Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00400/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd February 2020	**On 16 March 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE BLUNDELL

Between

T A M
(Anonymity Direction Made)

Appellant

and
Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr T Nyawanza instructed by Axiom Stone Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

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 his 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. This direction is made because there are minors involved.

1. The appellant is a national of Jamaica born on 1st March 1980 and she appeals against the decision to deport her under the Immigration (European Economic Area) Regulations 2016 ('the 2016 EEA Regulations').

2. The First-tier Tribunal dismissed her appeal, on 4th February 2019 under the 2016 Regulations but owing to a material error of law, in particular the failure to assess adequately the best interests of the children under section 55 of the Borders Citizenship and Immigration Act 2009 and a failure to have regard to **Ayinde and Thinjom (Carers -Reg.15A – Zambrano** [2015] UKUT 00560 (which held the best interests of the children were not necessarily adequately protected by them being taken into care) that determination was set aside. There were no findings preserved.

3. The key issues in the resumed hearing were whether the appellant presented a genuine, present and sufficiently serious threat to the fundamental interests of society and thus the decision to deport was taken on the grounds of public policy, public security or public health, in accordance with the 2016 Regulations and if so, secondly whether the decision to deport the appellant would force her children to leave the UK to accompany their mother and would be in breach of their fundamental rights as citizens of the EU and the decision would be proportionate in all the circumstances.

4. The Secretary of State had signed a Deportation Order on 6th June 2018 following the appellant's conviction and sentence on 23rd January 2014 at Birmingham Crown Court, for conspiracy to supply a Class A controlled drug, namely heroin, and conspiracy to supply a Class A controlled drug, namely Crack Cocaine. The appellant received a prison sentence of 8 ½ years.

5. The applicant had entered the UK as a visitor (although the precise date was unknown) having applied for entry clearance in Kingston, Jamaica in 2002. After arrival her leave was extended as a student until 30th September 2007. She was then encountered on 19th December 2007 and served with papers as an overstayer. On 23rd November 2009, however, she was granted 3 years discretionary leave until 22nd November 2012, owing to the length of her residency and family life in the UK. Her application in 2012 for leave to remain on the basis of long residency (14 years) was placed on hold pending her prosecution which led to her conviction referenced above. She was served with notice of her liability to deportation on 16th May 2014 and submissions invited. On 20th July 2016 she was served with a notice of a decision to make a deportation order under the UK Border Act 2007. In the light of her response and implied asylum claim, the appellant was sent a Preliminary Information Form ICD 4940 and ASL 4941 (asylum support application), to which she failed to respond. On 13th December 2017 she was served with a notice of liability to deportation under the 2016 EEA regulations because of her claim that she had a British child. The Deportation Order was then signed.

6. It was acknowledged by the Secretary of State on 21st June 2018 that she had a derivative right of residence under regulation 16 of the EEA Regulations because of her relationship with her two children born in the United Kingdom on 8th March 2006 (TRLN) and 26th September 2009 (RPWM). Both children were said to be British citizens and she the primary carer. It was not accepted that the appellant had a permanent right of residence owing to her failure to have lived in the UK in accordance with the 2016 Regulations, her immigration history detailed above and that she had been in prison (see Regulation 3(3) of the 2016 Regulations). She was thus entitled to the lowest level of protection under the 2016 Regulations. Nonetheless, the Secretary of State considered that the appellant represented a sufficiently serious threat to the fundamental interests of the United Kingdom and that her deportation would be proportionate.

7. The appellant challenged her deportation under regulation 36 of the 2016 EEA Regulations and on human rights grounds under Section 82 of the Nationality, Immigration and Asylum Act 2002.

8. With regard the appellant's criminality, the sentencing judge found that the conspiracy had lasted 4 months, there were 9 test purchases by police officers and the appellant always answered the phone, which was used 100,000 times with an average of 22 dealings a day. The appellant had denied the offences, said nothing at her trial until the day of her sentence and suggested to the Probation Officer she was entirely innocent. The sentencing judge found she had sole control of the phone, was obtaining the supply and was involved in the packaging. The appellant set up the supply business using her occupation as carer as a sort of disguise, was directing or organising, buying and selling on a commercial scale and must have had substantial links to others further up the chain. It was also identified that the appellant had induced the involvement of, and exploited, a vulnerable co-defendant.

Discussion

9. The appeal was filed under both Regulation 36 of the 2016 Regulations and under Section 82 of the Nationality, Immigration and Asylum Act 2002. It is necessary to consider the matter under the 2016 Regulations and where relevant, with reference to Article 8, the Secretary of State's position is set out in the Immigration Rules and Section 117C of the Nationality, Immigration and Asylum Act 2002. In both cases we are required to make a current assessment of the best interests of the children, Section 55 of the Borders Citizenship and Immigration Act 2009, **ZH (Tanzania)** [2011] UKSC 4.

