



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12189/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 5 November 2014

Determination Promulgated
On 24 November 2014

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

Manirambona

and

The Secretary Of State For The Home Department

Appellant

Respondent

Representation:

For the Appellant: Mr J. Salmon, Bradford Law Centre

For the Respondent: Mrs R. Petterson, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant who was born on 22 May 1977 is a citizen of Burundi. She appeals against the determination of First-tier Tribunal Judge Turnock following a hearing at Bradford on 19 June 2014 in which he dismissed the appellant's appeal against the decision of the respondent refusing to grant her a Derivative Residence Card pursuant to the provisions of Reg. 15A of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003), as

amended. Her application was refused by the respondent in a decision made on 25 February 2014.

2. The making of the application arose from the following circumstances, described as '*complex*' by the Judge. The appellant was married to her husband, also a national of Burundi who had been recognised in the United Kingdom as a refugee on 7 November 2003. The couple lost, and then resumed, contact with each other and the appellant applied for, and was granted, entry clearance under the family reunion policy. The visa was issued to her on 12 October 2006 on the strength of which she entered United Kingdom on 23 November 2006. The couple returned to Burundi in November 2008 and her husband, using the appellant's passport, attempted to seek entry clearance on behalf of another woman. This ruse failed and the husband was prosecuted. The appellant herself then applied for settlement making various false statements one of which was to the effect that she had been living in the United Kingdom for a number of years. Although she was issued with entry clearance acknowledging her as a returning resident, this was subsequently cancelled as a result of the fraud and her appeal dismissed, the Judge finding the appellant was complicit in the misrepresentations. Her credibility was grievously damaged.
3. That said, the appellant's poor immigration history is largely irrelevant to the consideration before me. The couple underwent an Islamic ceremony of marriage on 22 July 2011 but are not legally married in accordance with British law and, inexplicably, have failed to have their union regularised by a civil ceremony which would be recognised by United Kingdom authorities. The relationship with Mr Utamuliza is not in dispute; nor that he was subsequently granted indefinite leave to remain. Judge Turnock was satisfied the appellant lives with her 'husband' and their son who was born on 19 June 2012. He is now 2 years and 5 months old. Having been born in the United Kingdom of a person settled in the United Kingdom, he was entitled to British nationality. As such, he is both a British citizen and a citizen of the European Union.
4. The couple are not able to regularise the wife's position as the unmarried partner of a person present and settled in the United Kingdom because they did not seek to establish the requirements for entry clearance or leave to remain in that capacity when the application was made on 16 April 2013. They had not been living together in a relationship akin to marriage which had subsisted for two years or more prior to the application and no attempt was made to comply with the other requirements for settlement under this category. The application for a derivative residence card appears to be taken in an effort to avoid meeting the requirements of the Immigration Rules for leave to remain in a capacity recognised within them. Instead, the appellant or her advisers have sought a right to remain pursuant to the rights commonly identified as the *Zambrano* principle.

5. In *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09 (08 March 2011), the Court of Justice of the European Union made a decision on citizenship which went beyond a consideration of free movement rights and resulted in a novel principle affording non-Union citizens rights of residence. The case concerned a Colombian couple, Mr Zambrano and his wife, in April 1999 were living in Belgium and who applied for refugee status in Belgium. This was refused but the order included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country. In October 2000, he applied to have his situation regularised but that application was also rejected. On 1 September 2003, Mrs Zambrano gave birth to a second child who acquired Belgian nationality pursuant to what was then Belgian Nationality law. This was the child's sole nationality, since Colombian law did not recognise him as one of its nationals because the parents did not take specific steps to have it conferred on the child. A third child, born on 26 August 2005, also acquired Belgian nationality.
6. Mr Zambrano became unemployed and sought unemployment benefit, which was refused. Neither he nor his wife was permitted to work, notwithstanding the fact no expulsion measure could then be taken against them. There were, in effect, rendered destitute which could only be remedied by their leaving the country in what would have amounted to the *de facto* removal of their 2 Belgian-citizen children.
7. The Court of Justice decided Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union - the *Zambrano* children - of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. This was the effect of the refusal to grant a right of residence to their non-Union citizen parents where their minor children reside as nationals of the country. The Court of Justice said that it must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. The children as citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
8. The Court concluded by declaring that Article 20 TFEU:

'precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.'
9. The obvious limitation on the principle is that minor children, albeit Union citizens, are not at risk of being removed when there is one parent or carer who remains in the United Kingdom or indeed the European Union. *Zambrano*

operated in the context of the removal of *both* parents. This is reflected in the introduction into the 2006 Regulations, a new Reg. 15A which replicates the *Zambrano* principle and incorporates it into United Kingdom domestic law:

15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(4A) P satisfies the criteria in this paragraph if –

- (a) P is the primary carer of a British citizen ("the relevant British citizen");
- (b) the relevant British citizen is residing in the United Kingdom; and
- (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(7) P is to be regarded as a "primary carer" of another person if

- (a) P is a direct relative or a legal guardian of that person; and
- (b) P –
 - (i) is the person who has primary responsibility for that person's care; or
 - (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

15A (6)(c) "an exempt person" is a person –

- (i) who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;
- (iv) who has indefinite leave to enter or remain in the United Kingdom.

10. Mr Salmon, on behalf of the appellant, relies upon the recital provided by the Judge of Mr Utamuliza's evidence which is set out in paragraph 17 of the determination:

"Ibrahim is of an age at which he clearly needs a parent to look after him on a full-time basis. He continues to be breast fed. Obviously I cannot do that. I have tried to change nappies on a few occasions but am not at all good at it and his work is normally done by [the appellant]. [The appellant] and Ibrahim are extremely close. It is not possible for her to leave him with somebody else. When she tries he cries. This applies even to me. If [the appellant] was required to leave the UK Ibrahim would, in practice have to go with her. I could not manage with him on my own."

11. The Judge considered, notwithstanding the care provided by the mother, the *Zambrano* principle was not engaged because the mother was not, and is not, the primary carer as defined in Reg. 15A, see paragraph 9 above. The Judge properly took into account the fact that both shared equally the responsibility of looking after their child although, necessarily, some aspects were the preserve of the appellant. The Judge recorded that Mr Utamuliza had been granted

indefinite leave to remain in June 2010. Mr Utamuliza is therefore an exempt person in accordance with Reg. 15A (6)(c)(iv). This was accepted by Mr Salmon before the Judge, as it was accepted before me. The appellant is not, therefore, the child's primary carer and does not, therefore, benefit from the *Zambrano* principle pursuant to Reg. 15A just as she would not have benefited from the *Zambrano* principle as set out in the case of *Zambrano* itself and the cases that followed it.

12. Mr Salmon sought to persuade me that the description provided by Mr Utamuliza of the respective roles of the appellant and himself set out in paragraph 10 above overrides anything that is said in the Rules and that the appellant is the primary carer and cannot, therefore, be lawfully separated from her two children who cannot, themselves, be required to leave the United Kingdom. He submits that other decisions involving the *Zambrano* principle have involved fathers but never mothers and, in the case of a mother, in all but a tiny number of cases where the mother has given up responsibility for looking after a child, the mother will always be the primary carer and this fact trumps the immigration controls set out in the Rules by preventing her removal.
13. I reject that submission. The Rules are clear. They acknowledge that in a family where both mother and father are living together in a unit, responsibility for the care of their children will almost inevitably be a shared responsibility. In this context the discharge of shared responsibility does not mean that each parent has to share in the performance of every task as if they were Siamese twins. Nor does the concept of shared responsibility require the impossible task of calculating whether each parent discharges their respective responsibility in equal measure. It will often be the mother who provides the majority of care in relation to a baby. Some tasks are hers alone. That does not, however, violate the *Zambrano* principle when there is evidence of shared responsibility involving both parents when one parent is not under threat of removal to a place outside Europe.
14. Although the couple underwent an Islamic ceremony of marriage on 22 July 2011, the couple are not legally married in accordance with British law and their union recognised by the United Kingdom authorities. In *Dereci & Ors (European citizenship)* [2011] EUECJ C-256/11 (15 November 2011), the Court of Justice considered the cases of a number of applicants who were all third-country (non-Union) nationals wishing to live with their family members, who were Austrian nationals, resident in Austria. Although their Austrian relatives were Union citizens, none had exercised a right to free movement. The Austrian court sought a reference asking whether the refusal to grant the applicants a right of residence amounted to a denial of the genuine enjoyment of the substance of the rights conferred on their relatives who were Union citizens. The Court of Justice of the European Union decided it did not but, in doing so, considered the ramifications of Article 8 of the ECHR. It was on this passage that Mr Salmon sought to rely:

