



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

Appeal Numbers: IA/11045/2014
IA/11070/2014
IA/11055/2014

THE IMMIGRATION ACTS

**Heard at Field House London
On 17 February 2015**

**Decision and Reasons
Promulgated
On 21 May 2015**

Before

**THE HON. MRS JUSTICE THIRLWALL
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

Between

**LILIAN ELIZABETH AJALA
OLUFEMI OLUSHOLA OGUNSANYA
ADEMOLA OLUMIDE OGUNSANYA**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Ngwuochu, of Carl Martin Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. At the end of the hearing we announced that the appeals are allowed. This statement contains our reasons for that decision.
2. The appellants are a family group, the first two being the parents of the third appellant. The first appellant arrived in the UK as a visitor on 17

December 2003. It is not known when the second appellant arrived. The third appellant was born here on 6 April 2004. On 11 July 2010, the appellants applied for leave outside the immigration rules because of the ties they had established in the UK and the loss of ties to Nigeria. That application has been refused on four occasions, the last decision having been made on 3 March 2014. It is against that decision that the appellants brought their appeals under s.82 of the Nationality, Immigration and Asylum Act 2002. Subsequent to the immigration decision but before the appeals were heard, the third appellant was registered as a British citizen. It is the significance of this fact that is the subject of the appeal to the Upper Tribunal.

3. Mr Wilding conceded that he could not defend the First-tier Tribunal's decision because it simply failed to address the best interests of the British citizen child in accordance with regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 (as amended). That provision had been introduced to give effect to the judgment of the Court of Justice of the European Union in Ruiz Zambrano (case no C-34/09) [2011] Imm AR 521. In simple terms the case sets out the parameters of rights of Union Citizens even when they have not exercised their rights of free movement. Mr Wilding informed us that he had not seen a case which was so close to the facts in that case. We agree.
4. It appears that both representatives were unaware of the decision in Zambrano and regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 (as amended). This is extremely disappointing. It is also puzzling that the judge, who is a specialist, did not refer to it either. Whilst Mr Ngwuochu suggested that he had mentioned Zambrano during the hearing, we can find no reference to it in the records. Before us, it was only when the matter was raised by Mr Wilding that Mr Ngwuochu referred to it at all.
5. The Zambrano decision has been discussed in a number of reported decisions of this Chamber (e.g. Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 48 (IAC)). It is extremely unfortunate that it was not referred to in this case. It establishes that the first and second appellants have derivative rights of residence. The failure to consider it is a plain error of law.
6. In light of this finding we have no option other than to set aside the decision of the First-tier Tribunal. Given Mr Wilding's observation that this case was on all fours with Zambrano, it follows that we remake the decision to allow the appeal against the immigration decisions. However, we do so not under the immigration rules or Article 8 ECHR but under the 2006 Regulation. It will be for the Secretary of State to issue documentation to confirm that the first and second appellant have derivative rights of residence.

7. We add only one observation. No application for anonymity was made on behalf of any of the appellants. This is unsurprising. We do not understand why the order was made in the First-tier Tribunal. In the absence of anonymity orders in respect of the first two appellants, the third appellant, as their child, is immediately identifiable. As we were not asked to make an anonymity order in this case, none is made.

Decision

We set aside the First-tier Tribunal's decision and remake it to allow the original appeals.

Signed

Date

Deputy Upper Tribunal Judge McCarthy