10. **Zambrano** [2011] EUECJ C-34/09 established that member states cannot refuse a person the right to reside and work in the host member state, where that person is the primary carer of a Union citizen who is residing in their member state of nationality and refusal of a right of residence to that primary carer would deprive the Union citizen of the substance of their European citizenship rights by forcing them to leave the EEA. The decision in **Zambrano** was given effect in domestic law by amending the Immigration (European Economic Area) Regulations 2006 and in

the 2016 Regulations by Regulation 16(5) (previously under the Immigration (European Economic Area) Regulations 2006, 15A(4A)). However, Regulation 16(12) (previously 15A (9) provides that a person who is otherwise entitled to a derivative right to reside shall not be so entitled where the Secretary of State has made, as here, a decision under Regulation 23(6)(b).

11. Regulation 23 of the 2016 EEA regulations sets out the provisions with regard the exclusion from the United Kingdom for those with a derivative right of residence (by virtue of regulation 28) as follows:

Exclusion and removal from the United Kingdom

23. *–*

…

(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –

(a)that person does not have or ceases to have a right to reside under these Regulations;

(b)the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or

(c)the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

(7) A person must not be removed under paragraph (6) –

(a)as the automatic consequence of having recourse to the social assistance system of the United Kingdom; or

(b)if that person has leave to remain in the United Kingdom under the 1971 Act unless that person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.

(8) A decision under paragraph (6)(b) must state that upon execution of any deportation order arising from that decision, the person against whom the order was made is prohibited from entering the United Kingdom –

(a)until the order is revoked; or

(b)for the period specified in the order.

(9) A decision taken under paragraph (6)(b) or (c) has the effect of terminating any right to reside otherwise enjoyed by the individual concerned.

12. Any such deportation is required to be in accordance with regulation 27 of the 2016 regulations as follows:

Decisions taken on grounds of public policy, public security and public health

27. *–*

(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a)has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b)is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles –

(a)the decision must comply with the principle of proportionality;

(b)the decision must be based exclusively on the personal conduct of the person concerned;

(c)the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d)matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e)a person's previous criminal convictions do not in themselves justify the decision;

(f)the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin

13. Schedule 1 of the 2016 Regulations sets out at paragraph 3 that where a family member of an EEA national has received a custodial sentence the longer the sentence the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society. Schedule 1 paragraph 5 provides that removal of a family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (i.e. successfully reformed or rehabilitated) is less likely to be proportionate.

14. The fundamental interests of society are at Schedule 1 paragraph 7 as follows

The fundamental interests of society

7. *For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include –*

(a)preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b)maintaining public order;

(c)preventing social harm;

(d)preventing the evasion of taxes and duties;

(e)protecting public services;

(f)excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g)tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h)combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(i)protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j)protecting the public;

(k)acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

(l)countering terrorism and extremism and protecting shared values.

15. We have also had regard to the Secretary of State's Guidance on EEA decisions on grounds of public policy and public security Version 3 published in December 2017 and Free movement rights: derivative right of residence Version 5 published on 2nd May 2019.

16. We accept owing to the appellant's immigration history that she did not have permanent residence under the 2016 Regulations and no case was made otherwise. She entered the United Kingdom on a visit visa in 2002 and remained under the immigration rules until she was imprisoned in 2012. She cannot comply with the requirements of paragraph 8 of Schedule 6 to the 2016 EEA Regulations in order to secure permanent residence under the 2016 Regulations. She was not an EEA national or family member of an EEA national prior to her incarceration in 2012. Her derivative right of residence was acknowledged by the Secretary of State only in 2016. Further to Regulation 28 (1) (b) of the 2016 Regulations, the appellant holds a derivative residence card, and regulation 28 (2) determines that only the lowest level of protection will apply and sets out as follows:

28 …

(2) Where this regulation applies, this Part of these Regulations applies as though –

(a)references to "the family member of an EEA national" referred instead to "a person with a derivative right to reside";

(b)references to a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card referred instead to a "derivative residence card";

> *(c)regulation 24(5) instead conferred on an immigration officer the power to revoke a derivative residence card where the holder is not at that time a person with a derivative right to reside; and*
>
> *(d)regulations 24(4) and 27(3) and (4) were omitted*