72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

15. The reasons for refusal letter of 25 February 2014 gave some limited consideration to the Article 8 claim of the appellant and her family members in the context of the changes introduced to the Immigration Rules in 2012 designed to reflect the Secretary of State's thinking of her obligations under Article 8 of the ECHR. The refusal letter referred to the fact that Appendix FM and paragraph 276ADE would have to be met. The respondent's position as stated in the refusal letter was that if the applicant wished to remain in the United Kingdom on the basis of family or private life, it was necessary for them to make separate application (for which they would be charged a fee) by completing the relevant forms, either the FLR(M) or the FLR(O).

16. The letter went on to say that as the applicant had no alternative basis for her stay in the United Kingdom, she should make arrangements to leave and that, should she fail to do so, her departure might be subject to enforcement action. The letter continued:

"If you fail to do so voluntarily your departure may be enforced. In that event we would first contact you again and you would have a separate opportunity to make representations against the proposed removal."

17. This was repeated in the formal notice of "*Refusal to issue a Derivative Residence Card (No Further Basis of Stay in the UK)*":

"If you fail to make a voluntary departure a separate decision may be made at a later date to enforce your removal from the United Kingdom. Any such decision and associated appeal rights would be notified separately."

Furthermore, in informing the appellant of her rights of appeal, the decision maker set out in the grounds of appeal that it was open to the appellant to argue. The potential grounds included that the decision was not in accordance with immigration rules, breached the applicant's community rights under the European treaties but omitted any reference to the decision violating the appellant's human rights.

18. As the refusal letter states, there was to be no immediate removal for the appellant. Removal would be made the subject of a separate decision and associated appeal rights would be notified accordingly. However, the extent of those appeal rights was not identified; nor whether the respondent might exercise her power to fetter the appellant's rights by certification or by granting

the appellant an out-of-country right of appeal. This was not simply a decision refusing to issue a derivative residence card (a refusal which did not, *in itself*, contemplate removal capable of violating an applicant's human rights) but expressly threatened removal which *was* capable of doing so, albeit at a later stage.

19. The grounds of appeal to the Tribunal require a Delphic approach to their meaning:

“a. It is suggested that [the appellant] should have applied using forms FLR(M) or FLR(O). However, the claim is on the basis of EEA Law. If the Home Office were of the view that the form filled-in was not the appropriate one it should have rejected the application as invalid at the time when it was made not far short of a year ago.

20. On any view, this was a rejection of the stance adopted by the respondent in the refusal letter that a separate application had to be made in order for the appellant's human rights to be considered. By implication, the draftsman must have meant that the respondent was wrong in imposing that as a precondition for any consideration of the appellant's Article 8 rights. In other words, the grounds of appeal must, at least impliedly, rely upon a duty on the part of the respondent to make a decision in relation to the effect of removal upon the appellant's human rights.
21. For these reasons, I construe the grounds of appeal to the Tribunal as raising the point that the Secretary of State was wrong in failing to deal with the implications of the decision which engaged human rights. The Judge refused to consider Article 8 because, according to him, it was not in issue as ‘*There are no directions for removal*’ merely repeating the point made by the respondent in the decision letter but failing to determine the issue raised by the appellant's claim that Article 8 issues had to be determined. The grounds of appeal to the Upper Tribunal repeat the assertion that the Judge was required to consider all the grounds, including Article 8.
22. In *JM (Liberia) v SSHD* [2006] EWCA Civ 1402, Laws LJ gave the decision of the Court in a case that concerned a refusal to vary leave but in which no removal directions had been set. The Court of Appeal said at [22] that there was,

‘plainly force in this submission that, depending on the particular facts, human rights issues are indeed likely to be integral to the process of deciding whether an immigrant's leave should or should not be varied.’

