



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

Appeal Number: IA341402015

THE IMMIGRATION ACTS

**Heard at: Manchester
On: 3 May 2017**

**Decision Promulgated
On: 8 May 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TO

(ANONYMITY DIRECTION MADE)

Respondent

For the appellant: Mr A McVeety (Senior Home Office Presenting Officer)
For the respondent: Mr B Adewusi (Crown & Law solicitors)

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because this decision refers to the

circumstances of the respondent's minor child. The respondent ('TO') is a citizen of Nigeria. Her child was born in the United Kingdom in 2014 and is a British citizen.

2. The SSHD has appealed against a decision of the First-tier Tribunal dated 12 February 2016 in which it allowed the appeal on human rights grounds. The appeal before the First-tier Tribunal proceeded on the basis of the papers alone, at TO's request.

First-tier Tribunal findings

3. The First-tier Tribunal made the following material findings of fact:
 - (i) TO arrived in the United Kingdom in 2011 as a student. She remained as a student until May 2014 [5].
 - (ii) In January 2014 TO made an application to remain on the basis of her relationship with her British citizen partner [6].
 - (iii) As part of that application TO relied upon a TOEIC certificate, provided after a test taken at Burnley Training College in 2013 [11]. When taking that English test, TO used a proxy and as such has taken part in fraud, such behaviour is not conducive to the public good [27], there is a strong public interest in removing an individual whose presence is not conducive to the public good [43];
 - (iv) TO has a British citizen son, who was born in 2014 [6];
 - (v) TO is no longer with her British citizen partner and is the primary carer for her son [33]. This appears to be based upon an acceptance of TO's evidence that her partner abandoned herself and her son immediately after her application for leave to remain was refused on 30 October 2015 and that she had not seen her partner since the middle of November [21].
 - (vi) It is in the son's best interests to remain with mother [37] but TO and her son could adapt to life in Nigeria without any significant difficulty [39].
4. The First-tier Tribunal made it clear that if TO did not have a British citizen child she could not succeed with her appeal [33] and that the issue in the appeal turned upon the reasonableness of expecting the British citizen child to leave the United Kingdom [48]. The First-tier Tribunal directed itself to ZH Zambrano v SSHD [2011] UKSC 4 and the importance attached to the child's British citizenship, which would be lost if he left the United Kingdom [49-52]. At [53] the First-tier Tribunal turned its attention to Sanade (British children - Zambrano - Derici) [2012] UKUT 00048 (IAC) and quoted from [95] of that judgment. This emphasises that it is not possible to require a British citizen and therefore an EU citizen to relocate outside the EU or submit that it is reasonable to do so.

5. The First-tier Tribunal then concluded at [54]:

“Based upon the case law to which I have referred, and the fact that [TO] has a poor immigration history, but is not subject to deportation, I conclude that because her child is British, it would not be reasonable to require that child to leave the United Kingdom. Therefore pursuant to section 117(6) the public interest does not require [TO’s] removal, and she succeeds with her appeal in respect of Article 8 of the 1950 Convention.”

Alleged error of law

6. In a decision dated 9 February 2017 First-tier Tribunal Judge JM Holmes considered it arguable that the decision discloses a flawed approach to best interests and section 177B(6) of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’) and fails to follow the guidance in Kaur [2017] UKUT 14 or MA (Pakistan) v SSHD [2016] EWCA Civ 705 (7 July 2016). In the latter case the Court of Appeal found that when assessing section 117B(6), where the child has been in the United Kingdom for seven years and is therefore a ‘qualifying child’, this is a factor which must be given significant weight when carrying out the proportionality exercise.
7. Mr McVeety invited me to find that the First-tier Tribunal failed to consider all the relevant factors, including the strong public interest in removing TO, when assessing reasonableness.
8. In reply, Mr Adewusi submitted that this was not a material error of law because the case turned on the First-tier Tribunal’s finding that it would not be reasonable to require the EEA citizen child to be deprived of his EU nationality rights, by leaving the United Kingdom, and that this finding was in accordance with Sanade (supra). Mr McVeety directed my attention to VM (Jamaica) v SSHD [2017] Civ 255 and submitted that Sanade was no longer good law.
9. After hearing from both representatives, I reserved my decision which I now provide with reasons.

