



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

Appeal Number: PA/08967/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 30th May 2017**

**Decision & Reasons Promulgated
On 14 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

**MS G.N.
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representative

For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Turnock promulgated on 10th January 2017, who dismissed the Appellant's appeal against the Respondent's decision to refuse both her protection and human rights claims.
2. The Appellant is a citizen of Kenya who was born on [] 1983. Within the decision of Judge Turnock he noted how the Appellant claimed to have left Kenya in January 2007 and then to have worked in Dubai. She returned to

Kenya several times to renew her visa to work in Dubai. She claimed that she had arrived in the UK on 25th December 2015 and claimed asylum one and a half months later on 10th February 2016. Judge Turnock noted she had brought a claim for asylum based upon the fact that it was said that she was escaping from the Mungiki Group and that she was a member of a particular social group and risked being subjected to FGM upon return to Kenya and that she would be killed also because she had a child out of wedlock.

3. Judge Turnock noted that she claimed that she was the mother of a British citizen child, W who was born on 8th April 2016 and that her argument was that if she was moved from the UK, it would be in breach of Section 6 of the Human Rights Act 1998.
4. Judge Turnock refused the asylum claim and I note that within the grant of permission to appeal granted by First-tier Tribunal Judge Landes on 21st April 2017 that she did not grant permission to appeal in respect of the asylum claim and found that the Judge's adverse credibility findings in respect of the asylum claim were sustainable, clear and cogent.
5. In respect of the Article 8 claim Judge Turnock noted in terms of the evidence, at paragraph 40 of his judgment that the Appellant's claim was that on 10th January 2016 Mr A, who is said to be the father of the child, threw her out of the house telling her that he was not ready to marry and that the relationship was over and telling her to terminate the pregnancy so she could go back to Dubai.
6. Judge Turnock found at paragraph 42 that the Appellant's child, W, was born on 8th April 2016. The birth certificate which was issued on 9th May 2016 did not show the name of the child's father, but a subsequent birth certificate issued on 7th September 2016 showed the father of the child to be Mr A, who was born in Nigeria. Judge Turnock found that a copy of the passports of W and Mr A had been produced which showed them both to be British citizens.
7. Judge Turnock considered the human rights claim from paragraph 64 onwards of his decision and found at paragraph 67 that the Appellant does have a child with whom she lives and he was satisfied that there was family life existing between them. He said that although the Appellant had made some reference to having established a private life in the UK, she had produced no evidence in confirmation of that assertion. At paragraph 74 the Judge found that the Appellant is not currently in a genuine and subsisting relationship with a partner, but she was the parent of a British citizen child.
8. The Judge further accepted given the updated birth certificate at paragraph 82 that Mr A was the father and that a DNA report had been produced in that regard which stated that the probability of paternity was 99.99% and noted at paragraph 83 that: "However, most importantly, the

Appellant has produced a passport which confirms that her son is a British citizen”.

9. The Judge went on to consider a statement 15th December 2016 that had been provided by Mr A, who did not actually turn up at the appeal hearing to give evidence. In that statement, Mr A said that he was writing to fully acknowledge his son W and that he was ready to support him and look after him and he stated that he needed his son in the UK along with the Appellant, for his son to have a sound upbringing.
10. At paragraph 87 the Judge noted that Mr A was prepared to participate in DNA testing to establish paternity and that he had accepted the results of the test by having his name recorded on the child’s birth certificate. However, the Judge did not accept that evidence and the Judge found the Appellant not to be a credible witness and that there was no evidence that Mr A was actively involved in the child’s upbringing or making the financial contribution claimed towards the child’s upbringing. He found that although it was said that Mr A was unable to attend the hearing because of another commitment, the Judge found that called into question his commitment to his son, and the Judge noted then at paragraph 88 that there was no evidence from L, who was the woman with whom the Appellant was living, which could have confirmed the claimed visits made by Mr A to see and support his son and there was no reliable evidence as to the current circumstances of Mr A.
11. However, the Judge then went on to consider Section 55 of the Borders, Citizenship and Immigration Act in terms of the British citizen child, and also made reference to the case of **EV (Philippines) & Ors v Secretary of State for the Home Department [2014]** as to what was in the best interests of the child. The Judge at paragraph 91 found that Mr A was born in Lagos, Nigeria and appeared to have no connection with Kenya apart from his relationship with the Appellant and if the Appellant were removed to Kenya taking her son with her that would severely limit the potential for a close relationship between W and his father and that the nature of the current relationship between father and son was, he found, highly significant in deciding whether it was reasonable to expect the child to leave the UK.
12. Judge Turnock at paragraph 92 went on to find: *“On the evidence presented I am not satisfied that the Appellant has produced sufficient evidence to establish that Mr A is playing a significant part in the life of ”W* but then found at paragraph 93 that the child was a young child who had been in the UK for less than two years and found that it was in his best interests to remain with his mother, and he said that that would be achieved if either his mother is granted leave to remain or, alternatively, he is removed with his mother. He states that the child was not yet in education and had not put down roots in the UK and that he would be able to integrate with his mother into life in Kenya without significant difficulty and while he would be deprived of some of the benefits of British citizenship, he said that it would not be unreasonable for him to follow the

Appellant to the country of her origin. On balance he found the need to maintain effective immigration control was not outweighed by the factors favouring the grant of leave to the Appellant. He dismissed both the protection and human rights claim.