The IAT had found [28] that removal was not imminent and there was therefore no human rights claim before the Tribunal:

"We are aware that it has sometimes been said that, in dealing with a refusal to vary leave to enter or remain, the appellant authorities should deal also with

human rights on removal on the basis that removal is imminent: but it is not imminent in any legal sense because of the need for a further decision.”

That point was rejected by the Court of Appeal as erroneous [33]. The Court of Appeal, stated that, once a human rights point is properly before the AIT, they are obliged to deal with it, [28]. That was consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act.

23. By parity of reasoning, the refusal of a residence card in circumstances where the letter stated the appellant had no basis for remaining and was, therefore, liable to be removed and enforcement was likely to occur, albeit at a later date, engages the same principles identified by Laws LJ in *JM (Liberia)*. Applying those principles I am satisfied that there was an issue as to a potential violation of the appellant’s human rights which the respondent was required to consider.
24. If, in the course of an appeal, the Tribunal is required to consider whether the respondent’s decision is in accordance with the law, that assessment may involve consideration of whether the effect of the decision (as described by the respondent in the decision letter) is capable of violating the appellant’s human rights. That consideration arises by operation of law and arises independently of an application made for leave to remain on human rights grounds. Whether such an issue is raised will depend upon the factual matrix of the claim. In a case, such as is found here, where the claim to be entitled to the issue of a derivative residence card necessarily involves consideration of the nuclear family, including a child, the respective contributions each makes to the welfare of the child, the nature and extent of shared responsibility, the status of the parent who remains in the United Kingdom, it is highly artificial to give consideration to the material only insofar as it relates to the application of Reg. 15A without also considering whether the decision would involve a violation of the human rights of relevant family members such that the decision is rendered unlawful. In effect, the ramifications of the proposed decision cannot properly be considered without adopting an approach that considers both elements. Where a decision necessarily requires consideration of Article 8 private and family life principles, it is impermissible for the Secretary of State to avoid consideration of this element by imposing the requirement of a separate application and the payment of a fee. There will be cases where the nexus between an assessment of whether the requirements of the claim are met and an assessment of the appellant’s human rights claim will be tenuous or non-existent. In such a case, there is no reason why the respondent may properly decide that the assessment of the Article 8 claim is a separate exercise which should be made the subject of a separate application and a separate fee.
25. Whether there is a sufficient nexus between the two elements is fact sensitive but in this case, the two elements are inextricably entwined. Where this happens, a decision made by the Secretary of State in the form adopted here

requiring a separate application and a separate fee will amount to an unlawful refusal to consider an applicant's human rights claim.

26. What then is the Tribunal required to do? In the recent past, where the proportionality exercise was conducted by reference to an amorphous public interest which was left to the Tribunal to determine and to which the Tribunal attached such weight as it deemed was merited, the Tribunal reached its own decision on the proportionality exercise when the Secretary of State's assessment had to be re-visited on appeal, even in cases where there had been no prior consideration of the appellant's Article 8 claim. It was as easy for the Tribunal to decide where the proportionality balance lay as it was for the respondent; proportionality, although perhaps appearing so, was *not* an exercise of discretion but an exercise of judgment taking into account the competing interests of State and individual. It did not, therefore, require the exercise of a discretion which was primarily vested in the executive requiring the Tribunal to limit its appellate function to a declaration that the Secretary of State had failed properly to exercise her discretion such that a fresh and lawful decision was awaited in accordance with the principles identified in *Abdi v SSHD* [1996] Imm AR 148 (CA).
27. The legal landscape has now changed. The Tribunal is not permitted to construct its own version of the public interest without reference to the Secretary of State's views as set out in the Rules. Given the nature of the consideration now required, this presents both practical and legal difficulties when, as in the present case, the Secretary of State has made no decision at all. The first practical difficulty in a case such as the present is for the Tribunal judge to know what are the Rules that he is required to apply. The decision letter itself suggests something of the complexity:

If you wish the Home Office to consider an application on [the basis of family or private life] you must make a separate charged application using the appropriate specified application form (FLR (M) for the 5-year partner route, or FLR (O) for the 5-year parent or 10-year partner or parent route, or FLR(O) for the 10-year private life route).

