



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03905/2015**

THE IMMIGRATION ACTS

Heard at Birmingham

Decision & Reasons

On 26th January 2016

Promulgated

On 12th February 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

SS

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Khan (Counsel)

For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal directed against a decision of the First-tier Tribunal (Judge Jerromes, hereinafter "the judge") promulgated on 27th July 2015. In that decision the judge had dismissed the Appellant's appeal against a decision of an Entry Clearance Officer made on 22nd January 2015, refusing to grant him entry clearance to come to the UK as a carer of a British citizen child.
2. Briefly, by way of background, the Appellant has an unedifying immigration history and all of that is set out in the judge's determination. He entered the UK illegally in 2006, made an unsuccessful asylum claim, used a false identity and subsequently made false representations in an

earlier entry clearance application. However, none of that is relevant to the issues which fall to be resolved in this appeal. Whilst in the UK without leave, the Appellant met a female British citizen whom I shall refer to as MK. They commenced a relationship and, on 18th February 2008, MK gave birth to a female child who I shall refer to as J. The Appellant is the father. In November 2008 the Appellant, MK and J travelled to India. Whilst there, on 25th November 2008, the Appellant and MK married. Shortly after that the Appellant made an application for entry clearance to come to the UK, with a view to settlement, as the spouse of a British citizen (MK). That application was refused and on 25th January 2009 MK left India, presumably returning to the UK, whilst the Appellant and J remained in India. They have remained there ever since. The Appellant has subsequently, and unsuccessfully, sought to come to the UK as a person exercising rights of access to a British child. He then made the application which led to the refusal decision of 22nd January 2015. He sought to appeal that refusal on two grounds only. The first was that his application should have succeeded on the basis of his having derived rights of residence as a "**Zambrano** carer". The second was that the decision had infringed his rights under Article 8 of the European Convention on Human Rights (ECHR).

3. The judge dismissed the appeal on both grounds. The second ground, that relating to Article 8, has not been subject to further challenge so it is not necessary for me to say anything more about it. As to the first ground, it had been asserted by or on behalf of the Appellant that there was no-one other than him who would be prepared to look after J in the UK, his claiming that MK no longer had any involvement with or interest in the child. It was said pursuant to this that attempts to trace MK had been made but had been unsuccessful albeit that she had, apparently, signed for some letters sent by recorded delivery as part of the tracing efforts to an address where she had once resided. It was contended that, in all the circumstances, the "irresistible inference" was that MK simply did not wish to play a part in J's life. All of this was highly relevant because on 8th November 2012 amendments to the Immigration (European Economic Area) Regulations 2006, had been made to give effect to the judgment of the European Court of Justice in the case of **Ruiz Zambrano (C34/09)**. The amendments which had been made to Regulations 11 and 15A had the effect of conferring rights of entry and residence upon the primary carer of a British citizen (including a British citizen child) who is residing in the United Kingdom where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in another EEA state. Further, in **MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC)** it had been held by the Upper Tribunal that there was no reason, in principle, why the decision in **Zambrano** itself and the amendments to the EEA Regulations could not be relied upon by the parents of a minor EU national (including a British national) living outside the EU so long as it was the intention of the primary carer (and here it was) to accompany the child to his or her country of nationality.

4. The Appellant, of course, being out of the country, was not able to attend the hearing before the First-tier Tribunal but he did have legal representation. His current partner, a female British citizen who I shall simply refer to as K, did attend and she gave oral evidence. The Respondent was not represented.
5. The judge accepted that the Appellant is J's primary carer. She then observed that her next task was to consider whether the Appellant had shown that the decision to refuse him admission to the UK had deprived J of the genuine enjoyment of the substance of the rights attaching to her status as a European Union citizen. If the answer to that question was yes then, as a consequence of **Zambrano** and the amended Regulations, he would succeed. However, the judge gave most careful consideration to the attempts which had been made to trace MK. That was important because, of course, if MK was prepared to have J live with her then that would mean it would not be necessary for the Appellant to be admitted to the UK in order for J to have and enjoy the substance of the rights attaching to her status as a European Union citizen. As to those tracing attempts, which had been in part conducted by K and in part by an employee at the Appellant's representatives (UK Migration Lawyers Limited), the judge said this;

