



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

Appeal Number: HU/03124/2015

THE IMMIGRATION ACTS

**Heard at Columbus House, Newport
On 25 April 2016**

**Sent to parties on:
On 01 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

**M X
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Blundell, Counsel instructed by K & G Solicitors

For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of China. On 5 August 2015 the Respondent made a decision to deport her and to refuse her human rights claim. The Appellant appealed that decision under section 82 (1) of the Nationality, Immigration and Asylum Act 2002 on the grounds that her removal would breach Article 8 of the European Convention on Human Rights (ECHR). Her appeal was dismissed by First-tier Tribunal Judge Barrowclough in a decision dated 11 November 2015. The Appellant sought permission to appeal that decision. Permission was refused by the First-tier Tribunal but granted by

Upper Tribunal Judge Grubb on renewal of the application to the Upper Tribunal. He found it was arguable that the Judge erred in 'going behind' the Respondent's concession that it would be 'unduly harsh' for the Appellant's son 'J' to remain in the UK without the Appellant. Secondly, it was arguable that the Judge failed to take into account the son's British citizenship and EU citizenship in finding it would not be 'unduly harsh' for him to accompany the appellant to China. Thirdly, it was arguable that the Zambrano point was raised in the decision letter and was arguably a matter which the Judge should have considered.

The Grounds

2. Ground 1 asserts that the Judge's finding that it would not be unduly harsh for the Appellant's son to remain in the UK without the Appellant was not open to her as the Respondent had conceded in paragraph 44 of the refusal letter that it would be unduly harsh for him to remain in the UK without her. The concession was not withdrawn by the Respondent and the Judge failed to appreciate that it had been made. It is conceded that this on its own was not material as the Judge found that the other component of paragraph 399 (a) of the Immigration Rules was not satisfied but it is submitted that the Judge's findings in this regard themselves contained a material error of law.
3. Ground 2 asserts that in assessing whether it would be unduly harsh for her son J to accompany the Appellant to China the Judge was required to conduct a balancing exercise between, on the one hand, the public interest in deportation and on the other, the competing interests of the Appellant and her son. This required the Tribunal to treat his best interests as a primary consideration. It is submitted that the Judge failed to have regard to all the factors relevant to his best interest. In particular it is asserted that the Judge had failed to recognise the intrinsic value of the Appellant's son's British Citizenship and his right of residence in the European Union and the fact that relocation to China would deprive him of the genuine enjoyment of that right. Had the Judge had regard to this, it is argued that he could have concluded that relocation to China was contrary to the child's best interests and unduly harsh.
4. Ground 3 asserts that in the event paragraph 399 was not satisfied, the Judge was obliged by paragraph 398 to consider whether there were 'very compelling circumstances' outweighing the public interest in deportation. Since the Immigration Rules were a complete code in Article 8 deportation cases, they incorporated a full application of the five stage **Razgar** test and the Judge was obliged to consider whether the Appellant had a right of residence pursuant to the principle in **Ruiz Zambrano (C-34/09, EU:C:2011:124)** and if she did, the decision was not in accordance with the law. The Appellant had a right of residence because there was no one else to care for her son. The Judge was obliged to determine as part of the paragraph 398 assessment, whether or not the Appellant had a **Ruiz Zambrano** right of residence and whether this right prevented her deportation. He failed to do so and this was an error of law. In the event that

the **Ruiz Zambrano** point was not raised before the Judge the Appellant submitted that it was Robinson obvious.

The Hearing

5. Mr Blundell relied on the grounds of appeal. He referred to paragraph 44 of the RFRL at K8 of the Respondent's bundle where the concession was made that it would be unduly harsh for the Appellant's son to remain in the UK without her as there was no one to care for him. The first complaint in the grounds was that the Judge went behind that concession. That he did so was clear from paragraph 14 on the bottom of page 6 of the decision. It appeared that the Judge did so because Mrs Arnesen adopted a stance contrary to the refusal letter that was recorded at paragraph 11 of the decision. The law with regard to the maintenance and the withdrawal of concessions was set out at page 173 of the report in the case of **NR (Jamaica)**. What Kennedy LJ said at paragraph 22 was recorded at paragraph 11. Simply put, the Tribunal can allow a concession to be withdrawn if it felt it was a proper course. The factors were set out. It did not appear that Judge Barraclough had appreciated that there was an intention to withdraw a concession and there was no evidence to show that he appreciated that a concession was being withdrawn and the considerations in **NR (Jamaica)** applied. With regard to the question of timing, there was no indication that there was an application. There was also a question of prejudice. It was difficult to see how she was not caused serious prejudice because she did not have an opportunity to call oral evidence. Ms Fenney, who appeared on behalf of the Appellant before the First-tier Tribunal was entitled to conclude that she did not need to set out written or oral submissions. Had she directed her attention to that she could have brought arguments or evidence as to him remaining in the UK in the absence of his carer.
6. Firstly, as a matter of community law the Court of Appeal had considered the possibility of a child needing to go into care. At page 4117 p11 in **Hines v Lambeth London Borough Council** [2014] EWCA Civ 660, Vos LJ clarified what the Judge must have meant. The **Zambrano** father was in the UK in that case. Paragraph 24 was to similar effect. At paragraph 24 it was common ground that a foster care placement would not be adequate. There was an answer born out of authority to the proposal seemingly made by Ms Arnesen. At paragraph 44 of the refusal letter, the Respondent's criminality guidance at paragraph 3.5.14 the Respondent gave guidance that if the only way a child to remain in the UK would be with a foster care placement it would usually be unduly harsh. There was a presumption that the stance at paragraph 44 was the correct one. The error disclosed by ground one was twofold. The Judge did not appreciate that a concession had been made. He did not appreciate that a concession was being withdrawn and that there were legal and factual answers which could have been brought to bear on it.
7. The second ground concerned very familiar territory in the form of **ZH (Tanzania) v SSHD** [2011] UKSC 4. The Judge failed to give any weight or