28. A Judge, however, is required to apply the law and cannot normally divest himself of the obligation by not researching it. However, unless the Judge is adequately assisted by the parties, and particularly the respondent in a matter which concerns a contribution from her as to the public interest, there is a significant risk of factors being overlooked or misconceived.
29. In the context of this case there are also potential issues raised about eligibility. Thus, for example, a part of the Immigration Rules provides:

S-EC.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-EC.2.2. to 2.5. apply.

S-EC.2.2. Whether or not to the applicant's knowledge-

- (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
- (b) there has been a failure to disclose material facts in relation to the application.

30. In paragraph 14.4 of the determination, with reference to an earlier immigration appeal, the Judge recorded that the appellant was issued with a visa as a returning resident which was subsequently cancelled under the provisions of paragraph 320 (7A) as a false representation had been made to obtain entry clearance. As the provision makes clear, S-EC.2.1 to S-EC.2.5 contains a discretion ('will *normally* be refused') but the falsity is strictly limited to the application under consideration, not an earlier application. There may, however, be other provisions that a Judge may be required to consider dealing with past misrepresentations which, were he to fail to consider, would render the decision unlawful. It is arguable that the Tribunal is not the appropriate forum to make, for the first time, a decision on such discretionary matters. (It would be particularly unfortunate, were the Tribunal to reject an appeal on the basis of a discretionary element, if it transpires that the Secretary of State would not herself have so exercised her discretion.)
31. The respondent's letter continues that, if the applicant were to make an application, consideration should then be given to s. 55 of the Borders, Citizenship and Immigration Act 2009 in which it is said that the Home Office discharges its duty of care by acting on any concerns it identifies regarding the welfare of children with whom they come into contact *and by conducting checks* that are consistent with the impact of its decision-making.
32. Inevitably such a decision would also require the Tribunal to consider whether there are exceptional circumstances in accordance with the well-established procedure first set out in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192.
33. All this inevitably leads to the conclusion that the Tribunal cannot properly re-make the Article 8 decision in the absence of a clearly reasoned submission from the respondent addressing the Article 8 issues. In effect, this will become the reasons for refusal letter on Article 8 issues that this case has lacked so far. This can only be achieved by an adjournment permitting the appellant an opportunity to respond. I would regard this as an unsatisfactory process, all the more so since the respondent acknowledges in her letter that, if the appellant fails to leave voluntarily, she will be provided with '*a separate opportunity to make representations against the proposed removal*', see page 4 of the respondent's decision. The process may or may not carry with it a separate right of appeal. This is a highly unsatisfactory process and is far removed from the ethos of a one-stop appellate process.

34. The alternative solution is to find that, in the context of the new Immigration Rules on Article 8, a failure on the part of the Secretary of State to consider Article 8 at all renders the decision not in accordance with the law and the Secretary of State ought to be required to complete the task by making a decision on Article 8 in what might be a somewhat expanded application of *Abdi* principles. This will provide the respondent with both an opportunity to express her views on Article 8 in a refusal letter in a form which is now familiar to appellants and Tribunal alike. It might also afford the respondent an opportunity to consider whether it is an appropriate case to take the further steps already outlined in the refusal decision to offer the appellant a separate opportunity to make representations against the proposed removal, thereby rolling up the two separate stages of the process.
35. This is the course I propose to adopt.
36. I find that the failure of the Secretary of State to make a decision on the claim which properly addressed Article 8 was a decision that was not in accordance with the law and she is required to make a fresh and lawful decision. The appellant's application has not so far been fully decided and it awaits a lawful decision on the appellant's private and family life concerns.

DECISION

The appeal is allowed to the limited extent of requiring the respondent to make a fresh and lawful decision.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
20 November 2014