Discussion

10. Section 117B(6) of the 2002 Act provides as follows:

“In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -
(a) the person has a genuine and subsisting parental relationship with a qualifying child; and
(b) it would not be reasonable to expect the child to leave the United Kingdom.”
11. There are two routes by which a child can be a “qualifying child”: by virtue of his length of residence in the United Kingdom for a

continuous period of at least seven years or by his British citizenship. The instant case involves a British citizen child. By contrast MA (Pakistan) addressed “*how the test of reasonableness should be applied when determining whether to remove a child from the United Kingdom once he or she has been resident here for seven years*” – see [1] of MA (Pakistan). At [45] Elias LJ concluded that when assessing reasonableness the wider public interest considerations must be taken into account, but that significant weight must be given to the seven years length of residence when carrying out the proportionality exercise [46].

12. It is important to note in the instant case the First-tier Tribunal predicated its finding upon the child being a British citizen. When [33], [53] and 54] are read together the First-tier Tribunal effectively concluded that it would not be reasonable to expect the son to leave the United Kingdom, because to do so would deprive him of his EU citizenship.
13. The representatives agreed that the question for me is whether or not the First-tier Tribunal was entitled to adopt that approach.
14. The correct approach to the assessment of deprivation of EU citizenship of a child caused by the removal of a third party national has recently been revisited in VM (Jamaica) (supra). Sales LJ [52] considered Sanade to be based on “*an ill-advised concession made by the Secretary of State*” accepted to be correct in that case, “*that where a person enjoys family life as an engaged parent with a child who is a British citizen, then in terms of Article 8 it is not possible to argue that a third country national's removal may be proportionate on the footing that the family unit could move together to a country outside the EU: see Sanade at [93]-[95]. In other words, in that case it was conceded, in effect, that a British child's location in the UK was to be treated as a fixed point, and the Article 8 analysis had to be moulded in the light of that.*” Sales LJ reviewed the relevant authorities and reconsidered the Sanade issue in the following way:

“54. I begin with the relevant principles of EU law derived from *Ruiz Zambrano*; *Dereci*; Cases C-356/11 and C.357/11 *O, S and L v Maahanmuuttovirasto* [2013] Fam 203; and, more recently, the judgments of the CJEU of 13 September 2016 in Case C-165/14 *Rendon Marin* and Case C-304/14 *Secretary of State for the Home Department v CS*. For present purposes, the most important of these judgments is that in *Dereci*, dealing with the first question referred to the CJEU in that case at paras. [37]-[74].

55. To recap, the facts in the case before us are that the father, VM, is a third country national facing deportation; the mother, KB, is a British citizen who can remain in the UK if she so chooses; the three dependent young children are British citizens who enjoy an active family life with both the father and the mother, but could remain in the UK if the mother chooses to stay here.

56. In these circumstances, the deportation of the father does not

automatically entail that the children would have to leave the UK (and EU) with him, on the footing that there would be no family member with a legal right to be in the UK who would be able to care for them in the UK. So the situation is different from that in *Ruiz Zambrano*.

57. Rather than a legal impossibility of remaining in the UK, the family would face a difficult practical choice whether to separate (with the mother and children remaining in the UK, in which case there would be no infringement of their EU citizenship rights) or to leave and go to Jamaica as a family unit. This is the situation addressed in *Dereci* and in domestic authority.