separate consideration to the fact that J was a British Citizen and that he would be deprived of the benefits of that citizenship if forced to relocate. Lady Hale's comments in that case were at page 79 of the Appellant's bundle. She quoted the dicta in **Wan v Minister for Immigration and Multi-cultural Affairs** [2001] FCA 568 at paragraph 30 and the particular importance in assessing the best interests. Translating it to the context of this child, he had an identity as a British Citizen and access to all the benefits and the right to British education and he was an A* student who was going to study at Exeter College and be an Oxbridge grade student. He was not a child who had familiarity with China and it was not in the slightest bit fanciful that his educational qualifications would be dashed. He had an entitlement and there was no reference in the Judge's assessment to the significance of British Citizenship. He referred me to p81 of the Appellant's bundle and paragraph 47, page 82. Before leaving Ground 2 he stressed that British Citizenship would hardly ever be less than a weighty factor especially if they would lose the advantages for the rest of their childhood.

8. With regard to **Zambrano**, the Respondent at K3 to K5 of her bundle set out in some detail her view of the Respondent's case. It was difficult to imagine of a more paradigm **Zambrano** case than this. The Appellant's son had to go into foster care when she was in prison. Despite the Respondent setting out her view of his case in some detail and despite the case that there was relevant authority at item 7 in the Appellant's bundle in the form of the case of **Sanade and Others (British children - Zambrano - Derici)** [2012] UKUT 00048 (IAC) there was simply no consideration of this issue in the decision. That established the error of law. Mr Blundell produced two linked cases referred to in the R24 response. **SSHD v CS (Case C-304/14)** was referred from the Upper Tribunal. **CS** was the more relevant case because it was a pure **Zambrano** case and in the other case the Advocate General concluded that the Directive was relevant. **CS** was a clear sole carer of a **Zambrano** British Citizen child and it was a criminal case. The question considered by the Advocate General was in what circumstances they could be denied the right to reside on the basis of criminality. The facts of **CS** were set out at paragraphs 34-41 and 39 the conclusion of the First-tier Tribunal which was the ultimate conclusion that a citizen could not be constructively expelled. The Upper Tribunal considered in what circumstances it was permissible. The common features were set out at 59. Seriousness was considered at 68-70. A 12 month sentence was sufficient to engage automatic deportation provisions. At paragraph 124, 136 and 146 the Attorney General posed the question. The conclusion was at paragraphs 167 and 168 that a similar approach should be used to an expulsion to cases under the citizenship Directive. There was three tier protection and paragraph 168 applied in circumstances such as those which obtained in this case the highest level of protection where the **Zambrano** child would have to follow the carer at 177 there had to be an imperative reason relating to public security. At 15-24 of RFR the test in the regulations was applied. Reg 21 (a) was applied and rejected in **CS** and the Court applied an imperative grounds test instead. So there was a very real **Zambrano** issue to be examined in this case and based on the developing law an extremely

arguable **Zambrano** case. There was no evidence deployed by SSHD to show that the Appellant represented any genuine, present and serious threat and certainly not on an imperative level. The only rational outcome was that the appeal should succeed.

9. Mr Richards submitted that in terms of the concession seemingly made, it was not withdrawn as it was clear that Arnesen cross-examined the Appellant on matters directly going to the issue of the undue harshness of him remaining here and those submissions were recorded. The Appellant was legally represented by Ms Fenney and no doubt she would have been alerted to that matter and had every opportunity to make any application that she might have thought necessary to lead any evidence that she thought might assist the court and make any submissions. Nothing turned on the apparent concession in the refusal letter. All parties were alert to that issue and the Judge was entitled to make the findings. In terms generally of **ZH** and **Zambrano**, it was an unusual case. The Appellant had served a lengthy term of imprisonment. Her son J initially went to China and stayed for a short period and returned and returned here where he blossomed. The Judge looked at matters and concluded that Jackson could remain in the UK and do well in circumstances where his mother was in prison and therefore it would not be unduly harsh for him to remain having matured in the interim period. J in effect would not be forced to go to China and that it would be a matter of choice to continue his education or if that was their preference for him to join his mother in China. The Judge took account of all of the circumstances and was clearly mindful that J had British Citizenship. It was a matter of choice for the family whether J remained here as he had done before or whether he went with his mother to China and adequate reasons were given. No material error of law arose from those conclusions. This decision ought to stand.
10. Mr Blundell submitted with regard to Ground 1, if paragraph 9 of the decision showed that questions were asked in cross-examination that went behind the concession that was not an adequate answer to the complaint. Whether the attempt was made to go behind the concession the Judge needed to go through the steps set out in **NR**. Paragraph 9 appeared to show that the questions on which Mr Richards relied flew in the face of the policy suggesting that children should go into foster care. Paragraph 9 was not an answer. Mr Richard adopted the same position as the First-tier Tribunal. With regard to British Citizenship, it was a significant factor and simply mentioning it as a fact was not the same as considering it as a factor.

Discussion and Findings

11. I consider that there was a material error of law in the decision of the First-tier Tribunal for the following reasons. Ground 1 asserts that the Respondent had made a concession that it would be “unduly harsh” for the Appellant’s son to remain in the UK without the Appellant. I was referred by Mr Blundell to the case of **NR (Jamaica) v SSHD [2009] EWCA** in which the Court of Appeal considered the case law on concessions and concluded that the

Tribunal has a wide discretion to permit a concession to be withdrawn if in its view there is a good reason in all the circumstances to permit it.

12. The first question therefore is whether there was a concession. I find that there was. At paragraph 44 of the RFRL at K8 of the Respondent's bundle the Respondent stated:

It is accepted that it would be unduly harsh for J to remain in the UK in the event of your deportation, as there is no one to care for him. It is noted that his father is no longer in the UK. However, as above, it is considered that it would not be unduly harsh for Jackson to accompany you to China in the event of your deportation; you do not meet the exception at paragraph 399 (a) of the Immigration Rules.

13. There is no record, in the decision, of the Respondent notifying the Judge that she wished to resile from that concession. It is clear from paragraph 9 of the decision that the Appellant was cross-examined about leaving her son in the UK if she was returned to China. The submissions of both representatives were recorded at paragraph 11 of the decision and it is clear that Mrs Arnesen, whilst relying on the RFRL, also submitted that the Appellant's son could remain here without his mother. Ms Fenney dealt with that submission. She did not apply for an adjournment or claim to be prejudiced as a result of the change in the Respondent's position.
14. It is unfortunate that the Judge was not alerted by the parties to the concession at the hearing for two reasons. Firstly because it is clear from the case of **NR (Jamaica)** that an application should be made by the Respondent to withdraw a concession which the Judge may or may not accede to depending on the nature of the concession and the requirements of fairness. Secondly, in this case, there were sound reasons for the concession having been made by the Respondent as a result of established case law. This case, was, as is also clear from the RFRL, a "Zambrano" case as the Appellant's son was a British Citizen and the Appellant his primary carer. It is clear from paragraph 24 of **Hines v Lambeth London Borough Council (CA)** [2014] 1 WLR that, in considering whether a child would be constructively expelled from the Union because of the removal of a primary carer alternative care in the form of a foster care placement would not be adequate to avoid the conclusion that the child would be forced to leave.
15. In the circumstances, therefore, notwithstanding the fact that the concession had not been brought to the Judge's attention, there was clearly prejudice to the Appellant in the withdrawal of the concession and an application should have been made by the Respondent and considered by the Judge.
16. As the grounds acknowledge, this error of law cannot be said in itself to be material to the outcome of the appeal because, the Judge found that the Appellant had not met the other component of the requirements of paragraph 399(a) of the Immigration Rules and shown that it would be "unduly harsh" for the Appellant's son to accompany her to China. In this

regard, it is asserted in Ground 2 that the Judge failed to have regard to all factors relevant to J's best interest. In particular, it is asserted that the Judge failed to recognise the intrinsic value of J's British Citizenship and his right of residence in the EU.

17. There is no reference in the decision of the First-tier Tribunal to the case of **Ruiz Zambrano**. The Respondent was clearly aware of the relevance of Zambrano to this case and paragraphs 15 to 24 of the RFRL deal with the question of whether the Appellant, as her son's primary carer could be deported and whether she could derive a right of residence from the Appellant despite the circumstances of her offending behaviour. The Appellant's bundle also contained the case of **Sanade and other (British children - Zambrano - Derici) [2012] UKUT 00048 (IAC)**. Although the Advocate General's opinion in case **C-304/14** had not been delivered at the date of the hearing before the First-tier Tribunal there was very much a live issue in this case as to whether the removal of the Appellant would amount to the constructive expulsion of her son and whether and what circumstances deportation was lawful. There is also no reference in the decision of the First-tier Tribunal to the intrinsic value of British Citizenship with all the consequent rights and privileges and an assessment of this in relation to the question of whether it would be unduly harsh for J to live in China.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

The appeal is remitted to the First-tier Tribunal for rehearing with no findings of fact preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 1st July 2016

Deputy Upper Tribunal Judge L J Murray