13. The Appellant then sought to appeal against that decision. The Grounds of Appeal dealt with both the protection claim and the Article 8 claim. In respect of the Article 8 claim it was stated that there was evidence showing strong enough commitment by Mr A towards his son, W, and that the Appellant was the single mother of a British child and it would make life difficult for her son if sent to Kenya and they would have no accommodation, no money to feed him and being a 9 month British baby "he does not deserve all of this" was what was stated within the Grounds of Appeal. She said that sending herself and her son to Kenya would deny him fatherly love and support and that W's life would be in danger since they would be homeless and not be able to provide him with any basic needs.
14. Following that, there was a grant of permission to appeal by First-tier Tribunal Judge Landes on 21st April 2017, who granted permission to appeal on Article 8 grounds only. She did not grant permission to appeal in respect of the asylum claim on the basis that the decision and findings there were sustainable, clear and cogent. Judge Landes noted in respect of the Article 8 claim that the Appellant was now unrepresented and there was, she found, an arguable error of law regarding the human rights claim and that it was arguable that the reasons given by the Judge that it would not have been reasonable to expect the Appellant's son, a British citizen, to leave the UK were inadequate. The Judge found that he would be able to integrate into life in Kenya without significant difficulty but Judge Landes said she could trace no findings which supported that conclusion. In particular she could trace no findings about the conditions the Appellant and her son would return to or what practical or financial support they would have.
15. She went on to note that the Appellant had been working in Dubai, but that was before she had a baby and although there were indications that the Appellant had family living in Kenya, absent any findings about their current location and ability to support the Appellant and the child, at least initially, she did not consider it could be assumed that they would be able to support her and her son immediately upon return.
16. I have fully taken account of the Respondent's Rule 24 notice dated 4th May 2017 in which it is argued that the Judge had properly directed himself and it is said that the Judge noted at paragraph 74 that the Appellant is not currently in a subsisting relationship but is the parent of a child who is a British citizen. It is said that the Judge had correctly directed himself to **EV (Philippines)** and that the Judge had identified that the nature and quality of the relationship between the father and the child was a highly significant issue. It is said that the findings of the Judge at paragraphs 92 and 93 were entirely open to the Judge to make and

were not perverse and were properly reasoned and that the decision amounts to no more than disagreement with the findings of the Judge.

17. I bear in mind that the Appellant is unrepresented before the Upper Tribunal. Today I do note she was accompanied by the father of her child, Mr A, who had produced what he described as being legal submissions in respect of the Judge's consideration of the Article 8 case which were handed up to the Tribunal and in respect of which Mr Armstrong did not have any objection to the Tribunal considering.
18. I have taken account of the submissions made within that document but, in my judgment, the submissions made in that document do not go to the core of the problem in this case regarding First-tier Tribunal Judge Turnock's decision.
19. In his submissions Mr Armstrong properly conceded that although the evidence given by the Appellant before First-tier Tribunal Judge Turnock in regards to Mr A's involvement within W's life was said to be more substantive in terms of both visits and financial contributions, in fact Judge Turnock did not accept that Mr A was involved in W's life to the extent claimed. He found the Appellant not to be a credible witness and found specifically that :

"There is no evidence that Mr A is actively involved in the child's upbringing or making the contribution claimed by the Appellant, there is no confirmation of Mr A's contribution in the letter produced which said that he was unable to attend the hearing because of another commitment, which I find calls into question his commitment to his son."

20. As previously noted, there was no evidence from L which could have confirmed the claimed visits made by Mr A to see and support his son. There was no reliable evidence as to the current circumstances of Mr A. As Mr Armstrong concedes, the Judge did not accept therefore that Mr A was playing any or any significant part or role in W's life although the Judge then went on to find in paragraph 91 that that was a highly significant factor. The Judge bore in mind the fact that the child was less than 2 years old at that point and found that W would be able to integrate with life in Kenya with his mother without significant difficulties and he may be deprived of some of the benefits of British citizen, it was not unreasonable for him to follow the Appellant to the country of origin.
21. Mr Armstrong referred me to the case of **MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705** from the Court of Appeal and in particular to the lead judgment of Lord Justice Elias, with whom the remainder of the Court of Appeal Judges agreed. He referred me particularly to paragraph 114 of the judgment, where it was held that in considering the reasonableness question the wider public interest considerations rather than simply the position of the

child had to be considered including the immigration history of the parents.

