



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

Appeal Number: IA/10431/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 July 2015**

**Determination Promulgated
On 14 September 2015**

Before

DEPUTY JUDGE DRABU CBE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS VANUSA GUEDES GONCALVES
ANONYMITY DIRECTION NOT MADE

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Presenting Officer

For the Respondent: Mr G Lee of counsel instructed by M Reale, Solicitors.

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State. She appeals against the decision of Judge K. ST. J. Wiseman, a Judge of the First Tier Tribunal who for reasons given in his determination promulgated on 9 October 2014 allowed the appeal of Mrs Vanusa G Goncalves, a national of Brazil. The appellant had refused the application of Vanusa Goncalves for a Derivative Residence Card which she had sought on the basis that being a third country national upon whom a British citizen is dependent in the United Kingdom, relying on the Court of Justice of the European Union in the case of **Ruiz Zambrano** (c-34/09). Reasons for the Secretary of State's decision are given in her letter dated 13 February 2014. Judge

Cheales a First Tier Tribunal Judge granted permission to appeal stating in decision dated 15 March 2015, "It is arguable that the Judge has not addressed clearly the issue of whether or not the children would be compelled to leave the UK to follow their mother. The grounds show an arguable error of law."

2. The appeal raises a short but important point. It is contended by the appellant that as the children for whom the respondent is the carer are not being removed, Judge Wiseman erred in law in allowing the appeal of the respondent. I heard submissions from Mr Tufan and Mr Lee. Mr Tufan relied on the paragraph 41 of the decision of the Upper Tribunal in **MA and SM (Zambrano: EU children outside EU) Iran** [2013] UKUT 00380 (IAC) in the context of paragraph 10 of the decision of Judge Wiseman in this case. He contended that the two children whose primary carer has been found to be the respondent are not being compelled to leave and hence in allowing the appeal, the Judge had erred in law.
3. Mr Lee responded by arguing that there was no material error in law in the decision of Judge Wiseman. The Judge had looked carefully at all the relevant facts of the case and had made reasonable and rational findings as to what would happen to the two children in practical terms if the respondent were removed as the appellant was contemplating. The findings made by Judge Wiseman have not been challenged as being irrational or perverse, I was reminded. Mr Lee asked me to look carefully at the contents of paragraphs 90 and 171 of the judgment of the Court of Appeal in **Sanneh** [2015] EWCA Civ 49. The Court of Appeal has urged that a realistic view be taken of all the relevant circumstances and that is precisely what Judge Wiseman had done in deciding the appeal. The two children for who the respondent is the primary carer are 6 and 3 years old. In paragraph 37 the Judge states, indeed common sense dictates that a normal responsible mother would almost invariably be the primary carer of such young children. She says that she deals with everything for them in terms of school, health and minute by minute feeding and caring for their other needs and there is no reason whatsoever not to accept that is indeed the position," Addressing the contention of the Secretary of State that "the father is a carer as well." Of course he is in the sense that he works to keep the family and makes direct financial provision but it would be impossible on the facts known to describe him as a "primary carer" or a person who realistically could be. It may suit the appellant's case to say that he would be hopeless caring for such young children but to be blunt he probably would be: there are not many fathers even these days who would feel remotely comfortable in that role". The Judge in paragraph 39 states, "The only other matter that has to be considered is whether **Zambrano** is only meant to deal with a case where the appellant is the only available carer for British children and therefore they would inevitably have to go with the appellant in any event. However there is no indication from the judgement in **Zambrano** that the principle is restricted in such an extreme way. Although the facts of each case have to be carefully considered (particularly on the issue of ages of relevant children) it would in my view be impossible to find in the circumstances of this case that the

appellant is not the primary carer and in my view it would be inevitable that the children would have to go with her back to Brazil were she required to go: this would be totally in breach of Zambrano principles.” As is evident from the Court of Appeal decision in **Sanneh**, this analysis of relevant facts and the conclusions reached are in accord with the principles of law set in that judgment.

4. In paragraph 90 of the **Sanneh** decision Lady Justice Arden said, “The law must here be interpreted in the real world and freed from the shackles of unreality. The need to find that someone will be forced to leave the UK is therefore equivalent to saying that the Zambrano carer and the EU citizen child must not be left without the resources which are essential for them to live in this jurisdiction. In paragraph 171 of the **Sanneh** judgement Lord Justice Elias whilst agreeing with Lady Arden said, “EU law focuses on the substance of the right and not merely the form and will require the State to take steps to ensure that the essence of the right is respected”. Judge Wiseman found, on evidence before him that the respondent would be forced to take the two young children with her if she were removed from the UK and that is a finding of fact arrived at with care. In the circumstances therefore the argument that since the children are not being “compelled” to leave the UK, the appeal should not have been allowed by Judge Wiseman is not a valid argument. Their departure is made inevitable by causing their primary carer to leave.
5. Accordingly I find no error in law in the decision of the First -tier Tribunal and it must stand.

K Drabu CBE
Deputy Judge of the Upper Tribunal

Date: 9 September 2015