"49. The burden of proof rests on the Appellant. He says he has been unable to trace [MK]. However, on the balance of probabilities I find that although efforts were made to find [MK] in the manner described by the Appellant, [K] and [C], those efforts taken as a whole, were half-hearted and fall short of reasonable and genuine efforts for the following reasons:

- 49.1 There is no evidence of any efforts made to contact [MK's] family or friends in the UK. On the balance of probabilities, it is not credible that the Appellant would not know any of her family or friends given that they were in a relationship in the UK for over eighteen months.
- 49.2 In the Divorce Certificate, it states that [MK] went to stay with relatives in Ludhiana before leaving India in 2009; there is no evidence of any efforts made by the Appellant to contact [MK's] family or friends in India.
- 49.3 The Appellant says he tried to contact [MK] after she left India in 2009 but he does not explain how he tried to contact her or what contact details he used.
- 49.4 The Appellant has friends and relatives in Leicester (and indeed [K] lives in Leicester) and yet no-one has actually been to visit either [an address where MK is said to have previously resided] or [another address where MK is said to have previously resided] to make enquiries - surely an obvious step to take if there was a genuine intention to trace [MK].
- 49.5 Mr Blundell invites me to draw the 'irresistible inference' that [MK] has in fact been traced but does not wish to play a part in J's life from the fact that some of the letters sent by [C] were signed for

by someone who appears to be [MK] but she did not then respond. However, I am not prepared to draw such an inference as this by itself is insufficient evidence and is undermined by [K's] own evidence that [MK] could not be traced at [the second of the two above addresses] pursuant to the electoral roll search (although I accept that the electoral roll is not conclusive evidence)."

6. By way of explanation, the person I have referred to as C is the particular individual from the UK Migration Lawyers Limited who had assisted with the tracing efforts.
7. So, essentially, the judge was saying that the Appellant had failed to show that it was necessary for him to be admitted to the UK because he had failed to show that MK was not prepared to have J live with her.
8. There followed an application for permission to appeal, the grounds having been drafted by Mr M Blundell of Counsel who had represented the Appellant before the First-tier Tribunal. The first ground criticised the judge for focusing unduly upon the tracing attempts whilst failing to properly address evidence which had been given to the effect that MK had never attempted to contact J since January 2009, evidence said to be highly relevant. The second ground criticised the judge for erring in failing to consider whether J would be effectively compelled to remain outside the United Kingdom even if MK could be traced. It was suggested, in this context, that the mere presence of MK in the UK and the mere possibility that she might be able to care for J could not be determinative.
9. A Judge of the Upper Tribunal granted permission to appeal, commenting;

"Arguably, the First-tier Tribunal Judge's determination did not properly engage with the principles of Union citizenship in an out of country application."
10. There was a hearing before the Upper Tribunal (before me) so that it could be considered whether or not the First-tier Tribunal had erred in law such that its decision ought to be set aside and, if so, what should follow from that. Representation at that hearing was as indicated above and I am grateful to both representatives for their assistance. Mr Khan, essentially, relied upon the grounds of application as drafted and Mrs Pettersen contended that the judge had thoroughly evaluated all matters and had reached a decision she was entitled to reach.
11. This is in some respects a quite unusual case. The determination produced by the judge is certainly very thorough, setting out in some detail the factual background and the previous immigration history and carefully analysing and reaching a view about the tracing attempts which have been made. She clearly did not think that, at least from the Appellant's perspective, the attempts to trace MK had been genuine (see paragraph 49.4 of the determination). Thus she was, to that extent at least, making an adverse credibility finding with respect to the Appellant.

12. In my judgment it was open to the judge to find that the tracing attempts had been “half-hearted” and that the Appellant, at least, had not been making or directing genuine attempts. I note that those specific findings have not been the subject of any subsequent challenge. Effectively, therefore, the Appellant’s own actions, or perhaps inactions, have prevented there being a proper consideration as to whether MK is available to and is willing and able to look after J. In view of that it seems to me that it was open to the judge to rely upon what she found to be non-genuine attempts to trace MK in concluding that the Appellant had failed to discharge the burden of proof which does lie upon him. It is my conclusion, therefore, that the judge did not err in law and that her decision should stand.
13. Finally, the First-tier Tribunal did make an anonymity order. No doubt that was to protect the interests of J. I have continued that order on the same basis.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. Accordingly, that decision shall stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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.

Signed

Date

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT
FEE AWARD**

I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway

