



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

Appeal Numbers: IA/36823/2013  
IA/36832/2013  
IA/36835/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 2 December 2014**

**Dictated on 9 December 2014**

**Decision & Reasons  
Promulgated**

**On 16 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GIBB**

**Between**

**ADEBOLA SELIAT BABALOLA (FIRST APPELLANT)  
HIKMAT OYINDAMOLA BABALOLA (SECOND APPELLANT)  
ABDULMALIK OLAOLUWA BABALOLA (THIRD APPELLANT)  
(NO ANONYMITY ORDERS MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr K Olalunbosun, Solicitor, of OA Solicitors

For the Respondent: Ms S Rahman, Home Office Presenting Officer

**DECISION AND REASONS**

1. The first appellant, who is a Nigerian citizen, is the mother of the second and third appellants, who are her daughters, and her dependants. The second appellant is a Nigerian citizen, and the third a citizen of the USA.

The first appellant (the appellant) is also the mother of another daughter, Faiida Aderinsola Babalola, who is a citizen of the Republic of Ireland.

2. In 2012 the appellant made an application for indefinite leave to remain on the basis of long residence. In 2013 the appellant applied for residence cards for herself and the other two appellants, as family members of her other daughter, on the basis of her Irish nationality, and EU citizenship. The long residence refusals were accompanied by removal directions, under section 47 of the Immigration, Asylum and Nationality Act 2006. There was no right of appeal against these decisions, but there was one against the residence card refusals, under the 2006 Regulations. These appeals were dismissed by Judge of the First-tier Tribunal Dennis, in a determination promulgated on 2 October 2014 (following a hearing at Taylor House on 1 August 2014).
3. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Levin on 5 November 2014. In the grant of permission Judge Levin considered grounds about the failure to consider Article 8, and the failure to consider the best interests of the children with reference to section 55 of the 2009 Act; and a failure to consider Article 20 of the Fundamental Treaty of the European Union (TFEU) (and **Zambrano**), were arguable.
4. At the hearing before me Mr Olalunbosun, for the appellants, made submissions to the effect that the **Zambrano** decision, and a direct application of section 20 of the TFEU, could cover all EU citizens, and not only those children that were in the country of their own nationality. Based on this submission the appellant's other daughter, an Irish citizen, would be deprived of the right to live in the European Union if the appellant were to be removed to Nigeria.
5. On this point Ms Rahman, for the respondent, submitted that Regulation 15A of the 2006 Regulations had responded correctly to the decisions in **Chen**, and also in **Zambrano**.
6. Mr Olalunbosun's second submission was that Article 8 should have been considered by the judge. He referred to the Court of Appeal judgment in **JM (Liberia) v SSHD [2006] EWCA Civ 1402**. In her response on this point Ms Rahman, for the respondent, made the point that the judge had given reasons for not considering Article 8. At paragraph 16 of the determination the judge had said that no removal directions had been made in the decisions before him on appeal, and that any analysis of Article 8 or the best interests of the children was therefore otiose.

### **Error of Law**

7. I have decided that the judge did err in law in not considering Article 8. This is far from a straightforward area, and it may be that some further guidance on this issue will be forthcoming soon from the Upper Tribunal.

As things stand at present, however, the principle in **JM (Liberia)** remains good, and that is that there is no need for an actual removal decision for there to be a need to consider human rights arguments, based on the need of appellants to leave the UK as a result of decisions that they may be appealing against. The lack of removal directions in itself is not a sufficient reason, in view of **JM (Liberia)**, for the Tribunal to decline to deal with an issue raised in the grounds of appeal.

