONS**

**Introduction**

1. For ease of reference I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is the Respondent and Mrs Adeniran and her daughter are the Appellants.
2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Landes (the judge), promulgated on 27 May 2015, in which

she allowed the Appellants' appeals on Article 8 grounds outside of the Immigration Rules.

3. The appeals brought before the First-tier Tribunal were in turn against the Respondent's decisions of 9 May 2014, in which the applications for a residence card based upon Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (the Regulations) were refused. No removal directions had been set and no notice under section 120 of the Nationality, Immigration and Asylum Act 2002 served.
4. Prior to the appeals coming before the judge, the Appellants had had a previous appeal before the First-tier Tribunal in October 2014. There, First-tier Tribunal Judge Nixon had decided there was no right of appeal against the Respondent's decisions. That decision was challenged to the Upper Tribunal and on 28 January 2015 Upper Tribunal Judge Pinkerton concluded that Judge Nixon had erred in law. The appeals were therefore remitted back to the First-tier Tribunal.

### **The hearing before First-tier Tribunal Judge Landes**

5. In a thorough and well-structured decision, the judge first concluded that the Appellants had rights of appeal. The judge then went on to consider the merits of the appeals in respect of EU law and the Regulations. The issue was essentially whether the first Appellant had a derivative right based on the well-known Zambrano principle. In summary, the judge found that because the first Appellant's older child, David, was an Irish citizen, the first Appellant had failed to show that it was not possible for the family unit to go to Ireland, the country of which David is a national. On this basis the judge found that neither the second Appellant nor David would be forced to leave the territory of the European Union as a result of the Respondent's decisions. The appeals therefore failed under the Regulations.
6. I note that the arguments on behalf of the first Appellant at the hearing were not put on the basis of NA [2015] ECWA Civ 140 and the reference made to the Court of Justice therein (see paragraphs 18 and 62 of the decision).
7. The judge then went on to consider Article 8, basing her decision to do so on the decision of the Upper Tribunal in the case of Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC) (Ahmed in fact became NA when it reached the Court of Appeal). The judge considered all the relevant factors thoroughly, directed herself correctly to the approach in respect of Article 8, and concluded in clear terms that it would not be reasonable for either David or the second Appellant to leave the United Kingdom for Nigeria. She concluded therefore that the Respondent's decisions would constitute a breach of Article 8. Finally, at paragraph 62, the judge commented that she did not propose to consider the potential impact of her Article 8 decision as regards any derived rights of residence under EU law.

### **The grounds of appeal and grant of permission**

8. The grounds contended that the judge had erred in considering Article 8 at all, that in the alternative she erred in concluding that there would be breach of that provision, and finally that there was in fact no right of appeal in the first place. In granting permission on 6 August 2015, First-tier Tribunal Judge Nightingale was not impressed with grounds two and three (expressly refusing permission thereon), but deemed the issue of jurisdiction to consider Article 8 to be arguable.

### **The hearing before me**

9. At the outset of the hearing Mr Doyle very fairly accepted that in light of the Upper Tribunal decision in Amirteymour and Others (EEA appeals: human rights) [2015] UKUT 00466 (IAC), and perhaps more particularly the very recent Court of Appeal decision in TY (Sri Lanka) [2015] EWCA Civ 1233, the judge had, albeit through no fault of her own, erred in concluding that she had jurisdiction to determine the Article 8 issue. He accepted that in this respect the judge's decision could not stand. He also acknowledged that there was no "cross appeal" in respect of the judge's conclusions on the EU law issue.
10. Mr Doyle suggested in oral submissions and by way of a detailed Rule 24 response that these appeals should be stayed in light of the upcoming hearing before the Court of Justice in the NA case, a case that is due to be heard, as I understand it, in February this year. Mr Doyle referred to the unfortunate history to these appeals, the financial difficulties with which the first Appellant finds herself, and the effect of this on her ability to make a new application.
11. Mr Staunton simply relied on ground one and suggested that there was no need for a stay of these proceedings.

### **Decision on error of law**

12. There is clearly an error of law in this case, as has been accepted by Mr Doyle. The judge did not have jurisdiction to consider the Article 8 issue, as is clear from TY. Given that this was the sole basis on which she allowed the appeals, the error was obviously a material one.
13. I therefore set aside the decision.
14. Although the decision is set aside, I would wish to make it clear that but for the jurisdictional error, the judge's findings on and consideration of the Article 8 claim was in my view impeccable.

### **Disposal**

15. I informed the parties at the hearing that I would not stay these cases pending the outcome of NA in the Court of Justice. This is primarily because there has been no “cross-appeal” by the Appellants against the judge’s decision in respect of the EU law issue. As a consequence, that particular point has been resolved against the Appellants. The error of law in these appeals relates only to the jurisdiction concerning Article 8: the legally sound conclusion on the EU law issue stands (see, for example, paragraphs 19-20 of EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 (IAC)). Further, as far as I am aware, there is no general stay being placed upon cases in which the NA judgment may have some bearing. Finally, the judgment in NA is not expected until later this year and I see no good reason to add significant delay to the final resolution of these appeals (which involve two children).
16. I appreciate what Mr Doyle says about the first Appellant’s financial difficulties, but that is not a matter which can have a material bearing upon how I dispose with these appeals. One would hope that the Respondent has in place procedures for applications to be made notwithstanding financial difficulties, particularly where there are children involved. Article 8 rights need to have the opportunity of being ventilated and properly considered.
17. In light of the above, I re-make the decision in these appeals by dismissing them both under the Regulations. I have no jurisdiction to consider the Article 8 issues.

#### Anonymity

18. Like the First-tier Tribunal, I make no direction in these appeals. Although the second Appellant is a minor, there is no good reason to make a direction, having regard to the Presidential Guidance Note of 2013.

#### **Notice of Decision**

**I set aside the decision of the First-tier Tribunal.**

**I re-make the decision by dismissing the appeals under the Immigration (European Economic Area) Regulations 2006.**

**No anonymity direction.**

Signed

Date: 28 January 2016

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award

Signed

Date: 28 January 2016

Deputy Upper Tribunal Judge Norton-Taylor