17. Although at a previous case management hearing the Home Office Presenting Officer confirmed that the Secretary of State relied on the exception principle in **R v Bouchereau** [1978] QB 732 at p 742, that past conduct 'alone' may constitute a threat to the requirements of public policy, Ms Cunha did not pursue that submission and we were not persuaded that principle should apply in any event. As set out in **Robinson (Jamaica) v Secretary of State** [2018] EWCA Civ 85 at [69] and citing from **R v Bouchereau** [1978] QB 732 at p 742

> *'Although therefore in the nature of things, the conduct of a person relevant for the purposes of article 3 will generally be conduct that shows him to have a particular propensity, it cannot be said that that must necessarily be so'.*

At [71] Singh LJ in **Robinson** stated that it was important to 'recognise that what the ECJ was there talking about was not a threat to 'the public' but a threat to 'the requirements of public policy' and the latter was a broader concept and 'that past conduct can only be taken into account in so far as it provides evidence of personal conduct constituting a 'present threat to the requirements of public policy'…'"in general" that will imply that the person concerned has a "propensity to act in the same way in the future" but that need not be so in every case'. Singh LJ considered that it was helpful to have regard to the opinion of the Advocate General in **Bouchereau** when he referred to the type of case which might attract "deep public revulsion" as being 'the kind of extreme case in which past conduct alone may suffice as constituting a present threat to the requirements of public policy'.

18. We do not wish to undermine the nature and seriousness of the offence committed by this appellant, as witnessed by the length of sentence that she has received and we accept that the **Bouchereau** exception may apply to the case of a person with a derivative right of residence owing to the care of a child, but we are not persuaded that this is such an extreme case which involves such 'public revulsion' as to warrant application.

19. General considerations of deterrence and public revulsion *normally* have no part to play, albeit the appellant does not have permanent right of residence. As held by Singh LJ at paragraph 84

> '*what one is looking for is a present threat to the requirements of public policy; but it also recognised that, in an extreme case, that threat might be evidenced by past conduct which has caused deep revulsion'*

and he proceeded at paragraph 85

> *'I am also of the view that the sort of case that the ECJ had in mind in Bouchereau, when it referred to past conduct alone as potentially being sufficient was not the*

present sort of case but one whose facts are very extreme. It is neither necessary nor helpful to attempt an exhaustive definition but the sort of case that the court was thinking of was where, for example, a person has committed grave offences of sexual abuse or violence against young children'.

20. This is not such an extreme case. Although it is the type of offence, supplying of drugs, in which public revulsion at a past offence alone might be sufficient, we do not find the particular circumstances can characterise the offence as 'the most heinous of crimes'. In **R v Secretary of State ex p Marchon** [1993] Imm AR 384, the offence of drug importation was committed by a doctor and was described in the subsequent judgment of **Straszweski** [2016] 1 WLR 1173as 'especially horrifying'. Although a care worker, the appellant in this instance had no prominent position of public importance and it is difficult to characterise the offence as the 'most heinous of crimes', where the adjectival superlative 'most' is applied to 'heinous' which is defined in the dictionary as 'evil' 'monstrous' and 'reprehensible'. Nor does the appellant's recruitment of a vulnerable individual suffice, in our judgment, to tip her offending into the very extreme category of case described in the authorities.

21. We therefore do not accept that the appellant falls foul of the **Bouchereau** exception whereby past conduct 'alone' may constitute a threat to the requirements of public policy, when concluding that the appellant presented a sufficiently serious threat to the fundamental interests of the United Kingdom.

22. **Robinson (Jamaica) v Secretary of State** [2018] EWCA Civ 85 specifically considered the question of the principles to be applied in circumstances where a third country national was to be deported to Jamaica but prior to her deportation gave birth and was subsequently found to be the sole carer of an EU citizen child. The question examined was the approach to be applied in such circumstances. The EU did not preclude expulsion, where there was a genuine, present and sufficiently serious threat to public policy or public security in view of the criminal offences committed by that third country national, provided the principle of proportionality was observed. Singh LJ provided guidance as follows from paragraph 56 onwards:

"...I will seek to summarise what the CJEU said with a view to providing guidance to the UT when issues of this kind have to be considered both in the present case and in future cases.

57. First, account must be taken of the right to respect for private and family life, as laid down in Article 7 of the EU Charter of Fundamental Rights, and also the obligation to take into consideration a child's best interests, which is recognised in Article 24(2) of the Charter.

58. In principle, the concepts of "public policy" and "public security" provide legitimate aims which can justify an interference with those fundamental rights. For example, "the fight against crime in connection with drug trafficking as part of an organised group" will be included within the concept of "public security", as will the fight against terrorism.

59. Thirdly, the expulsion decision must be founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are EU citizens.

60. That conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can only result, where appropriate, from a specific assessment by the national court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the courts ensure.