8. During the course of the hearing I did check whether Article 8 was indeed raised, and it was clear that it was, both in the First-tier grounds of appeal, and in the First-tier skeleton argument.
9. Apart from this general point there is a more specific one applicable in this case. At the hearing before me Ms Rahman, for the respondent, accepted that removal directions (IS151B) were made for the appellant on 21 March 2013. She had nothing to show that these removal directions had been withdrawn. Although the judge was correct to identify that he was dealing only with the appeal against the refusals of residence cards, nevertheless it appears that the position before him was that there was in fact a removal direction in force, albeit only for the first appellant.
10. It may be arguable that the general application of the **JM (Liberia)** principle to European cases is incorrect, particularly where applications are being made for permanent residence, and there is no suggestion as a result of a refusal that an applicant is being required to leave the UK, even voluntarily. This family, however, do not appear to fall into that category. The observations that the judge made about the appellants' immigration history, at paragraph 15 of the determination, and the overall circumstances, suggested that this was a situation in which the appellant and her children were to be regarded as having no basis of stay in the UK.
11. In his observation at the end of paragraph 5 of the determination the judge noted that he was in no position to challenge the residual effect of the removal directions of March 2013, and that he must limit his decision to the residence card refusals. This was undoubtedly correct, in that he was only considering appeals against the latter decisions, but it does appear to me, with respect, that he nevertheless fell into error on the basis that he put forward as his reason for not dealing with Article 8 the fact that no removal directions had been made in the decisions under appeal (paragraph 16). The difficulty with this, quite apart from the general **JM (Liberia)** principle, is that the removal direction for the appellant remained in force, and the fact that it had been made in connection with a different decision, did not alter that point.
12. I have considered the broader submissions made on the appellants' behalf about **Zambrano**, and the TFEU. It appears to me that the **Zambrano** decision was limited to EU citizens who were in the country of their own nationality. The final ruling of the Grand Chamber of the Court of Justice of the European Union in that case was as follows:

“Article 20 TFEU is to be interpreted as meaning that it 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, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.”

13. This makes it clear that the decision was concerned with residence in the member state of residence and nationality of the children. In this case the child that the appellant is referring to is not a British citizen, but a citizen of the Republic of Ireland. If the family were in Ireland, the **Zambrano** argument would work. As they are not, it does not.
14. The other relevant decision, also reflected in Regulation 15A (as amended) was the **Chen** case. This referred to self-sufficient children. In this case there was no challenge by the appellant to the judge’s conclusion that she had not established such self-sufficiency.
15. The wider principle suggested by Mr Olalunbosun would have the effect of removing the right of member states to require self-sufficiency in **Chen**-type cases. Although **Zambrano** has been accepted, it has such an effect only for British children in the UK (or for EU citizens in the countries of their own nationality) and I cannot accept the submission that there is a proper basis, by direct reference to Article 20 of the TFEU, for extending the **Zambrano** principle as suggested.
16. In relation to the 2006 Regulations no error has been disclosed in the judge’s conclusions. In relation to the **Zambrano** point, even if it might be argued that this was not fully dealt with, nevertheless any potential error could not be material given my remarks above. In relation to the judge not dealing at all with Article 8, however, I find that there was a material error of law, and that aspect falls to be set aside.
17. Within the terms of the Practice Statement, giving guidance as to whether decisions should be remade in the Upper Tribunal or remitted, this appeared to me to be a situation in which the appellant had not had any hearing at the First-tier of the relevant point. As a result it appeared to me an appropriate case for remittal. The parties were both in agreement.
18. Despite the outcome I suggested to Mr Olalunbosun, and the appellant, that serious consideration should be given to the overall position. If it is accepted that the appellant and the children have only been in the UK, most recently, since 2012, and bearing in mind the comments about the approach to children and education in the case of **EV (Philippines) v Secretary of State [2014] EWCA Civ 874**, I suggested that the appellant and her representatives should take a long hard look at the

arguability of the Article 8 case, once it is accepted that the European aspect falls away. I considered an immediate remaking, but there was insufficient time in the list. Since the matter would have required an adjournment remittal remained the correct course, bearing in mind that the full facts (particularly about the children) were not clear. Nevertheless, the appellant's representatives should be alert to the issue of whether time and costs should be expended in the event that, on a proper consideration of the factual circumstances, there is no properly arguable case.

19. Despite the involvement of the appellant's children it was not suggested by either side that there was any need for anonymity in these appeals. There was no application for any fee awards. In the circumstances, despite having allowed the appeals on the Article 8 point only it does not appear to me to be appropriate to make any fee awards.

### **Notice of Decision**

The judge's decision dismissing the appeals is set aside only in relation to the lack of consideration of Article 8. The findings in relation to the 2006 Regulations remain undisturbed.

The appeals are remitted to the First-tier Tribunal for a fresh hearing, limited to the Article 8 grounds only.

Signed

Date **2 December 2014**

Deputy Upper Tribunal Judge Gibb