58. The facts in *Dereci* concerned a Turkish national who entered Austria illegally and married an Austrian national by whom he had three children who were also Austrian nationals and were minors; Mr Dereci had his application for a residence permit in Austria rejected and was made subject to orders for expulsion and removal from Austria: see [24] and [27]. The question arose, amongst others, whether Mr Dereci was entitled to be granted a residence permit in Austria by reason of his relationship with his wife and children, who were all Austrian nationals with EU citizenship, by virtue of Article 20 TFEU and the principle in *Ruiz Zambrano*. In its judgment the CJEU said this at [63]-[68]:

"63 As nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under art.20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin (see *McCarthy* [\[2011\] 3 CMLR 10](#) at [48]).

64 On this basis, the Court has held that art.20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano* [\[2011\] 2 CMLR 46](#) at [42]).

65 Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano* [\[2011\] 2 CMLR 46](#) at [43] and [44]).

66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member

State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."

59. Thus the CJEU ruled that the facts that the family wished to stay together in Austria and otherwise faced a difficult choice of either leaving Austria (and the EU) together in order to preserve the family unit or splitting up (with the mother and children remaining in Austria, as they were entitled to do) was not sufficient to generate a right under EU law for the father to remain in Austria, parasitic upon the rights of his wife or children as EU citizens. Clearly, depending on the family circumstances and the strength of the ties between them, the practical outcome might well be that the wife and children would decide to accompany Mr Dereci to live in Turkey.

60. On this reasoning, VM has no claim to remain in the UK as a result of the citizenship rights in EU law of his wife and children. If he is deported to Jamaica, KB and the children (with KB deciding for them) will face a difficult choice whether to relocate there with him or remain in the UK without him. But the fact that they will be confronted with that choice, and might in practice feel compelled to go with him, does not engage EU rights in a way which creates a right under EU law for VM to remain in the UK. As this court held in *FZ (China) v Secretary of State for the Home Department* [2015] EWCA Civ 550, following *Dereci* and the decision in *O, S and L* (at paras. [42]-[44] of the Advocate General's Opinion and para. [56] of the judgment), "the critical question is whether there is an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported" (see paras. [14]-[19], in particular at [19]). In the present case there is no "entire dependency" of AB, KSM and KDM on VM, in the requisite sense, because they could remain in the UK with their mother, KB, who as a British citizen herself has a right to be here.

61. The analysis in *FZ (China)* is consistent with the guidance given by the Supreme Court in respect of the application of *Dereci* in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, at [61]-[67]. The Supreme Court distinguished the situation in *Ruiz Zambrano* - which concerned the refusal of a right of residence and a work permit in a member state to the third-country parents of dependent minor children who were citizens of that state, which had "the inevitable consequence" that the parents would have to leave the EU and the children would have to accompany their parents - from that in *Dereci*, in which "the same relationship of complete dependence" between the EU citizen (the wife and children in the *Dereci* case) and the third country national (Mr Dereci) was not present, where the argument based on Article 20 TFEU and the EU citizenship rights of the wife and children was rejected: see [64]-[67] (emphasis added).

62. In *FZ (China)*, as in the present case, a third country national was married to a British wife by whom he had a British daughter, who was a minor dependent on her parents. Although the wife would face a difficult choice if her husband were deported, whether to go with him to keep the family together or to remain in the UK with her daughter, that situation did not engage the principle in *Ruiz Zambrano* so as to generate a right for the husband to be allowed to remain. The wife might feel compelled by circumstances to leave with her husband and take their daughter with her, but she was not compelled by law to do so. The wife could choose to remain. There was therefore no "entire dependency" of the daughter on the person being deported, namely the father. See also *S1, T1, U1 & V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560 at [46]-[51], which is to similar effect.

63. In my view, the reasoning in *FZ (China)* covers the present case and shows that, contrary to the view of the UT at para. [16] of the UT appeal

decision, the possibility that KB and the children will choose to go to Jamaica with VM does not "violate the fundamental precepts of EU law."

64. It follows that the presence of the children in the UK does not, as a result of the operation of EU law, have to be treated as a fixed point for the purposes of the proportionality analysis under Article 8. It was legitimate for the FTT in the 2015 FTT decision to consider for the purposes of its Article 8 proportionality analysis whether the family unit could be expected to take the option, which EU law allows the Secretary of State to present to KB and the children, of relocating to Jamaica with VM."

