



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/00789/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22<sup>nd</sup> July 2014

Determination Promulgated  
On 11<sup>th</sup> Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS YUXIA WANG  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Francis Hoare (Counsel)  
For the Respondent: Mr Chris Avery (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge S J Clarke promulgated on 1<sup>st</sup> May 2014, following at hearing at Hatton Cross on 11<sup>th</sup> April

2014. In the determination, the judge dismissed the appeal of Ms Yuxia Wang, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a citizen of China who was born on 27<sup>th</sup> February 1971. She appealed against the decision of the Respondent Secretary of State to refuse her a derivative residence card on 9<sup>th</sup> January 2013 on the basis that she was a third country national, who stood to benefit from the ECA judgment in **Ruiz Zambrano (C-34/09)**, because she is the primary carer of her British citizen child, Zihao Xu.

### **The Appellant's Claim**

3. The Appellant's claim is that she is the mother of Zihao Xu, who is a British citizen child, and with whom she lives and whom she cares for. Her husband, the father of Zihao Xu, did not want the child, and he wanted the Appellant to have an abortion, which ended their relationship prior to the birth of the child. He, Feng Xu, is also a British citizen having been naturalised in this country.

### **The Judge's Findings**

4. The judge had regard to a letter written by the Appellant on 14<sup>th</sup> November 2012 that her father did not want the child, had never supported her or the child financially or emotionally, but the Respondent Secretary of State did not accept the contents of this letter, and refused to grant the Appellant a derivative residence card on 9<sup>th</sup> January 2013.
5. At the hearing before the judge, there was evidence that the Appellant had come to the UK for studies, which her parents had financed with some difficulty, and she supported herself with rental income from some of the properties that she owned in China, and also had some savings. The judge heard evidence that the Appellant had to beg the child's father to attend the registration of the birth, which he did attend, but he was not married and is not working at present.
6. The last time they spoke was in 2014 when she told him that her application had been refused. The only person who has looked after the Appellant and the child is the child's father's stepfather and the Appellant telephones him when she is trying to phone the baby's father or when she attempts to go to the home of the child's father. He, Feng Xu, the child's father, has seen the child only four or five times (paragraph 16). He was ten years younger than the Appellant "and sometimes he behaves like a child" (paragraph 19).
7. The judge's findings were that "In the absence of supporting witnesses and cogent documentary evidence, especially from independent sources such as the GP's surgery and the new nurseries, the child would be attending", there were "inconsistencies in the account given to me by the Appellant, which was such that

she was left with no option but to conclude that the burden of proof upon her had not been discharged (paragraph 35).

### **Grounds of Application**

8. The grounds of application state that there was no cross-examination of the Appellant as to whether she was the mother or the primary carer of the child. This was essential given the decision in Zambrano from which the Appellant stood to benefit had she been the primary carer.
9. On 6<sup>th</sup> June 2014, permission to appeal was granted with express reference to the case of Yoshikazu Iida v Stadt Ulm (Case No C14/11) judgment (Third Chamber) of 8<sup>th</sup> November 2012. Here it was said (at paragraph 70) that a court “must examine whether the refusal of the right of residence undermines a right to respect for private and family life provided for in Article 7 of the charter”.

### **Submissions**

10. At the hearing before me on 22<sup>nd</sup> July 2014, I had the benefit of a skeleton argument from Mr Francis Hoare, which adequately set out his submissions before me. Mr Hoare began by pointing out that there were a number of fundamental errors in the approach of the judge. The most important of these was a failure to actually decide that which had to be decided as a question of fact by the judge. The judge had ample evidence before her consisting, for example, of a number of witnesses (see paragraphs 28 to 30) in the form of witness statements, and there was also the evidence of the Appellant herself, but the judge decided that, “In the absence of supporting witnesses and cogent documentary evidence ..... I conclude that the inconsistencies in the account given to me by the Appellant is such that she has not discharged the burden of proof ...” (paragraph 35).
11. Inconsistencies, submitted Mr Hoare, are relevant to the findings of reliability, but they are not decisive and there is no requirement of cogent documentary evidence to support what is being said. In fact this was a case where the Appellant had always lived with her child Xihao Xu, a British citizen, and if she was not to be the primary carer, it was difficult to see who would be the primary carer.
12. But most importantly, the fundamental question as to whether she did care for her child was never put to her by either Counsel for the Respondent or by the judge herself. At the same time the refusal letter had accepted that, “This department ... believes that Mr Xu has some parental contact with the child” which suggested that he, the father, did not have full parental care of the child, or even most of it, because this language suggests that, the child was being looked after by someone else. That person could only have been the Appellant with whom the child was living. Furthermore, no consideration was given to the child at all by the judge and to what the child’s requirements might have been.