61. That assessment must therefore take account in particular of:

(1) the personal conduct of the individual concerned;

(2) the length and legality of his residence on the territory of the member state concerned;

(3) the nature and gravity of the offence committed;

(4) the extent to which the person concerned is currently a danger to society;

(5) the age of the child at issue and his state of health;

(6) his economic and family situation.

62. In carrying out the balancing exercise required by that assessment, the court must take account of the fundamental rights at stake, in particular the right to respect for private and family life, and ensure that the principle of proportionality is observed.

63. *Furthermore, account must be taken of the child's best interests when weighing up the interests involved. Particular attention must be paid to his age, his situation in the member state concerned and the extent to which he is dependent on the parent who is to be deported".*

23. We turn to an overall consideration of whether the appellant's personal conduct represents a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. The appellant received a lengthy sentence of 8 ½ years which represents a very serious sentence for a serious offence. By paragraph 3 of schedule 1 to the 2016 Regulations, it is more likely that the appellant poses a threat to the fundamental interests of the UK as a result of such a sentence. The appellant was imprisoned in 2012 and released on 29th December 2017. We have taken into account the factors under Regulation 27(5) when assessing whether the threat posed to the public policy and public security requirements. The nature and extent of the harm inflicted on society and the wider community is demonstrated by the description by the sentencing judge of those who were convicted and sentenced with the appellant, drug abusers with longstanding habits, used to supply drugs, who also had children but were imprisoned for periods of years. The impact on, for example, the children, let alone the even wider community, is evident.

24. As the Secretary of State set out in the decision to make the deportation order, the appellant denied the offence in which a jury convicted her of supplying Class A drugs. These drugs are categorised as such because, as set out in the Secretary of State's decision letter, they have the most serious detrimental impact on the health and well being of those who become addicted and the harmful consequences for society as a whole includes destroying lives and creating havoc and insecurity in communities in the United Kingdom. The offence was serious and the sentence the appellant received reflected this.

25. The appellant was criticised by the Secretary of State for failure to complete programmes such as the Enhanced Thinking Skills and for receiving two adjudications whilst imprisoned at Drake Hall. The OASys report confirmed, however, that whilst the appellant was in custody there were no issues with staff and she was motivated to comply whilst in prison and on Licence. There was reference to the use of changing a mobile phone without permission and bringing back money from home leave but she subsequently gained back her outwork. The report confirmed that it was part of her Licence conditions to complete the MARIPOSA Women's Programme designed to support women in their thinking and behaviour. That Licence is ongoing and thus the possibility to complete the course remains and is not necessarily outstanding. The probation officer who compiled the OASys report confirmed that TAM had attended to see the officer when requested whilst on home leave and kept in regular phone contact to keep him/her updated on her progress and concerns.

26. Although the appellant was rearrested in 2019 following a domestic dispute with her ex-partner and was said to have breached the conditions of her licence, she was acquitted and no further action has been taken against her. She has not been convicted of reoffending since her release just over two years ago. We take into account the fact that the threat does not need to be imminent and as set out in the Guidance on "EEA decisions on grounds of public policy and public security" (2017), even a low risk can constitute a present threat especially where the consequences of any offence could be serious and we accept that if there were reoffending of a similar nature this would be serious enough to affect one of the fundamental interests of society. We do accept that she has been released under licence with an expiry date of 30th March 2022 which suggests a possible ongoing threat of reoffending but we also acknowledge that she has secured a post of employment as a care assistant and her employer although not giving evidence before us, did so before the First-tier Tribunal and submitted a statement to testify that she employed the appellant and we also understand that the appellant has now been promoted during her full-time employment. This suggests an element of rehabilitation. We do acknowledge that the appellant was in work prior to and during her offending. She was described by the judge as 'orchestrating' the drug dealing which was extensive over a short period of time. The drug offences took place between November 2012 and February 2013.

27. We turn to a detailed consideration of the OASys report dated 23rd January 2018. This suggested, two years ago, a risk of general reoffending of 10% within the forthcoming two years. That has not occurred. Although the appellant claimed she

was not supplying drugs the report confirms that she accepts she was guilty of answering the telephone and allowed her premises to be used, she knew that it was connected with the supply of drugs and that she should have informed someone. The OASys report confirmed that the appellant now recognised the impact and consequences of her offending on the community and wider society. This was her first conviction at the age of 27 years and her only other offence was a driving offence in 2007; she had no established pattern of similar offending. The OASys report confirmed, at that time, that her ex-partner, RW, had lived at her previous address with her children and she would have to move on her release. His, RW's, partner lived at the address caring for the children when he was taken into custody.