22. However, of course I bear in mind in that regard that **MA (Pakistan)** was dealing not with a case of a British citizen child but a child who was a foreign national who had at that stage lived in the UK for more than seven years. Clearly, under Section 117B(6) obviously in the case of either a British citizen child or in terms of a child who has lived in the UK for more than seven years, the public interest does not require removal where it would not be reasonable to expect the child to leave the UK.
23. However, in considering the reasonableness issue, I find that Judge Turnock has failed to consider in this case is whether or not the **Zambrano** principle would be breached.
24. The principle set out in the **Zambrano** case is reflected within the Home Office's own guidance in respect of family life as a partner or parent and private life under the ten year route dated August 2015 that both decision makers should not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force the British child to leave the EU, regardless of the age of that child.
25. Mr Armstrong is quite correct in saying that the fact that there is a British citizen child is not a trump card. However, the principle in the **Zambrano** case was recently upheld and considered by the Grand Chamber in the case of **Chavez-Vilchez and Others (Union citizenship - Article 20 TFEU - Access to social assistance and child benefit conditional on right of residence in a Member State : Judgment) [2017] EUECJ C-133/15**.
26. Consideration has to be given to whether or not there is any other person who would in fact be in a position and willing to look after the British/EEA national child within the UK if an Appellant were to be returned to their country of nationality, or whether the decision will in fact force the child to leave the EU.
27. In this case Judge Turnock found that W was a British citizen child and on the findings of Judge Turnock his findings were that Mr A was not actually involved in the life of W in any way and certainly not to the extent claimed and did not accept that there were visits or financial contributions and simply found in effect that it would be reasonable for W to leave the UK if the Appellant were forced to leave.
28. In that regard, although Mr Armstrong argued that **EV (Philippines)** was considered by the judge in respect of what is in the best interests of the child, there has not been a consideration of the **Zambrano** principle and no consideration as to whether the decision in effect forces W to leave the EU. The whole point of the **Zambrano** principle is that it is not reasonable to force a British citizen child to leave the EU. That, I find, is a **Robinson** obvious point that should have been considered in this case given the

Judge's findings that Mr A was not involved in the upbringing of the child as claimed.

29. I do therefore find that there is a material error of law in that regard in the decision of First-tier Tribunal Judge Turnock.
30. However, I agree with Judge Landes that the decision in respect of the protection and asylum claim should stand. Judge Turnock did give clear and adequate and sufficient reasons for rejecting the protection claim.
31. However, in respect of the Article 8 claim in light of the material error of law, I cannot be satisfied that it can be said that the decision would have been necessarily the same had that error not been made. I find that the decision was in respect of the Article 8 claim should be set aside.
32. I accept the argument made by Mr Armstrong that the situation since the date of the decision before Judge Turnock in December last year may have changed.
33. However, the findings of Judge Turnock regarding his consideration that he did not find the Appellant to be a credible witness and that there was no evidence of Mr A being actively involved in W's upbringing or making the contribution claimed by the Appellant and no confirmation of Mr A's contribution in the letter produced, and his finding that Mr A had failed to attend the hearing, this called into question his commitment to his son in paragraph 87, are findings that should be preserved. Those were based upon the evidence before First-tier Tribunal Judge Turnock in December. Although clearly matters may have changed since then, the findings as to Mr A's involvement as at December should be preserved. Mr Armstrong accepts those findings were open to the Judge on the basis of the evidence at that stage.
34. I accept the argument by Mr Armstrong that clearly there has been no separate or further evidence produced in respect of the position today and although I do have both the Appellant and Mr A before me today, I am not persuaded that it would be fair or in the interests of justice simply to hear evidence from them and submissions from the Appellant today. The **Zambrano** point and the consideration of the European case law following it is a technical legal argument. The Appellant should also have the opportunity of giving a statement to address the issue and to take some legal advice on that issue. I do not think it is in the interests of justice to expect the Appellant to be able to deal with any complex legal arguments on that **Zambrano** issue herself this afternoon.
35. I therefore do find that given that there is a fair amount of fact-finding that will be required in terms of the current position under Article 8 and in consideration of the **Zambrano** principle. It is appropriate to set aside the decision of First-tier Tribunal Judge Turnock in respect of the Article 8 consideration, save for the preserved findings of fact which I have already

previously mentioned. I therefore do allow the Appellant's appeal to that limited regard.

36. I therefore direct that the case should be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Turnock, being limited to the Article 8 claim and consideration of the **Zambrano** principle, subject to the preserved findings of fact referred to in my judgment regarding the extent of Mr A's involvement in W's life as at December 2016.
37. I do bear in mind that the First-tier Tribunal Judge Turnock did grant an anonymity direction in this case and in such circumstances I do find that it is appropriate given the issues raised within that judgment for there to be an anonymity order. The case clearly does involve a young child.

Notice of Decision

The decision of First-tier Tribunal Judge Turnock in respect of the Article 8 claim, does contain a material error of law. I set aside his decision in respect of the human rights Article 8 claim, save for the preserved findings of fact referred to in the body of my decision regarding the extent of Mr A's involvement in W's life as at December 2016.

I remit the case back to the First-tier Tribunal for a rehearing on the Article 8 human rights claim only, to be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge O'Keefe.

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 her or any member of her 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 5th June 2017



Deputy Upper Tribunal Judge McGinty