13. Yet, submitted Mr Hoare, there was ample evidence before the judge that would have led her, on a balance of probabilities, to conclude that the Appellant was the primary carer of the child. This was clear from the tenancy agreement in the Appellant's name (see page 8 of the bundle); the letter from Riverview Primary School dated 21<sup>st</sup> March (at page 15 of the bundle); and a statement from the stepfather of the Appellant's husband (at page 17). What was remarkable was that although the judge referred to letters of support of the Appellant (at paragraph 28), no mention was made whatsoever of the letter at page 17 from the stepfather.
14. Had this been referred to, it would have discharged the burden of proof in favour of the Appellant. It is true that three witnesses, who gave witness statements but did not attend, were not subject to cross-examination, but they all collectively made the same point that the Appellant was a single mother who looked after her own child.
15. If there was any doubt about any of these matters, she should have been cross-examined on this specific point. She was not. The judge did not put any questions to her either. Instead, the judge held that he simply could not decide because of the inconsistencies. Yet, there is no allegation that the Appellant had been dishonest in what she was saying.
16. For his part, Mr Avery submitted that the inconsistencies were such as to prevent the judge from coming to firm findings. The judge was entitled to conclude as she did. Evidence had been considered in the round and the judge had concluded that she was not a primary carer under EU law. It was difficult to see what else the judge could have done.
17. In reply, Mr Hoare submitted that I should make a finding of an error of law and then I should remake the decision on the following facts. First, the Appellant had always lived with her own child, who was a British citizen child, and the evidence was there to show this. Second, she had the tenancy of her residency in the agreement with her. Third, her father had almost nothing to do with the child and this evidence was before the judge. All three of these facts were before the judge, notwithstanding any credibility issues that remained for her to get around. Fourth, the witness statement of the stepfather (at page 17) was of crucial significance and yet the failure to take into account was a fundamental error. But most importantly, it was never put to her that she was not the primary carer of the child. The Secretary of State never so suggested in direct terms in the refusal letter. If she was a single mother then she would win her appeal because of the principles in ZH (Tanzania), which states no matter how bad her immigration record, persons could not be visited upon her child, who she looked after. I should allow the appeal.

### Error of Law

18. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, this is a case where the single most important issue before the Tribunal was whether the Appellant was a primary carer of her child, a British citizen. This question was not

put to the Appellant either by the representative for the Respondent or by the judge. It is an important feature of this case that the Appellant lived with her own child and always had done. Second, it is an error to say that ““In the absence of supporting witnesses and cogent documentary evidence ..... I conclude that the inconsistencies in the account given to me by the Appellant is such that she has not discharged the burden of proof ...” (paragraph 35), especially given that the refusal letter had accepted that, “This department ... believes that Mr Xu has some parental contact with the child” simply because of the inconsistencies. It was very difficult to know from the findings made what the judge did decide in terms of the specific facts which were before the Tribunal.

### **Remaking the Decision**

19. I remake the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons.
20. First, there is the evidence. This consisted fundamentally of the evidence of the landlord of the Appellant, the evidence from the NHS of the Appellant’s involvement as a mother in the life of her child, and the fact that the Appellant had day-to-day care of her child (something which is seemingly conceded in the refusal letter).
21. Second, there is the refusal letter itself. This is predicated on a false basis. Its emphasis is very much on “whether the child would be unable to remain in the UK should the Appellant be forced to leave”, which is not the issue which the Respondent had to decide. What the Respondent had to decide was whether under Regulation 18 of the Immigration (European Economic Area) Regulations 2006 the Appellant had the right to remain in the UK as a primary carer of her child.
22. The evidence also consisted of the very marginal presence of the child’s father in her life. He had only visited the child on four occasions. These were on 21<sup>st</sup> January 2011 when he was still in hospital after the birth of Zihao, when on 4<sup>th</sup> February 2011 he met the Appellant at the registration office for the registration of her birth, and when she got very ill at night with a fever, and when he met her on another occasion in 2013. Therefore, he did not have primary care of the child.
23. That left the question of whether the stepfather, Chan Coong Phung, had a role to play in her life. The Appellant states in her witness statement that she had visited Mr Xu’s stepfather, Chan Coong Phung, with Zihao on a number of occasions, but this was when Mr Xu was not present, and Mr Xu had never visited her in her own house. There was no evidence, and none shown by the Respondent, that the stepfather played the role of a primary carer for the child, Zihao.
24. The judge at first instance did not find that the Appellant was not the mother of the child Zihao. There had never been any suggestion that any other person cared for the child. There were, on the other hand, letters produced from witnesses, whose

identity was not impugned, to the effect that the child, Zihao, lived with the Appellant alone. One of these witnesses was the landlord.

25. I have no reason to believe that, taking the facts as a whole, that this evidence is not to be taken at face value. The Appellant herself lived in her own property of which she had a tenancy agreement and she lived with the child, Zihao. She was a single mother. She was in receipt of regular payments of £2,000 into her account, and there is no reason to believe that these monies come in, which they do, in any other way than what she maintains.
26. In Zambrano, the ECJ explained the application of Article 20 TFEU and stated that this “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of the status as citizens of the union” (paragraph 42).
27. The child, Zihao, is a citizen of the Union and she is entitled to the “genuine enjoyment of the substance of the rights” as a citizen of the Union. In Zambrano the ECJ also stated that,

“A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect. (Paragraph 43)
28. On any view, a child who lives with her single mother, in that mother’s tenanted property, with no other adult around her, is a dependent minor child on her mother, and there is no evidence to the contrary, and none was actually pinpointed in the refusal letter.
29. In circumstances where the father, Mr Xu, has only been around the child, Zihao, when he has had to be there, and that only on four occasions, I find that if this Appellant is required to return to her country, then, “it must be assumed that such a refusal would lead to a situation where” the child, Zihao as a “citizen of the Union, would have to leave the territory of the Union in order to accompany” her mother (see paragraph 44 of Zambrano).
30. The effect of this would be that as a citizen of the Union, the child Zihao, would “be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union” (see paragraph 44). Accordingly, as a matter of treaty law this appeal must be allowed. It must also be allowed on the basis of the principles set out with respect to Article 8 ECHR rights in ZH (Tanzania) where the Supreme Court found that the “inevitable result” of a mother being removed would be that the children would have to move with her, though I need not decide this question given that I am allowing this appeal under Regulation 18 of the Immigration (European Economic Area) Regulations 2006. Were I to decide it, I would find that the “best interests” of the child, Zihao, are served by remaining in this country, and if this was the case under Section 55 BCIA 2009, then this must be a

relevant consideration for the assessment of Article 8 ECHR rights, with respect to the child, Zihao. However, as I have indicated, I do not decide this point.

**Decision**

31. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
32. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

9<sup>th</sup> August 2014