28. During her time in prison the appellant undertook outwork doing voluntary work at Kathryn House and Drake Hall as a Listener. She completed various courses in prison including those related to counselling, health and beauty. She was not herself a drug user and the OASys report identified, although the Secretary of State criticised the appellant for not taking a ETS course, no thinking and behaviour issues linked to a risk of serious harm (OASys page 21) and identified that she was very motivated to address her offending behaviour and comply with her licence. She had not (and to date has not) been convicted of any offence of violence, possession of weapons, burglary or robbery. Her OVP risk of reoffending was categorised as 'low' and she was categorised as a low risk of serious harm in the community. She was described as being 'very capable' of having capacity to change and reduce offending.

29. The appellant gave evidence before us and confirmed that she was in full time employment and cared for her older child and was intent on recovering the care of her son. Bearing in mind the Social Services Report which we address below we found her evidence to be credible.

30. Following **Arranz (EEA Regulations – deportation – test)** [2017] UKUT 00294 (IAC)) the burden of proof of showing that the appellant falls fouls of Regulation 21(5)(c), rests with the Secretary of State. We take into account the considerations under Schedule 1 with regard the fundamental interests of society, particularly the prevention of social harm and the reference to wider societal harm and we conclude that although the appellant has been convicted of a very serious offence, in all the circumstances, particularly when studying the OASys report in detail we do not find that Secretary of State has shown the appellant, albeit having the lowest level of protection, on balance, is a genuine, present and sufficiently serious threat affecting of the fundamental interests of society. We have paid particular regard to Schedule 1(7)(c) and (g), and Ms Cunha's submissions that the appellant remained a threat to the fundamental interests of society, but from the OASys assessment, her current employment, lifestyle and care for her children, we conclude, on balance, that there is a low and diminishing risk of her reoffending.

31. When assessing whether the appellant remains a sufficiently serious threat to public security, we identified that the OASys report identified a low risk of re-offending. In our assessment we are persuaded by the OASys report and her likelihood of re-offending not least because the appellant has not only resumed her previous role as a

carer but also had risen to a leadership position within the company. At the date of hearing before the Upper Tribunal the appellant had maintained her employment. This is her only offence (albeit a serious one) in relation to drugs and there were no reports of significantly poor behaviour in prison. Whilst there she used her time constructively. She has evidenced that she wishes to take care of her children by providing them with a home and caring for them. We accept that the appellant had children before being incarcerated but the realisation of the effects of imprisonment have been brought home to her.

32. Having considered the evidence as a whole, including the length of the appellant's sentence and the nature of her offending (the significance of which is underlined by schedule 1 to the 2016 Regulations), we come to the clear conclusion that she does not presently represent a genuine and sufficiently serious threat to the fundamental interests of the UK. Bearing schedule 1 firmly in mind, we find that the respondent has failed to discharge the burden upon her of demonstrating that the appellant represents such a threat. That finding of fact is determinative of the appeal, as is clear from MC (Portugal) [2015] 520 (IAC).

33. Even if we are wrong in concluding that she no longer remains a sufficiently serious threat to the fundamental interests of society, we turn to a consideration of the proportionality of the decision and in particular consider the relevant factors under regulation 27 (6) of the 2016 Regulations such as the appellant's immigration history, age, state of health, family and economic situation, her length of residence here, and her social and cultural integration into the United Kingdom and the extent of her links with Jamaica. In particular, and as encouraged by Mr Nyawanza, we have considered the best interests of the children as a primary consideration. We note their interests are not a 'trump' card but the best interests of the children are an axiomatic consideration given in the proportionality assessment required.

34. **Zoumbas v Secretary of State [**2013] UKSC 74 explains that

> *(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;*
>
> *(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;*
>
> *(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;*
>
> *(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;*
>
> *(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;*

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

35. The children are aged 13 years and 11 years. They were both born in the United Kingdom, have lived here all their lives and are British citizens. They are settled at school with the older child being at secondary school and having entered her formal GCSE studies. We were provided with the private Social Circumstances Report (SCR) dated 20th October 2018 by a qualified social worker who confirmed that she had contacted both schools. The school Pastoral Care Manager of the school reported she was concerned for both children if there were any further changes in their lives. That report confirmed that the appellant was the primary and sole carer for both children and that it was in their interests that the position continued to be stable for their education and emotional wellbeing.

36. When sentenced the appellant arranged for her children to be cared for by RW, RPWM's father and his partner. She maintained contact by telephone calls and prison visits and home leave. RPWM was described as settled and doing well at school. Both parents are recorded by school as having parental responsibility for RPWM, but the SCR author was advised by a Birmingham Senior Social worker that only the mother (appellant) had parental responsibility. During the imprisonment of the appellant the children were subject to a private fostering arrangement. After a gradual transition the children were restored to the appellant's care on her release. A senior social worker raised concerns with the author of the SCR if the children were to relocate to Jamaica or remain in the United Kingdom without their mother.