15. In the instant case, the First-tier Tribunal made a clear finding of fact that TO is no longer with her British citizen partner and is the primary carer for her child. This is predicated upon an acceptance of TO's evidence that she and her son have been abandoned by her partner in November 2015. Although the First-tier Tribunal described TO as being the primary carer for her son, it appears from the evidence that there was no other carer and in effect the First-tier Tribunal accepted that she was the sole carer, and the son was "entirely dependent" upon TO.
16. The facts of this case are therefore readily distinguishable from VM: VM was a third country national facing deportation, the mother was a British citizen who could remain in the United Kingdom if she so chose; the three dependent young children were British citizens who enjoyed an active family life with both the father and the mother, but could remain in the United Kingdom if the mother chose to stay here. In those circumstances, the deportation of the father did not automatically entail that the children would have to leave the United Kingdom (and EU) with him, on the footing that there would be no family member with a legal right to be in the United Kingdom who would be able to care for them in the UK.
17. Contrast the position of VM with the instant case. The son is entirely dependent upon TO. The First-tier Tribunal effectively accepted the evidence that there would be no family member in the United Kingdom able to care for him. This means that the refusal of leave to TO would lead to a situation where her son, an EU citizen, would have to leave the territory of the EU in order to accompany his mother. In those circumstances, the son would, in fact, be unable to exercise the substance of the rights conferred on him by virtue of his status as an EU citizen of the Union. In many cases it will be necessary for the First-tier Tribunal to consider for the purposes of its assessment of reasonableness and the Article 8 proportionality analysis whether the family unit could be expected to take the option of relocating to a third country together. To do otherwise would erroneously treat the presence of the British children in the United Kingdom as a fixed point. However in this case it was not necessary to undertake that analysis. The son in this case would not be taking an option, because there was no choice to make - he has to follow his mother, who he is entirely dependent upon.

18. It follows that the First-tier Tribunal was entitled to conclude that the impact of Zambrano (supra) (which Sanade did no more than interpret) is such that it would not be reasonable to expect the son to leave the United Kingdom (and the EU). The First-tier Tribunal may not have spelled out its reasoning as clearly as it might but the reasoning it provided is adequate. To recap: the First-tier Tribunal accepted the evidence that the son was entirely dependent upon TO; in these circumstances it was entitled to find that it would be unreasonable to expect him to be deprived of his EU citizenship by leaving the United Kingdom with his mother, his only carer.
19. In these circumstances, the First-tier Tribunal was entitled to the conclusion at [54] that for the purposes of section 117B(6), in a case such as this which does not involve criminal offending or deportation, it would be unreasonable to expect the son to leave the United Kingdom and relinquish his EU nationality rights.
20. In any event, the First-tier Tribunal was well aware that TO had been involved in fraud and had a poor immigration history. The First-tier Tribunal reminded itself that TO's conduct was not conducive to the public good twice [27 and 43]. When determining the issue of reasonableness at [54] the First-tier Tribunal applied the principles relevant to the role of the child's British / EU citizenship but also expressly took into account "*the fact that [TO] has a poor immigration history*". When assessing reasonableness the First-tier Tribunal therefore took into account the relevant wider considerations including TO's behaviour and immigration history.

Final points

21. At the hearing Mr Adewusi indicated that TO sat at the back of the hearing room with the son referred to above and two younger children, who he said all had the same father. This may well be inconsistent with the evidence before the First-tier Tribunal concerning the whereabouts of the son's father. However, my task is to determine whether the First-tier Tribunal made a material error of law on the material before it. For the reasons I have provided above I do not so find. The SSHD may however wish to explore the current circumstances of the son's father when considering what leave is appropriate in this case.

Decision

22. The decision of the First-tier Tribunal does not contain a material error of law and is not set aside.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 4 May 2017