37. We accept that CN, the father of the first child TRLN, was removed (possibly deported) from the United Kingdom sometime after being granted Indefinite Leave to Remain and that the family have no further contact with him since his removal. As neither child has visited Jamaica since their birth and the relationship between CN and the appellant had broken down by at least 2009 (when RPWM was born) the lack of contact between TRLN and her father is more likely than not.

38. Initially, there was no direct statement from Birmingham Social Services. That position had been criticised by the First-tier Tribunal and we ordered Birmingham Social Services to compile a report on the current position of the care of the children. No statement from the previous partner RW was produced.

39. A social worker Ms RM from Birmingham Children's Services compiled a report on 20th January 2020 and she confirmed that RW was RPWM's father and that during part of the time of the appellant's imprisonment he entered a private fostering arrangement in respect of both children (the older not being his child). On 21st April 2017 RW, himself, was incarcerated for drug offences and the children lived with RW's partner Ms B, who was also the mother of two of RW's other children. She

became the primary carer at this point. Ms RM confirmed the direct contact between the appellant and her children when she was on day and weekend release from prison. No formal assessment was apparently completed but on 10th September 2018 by which time the children had presumably been returned to the appellant's care after her release, a letter was forwarded to the appellant confirming no further concerns were identified.

40. A Section 47 Children Act 1989 assessment (investigation where there is reasonable cause to believe children may be likely to suffer significant harm) was initiated in 2019 following a domestic incident between the appellant and the father RW. The appellant was recalled but later acquitted by the court on 16th July 2019. TRLN returned to her mother's care on her release, but the son was left in the care of his father RW. The social worker confirmed a Section 37 Children Act 1989 (investigation into the welfare of a child) assessment had been made and stated at paragraph 17 of the report

> *'The Section 37 assessment has been completed and makes the recommendation that RN [RPWM] is to be in the care of his mother and to have frequent contact with his father. There have been no present safeguarding concerns identified in relation to mother and her parenting. There have been concerns around father's possible gang affiliation and criminal lifestyle and how this could impact on RN [RPWM]. Private law proceedings are currently ongoing'.*

41. It would appear currently that RPWM continues to reside with his father and TRLN resides with her mother who supports RPWM's contact with his father. The Birmingham Children's Services report noted that it was agreed by all parties that contact should be increased carefully and rapidly between the mother and son but owing to the dispute between mother and father there needed to be third party support. Since October 2018 RPWM has seen his mother every weekend and stayed with her overnight. There had been no concerns regarding his emotional and physical presentation at school. Ms RM, the social worker stated at the end of 2019,

> *'it has been recommended by Birmingham Children's Trust that Ms TAM has RM [RPWM] in her fulltime care. Support will be offered in regards to any transitions if it is ordered that RN [RPWM] is in his mother's care'…'meeting their needs is her main focus in life…Ms TAM has engaged with Social Worker[s] been available for all meetings…'.*

42. There was some confusion as to whether RW had parental responsibility for RPWM and the appellant maintained that he was not recorded on RM's birth certificate. It is clear, however, that there is no one else in the United Kingdom with parental responsibility for RPWM and no other direct relative and thus no feasible alternative arrangements possible for him. The father of TRLN is residing outside the UK. The Home Office Guidance on Free Movement Rights, May 2019, suggests at page 55 that even if there is another parent, where there are child protection issues related to that parent, that would be considered an 'unsuitable care arrangement'.

43. **Ayinde and Thinjom (Carers – Reg.15A – Zambrano)** [2015] UKUT 00560 (IAC) with reference to the 2006 Regulations held

> *(a) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in Zambrano [2011] EUECJ C-34/09 is limited to safeguarding a British citizen's EU rights as defined in Article 20.*
>
> *(b) The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union.*

44. Although made in relation to the 2006 Regulations, we conclude that the decision in **Ayinde** also has bearing on the 2016 Regulations, not least because of the following decisions which related to the underlying Treaty on the Functioning of the European Union ("TFEU"), **Rendon Marin (Judgment: Citizenship of the Union** [2016] EUECJ C-165/14 and **Secretary of State v CS** [2016] C-304/14. Those authorities held that Article 20 of the TFEU should be interpreted as precluding legislation of a Member State, which required a third-country national, who has been convicted of a criminal offence, to be expelled from the territory of that Member State when the national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth and without having exercised his right of freedom of movement, when the expulsion of the person concerned would require the child to leave the territory of the European Union thereby depriving him of the genuine enjoyment of the substance of rights as an EU citizen. We refer to **Robinson** above and emphasise that those judgements ruled that in exceptional circumstances a Member State may adopt an expulsion measure, provided that it is founded on the personal conduct of that third country national, which must constitute a genuine present and sufficiently serious threat adversely affecting one of the fundamental interests of society and that it is based on considerations of the various interests involved matters which are for the national court to determine. As found above, the best interests of the children would be one of the factors which need to be carefully considered in decisions made with reference to both the EU law and domestic legislation. For all the reasons given above we do not conclude that exceptional circumstances exist in this matter such that the appellant should be expelled.

45. The principles established by **Zambrano**, **Rendon Marin** and **CS** and the effect of those principles on deportation were explored in **VM (Jamaica) [2017]** EWCA Civ 255 and the concept of 'entire dependency' examined. At paragraphs 60 and 61 Lord Justice Sales said this:

> *"60. On this reasoning, VM has no claim to remain in the UK as a result of the citizenship rights in EU law of his wife and children. If he is deported to Jamaica, KB and the children (with KB deciding for them) will face a difficult choice whether to relocate there with him or remain in the UK without him. But the fact that they will be confronted with that choice, and might in practice feel compelled to go with him,*

does not engage EU rights in a way which creates a right under EU law for VM to remain in the UK. As this court held in FZ (China) v Secretary of State for the Home Department [2015] EWCA Civ 550, following Dereci and the decision in O, S and L (at paras. [42]-[44] of the Advocate General's Opinion and para. [56] of the judgment), "the critical question is whether there is an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported" (see paras. [14]-[19], in particular at [19]). In the present case there is no "entire dependency" of AB, KSM and KDM on VM, in the requisite sense, because they could remain in the UK with their mother, KB, who as a British citizen herself has a right to be here.

61. The analysis in FZ (China) is consistent with the guidance given by the Supreme Court in respect of the application of Dereci in R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11, at [61]-[67]. The Supreme Court distinguished the situation in Ruiz Zambrano - which concerned the refusal of a right of residence and a work permit in a member state to the third-country parents of dependent minor children who were citizens of that state, which had "the inevitable consequence" that the parents would have to leave the EU and the children would have to accompany their parents - from that in Dereci, in which "the same relationship of complete dependence" between the EU citizen (the wife and children in the Dereci case) and the third country national (Mr Dereci) was not present, where the argument based on Article 20 TFEU and the EU citizenship rights of the wife and children was rejected: see [64]-[67] (emphasis added)".

46. We accept on the facts as now presented by the latest social worker report that the appellant's daughter lives with her and has entire dependence on the appellant.

47. Additionally, as pointed out by the Upper Tribunal at paragraph 54 of **Ayinde**

> *'Whilst a minor child can survive without his parents in that adoption, foster-care or a children's home may provide a proper and adequate level of care, such alternative care is only likely to be contemplated if there are serious reasons for breaking the relationship between a child and one or both of his parents. Serious wrong doing on the part of both parents (or, more often, of one of the parents) may justify the separation. … It is beyond the range of proportionate responses that a minor should be required to go into some form of alternative care (be it adoption, foster-care or residential care) in order to enjoy his EU rights were both his parents required to leave'.*

48. That conclusion chimes with the approach of the Court of Appeal at [11] of **Hines v London Borough of Lambeth** [2014]1 WLR 4112, in which Vos LJ (with whom Patten and Sullivan LJJ agreed), proceeded on the basis that 'adequate arrangements' for a minor's care could not include adoption or foster care: [11].

49. The father of TRLN has been deported to Jamaica and there is no contact between them and RW, the father of the second minor child has also been in custody. We take very seriously the recommendation by Birmingham Children's Trust that both children should be in the care of the appellant. Even if RPWM returns to his father's

care full time, and against the recommendation of Birmingham Social Services, the daughter is in the full-time care of the mother and would have to be subject to a private fostering agreement contrary to **Ayinde and Hines**. It is in the best interests of the children to retain stability after the chaotic lives they must have endured with their parents either being incarcerated or deported. It is also in the children's best interests to retain contact with each other and even if the mother returned to Jamaica with TRLN that would leave the prospect of a sibling separation and diminished contact between them. Despite the recommendation that both children are in the care of the mother RPWM would wish and need, no doubt to retain contact with his father and half siblings (the children of RW and his partner).

50. Indeed, although **Ayinde** does not appear wholly to rule out the children going into care, there is no indication in either of the social worker reports of the prospect of the care of the daughter being with any other person than the appellant. Further, there is a recommendation that the son also reside with the mother as the primary carer. The removal of the mother would in effect force the daughter either to leave the United Kingdom which we consider to be unreasonable, because she is settled at secondary school, has only known the United Kingdom and is a British citizen or be placed into care. As drawn sharply into focus by **Ayinde** that latter course is beyond the range of proportionate responses.

51. We also consider that a ruling which forces the children into care raises the spectre of the sins of the parent being visited on the child's best interests' assessment, contrary to **ZH (Tanzania) [2011] UKSC 4** and **Zoumbas,** although we accept these decisions were not made in the context of European law.

52. The last question is whether the children's interests are in effect outweighed in the balancing exercise we are obliged to undertake.

53. The appellant is now 39 years old and came to the UK in 2002. Her immigration history is chequered. She entered legally as a visitor in 2002 and her leave was extended as a student until 2007 but she was then served with papers as an overstayer. She was then granted 3 years discretionary leave owing to her family life but her application to remain on the grounds of long residency was put on hold. Her leave has always been precarious and her imprisonment undermines her integration.

54. We accept, however, that she has resumed her work as a care assistant and was subsequently promoted. She has received glowing references from her employer who confirmed that she was 'highly reliable and committed to her clients and new and incoming care assistants in her area' and her promotion was owed to her 'dedication to high quality care delivery, her reliability and her punctuality' and that she 'continues to be well-loved by our clients as indicated by recent telephone surveys and service user reviews and client visits by our management team'. Her employer referenced her remorse and that she demonstrated commitment to her family and was 'continuously committed to be[ing] a resourceful and a responsible contributing citizen'.

55. We do appreciate that she has secure employment in the United Kingdom and forged a settled home for herself and her children (she has been renting with a friend). Re-establishment would be much more difficult in Jamaica, where she states she has no family, her relatives having moved to the USA or Aruba (where her eldest daughter lives), and where the appellant has not lived since 2002. Evidently, she has not visited since at least 2012 (her imprisonment). Clearly deportation would involve disruption , but the appellant is in good health she lived in Jamaica until the age of 22 years and we conclude would be able to re-establish her life there. More importantly, however, the impact on the children's school and connections in the United Kingdom would be highly disruptive.

56. Of importance, although not a trump card, is the interests of the children. We have explained our reasoning above and find that we do not accept that the Secretary of State has shown the appellant remains genuine, present and sufficiently serious threat affecting of the fundamental interests of society but even if she did represent a low level risk, the response overall to deport her under the EEA regulations is disproportionate bearing in mind the 'entire dependence' of the daughter on the appellant and the subsequent effect on the children.

57. We recognise that the **Zambrano** principle is not an absolute. We weigh the criminality on the part of TAM which involved a very serious offence of the supply of drugs for which she received 8 ½ years in prison and our findings in respect of her previous offence against the harm which will be inflicted upon the British citizen children. As we have indicated the children, in particular the daughter, has never visited Jamaica and she is in her teenage years and settled in her secondary education. We do consider further to **Patel v Secretary of State** [2019] UKSC 59 that the requisite element of compulsion for the children to leave to United Kingdom and the EU is present. Further to Section 6(4)(c) of the European Union (Withdrawal) Act 2018 (as amended) and the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No 3) Regulations 2019, no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by but the principle of 'stare decisis' still applies.

58. On the strength of the evidence as analysed by us we find that the appellant is not a "genuine present and sufficiently serious threat affecting one of the fundamental interests of society" but even if we are wrong on that basis we find the decision is disproportionate particularly in the light of the best interests of the children. Drawing together the various strands analysed above and balancing the weight in each factor we weigh the criminality and the requirements of public security and public policy against the conduct of the appellant since released from prison, her co-operation with the probation and social services and the realisation of her responsibility to her children and her commitment to her work and the interests of her children, and on balance we find the decision not remove her would at this time be disproportionate.

59. We enlist our findings above where relevant to Article 8 in the alternative when applying the Immigration Rules, paragraph 398 and Section 117C of Nationality,

Immigration and Asylum Act 2002. We find that the removal of the two British Citizen children to Jamaica in these particular circumstances, conjure very compelling circumstances because they would either be removed from their, finally, settled lives in the United Kingdom or be relocated into care, which in view of the findings of Social Services is highly likely. That would separate the children from the parent and very possibly from each other and any other siblings.

60. In the circumstances and on the basis of our reasoning above we allow the appeal under the Immigration (European Economic Area) Regulations 2016 and under the Immigration Rules.

Order

Appeal Allowed.

Signed *Helen Rimington* Date 12th March 2020

Upper Tribunal Judge Rimington