



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

Appeal Number: IA/50432/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 July 2017**

**Decision & Reasons Promulgated
On 01 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**GR
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms B. Asanovic, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

Anonymity

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. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

1. By my decision promulgated on 19 June 2017 (a copy of which is appended to this decision) I set aside the decision of the First-tier Tribunal promulgated on 21 June 2016 on the basis that it contained a material error of law. I now remake the decision of the First-tier Tribunal.
2. There is a single issue before me in remaking this appeal, which is whether the appellant qualifies for a derivative right of residence in the UK under Article 20 of the Treaty on the Functioning of the European Union (“TFEU”).

Findings of Fact

3. The factual matrix is not contentious. Having considered the appellant’s witness statements, oral evidence before me, and supporting documentary evidence (including in particular the comprehensive up to date report by social worker Shuli Greenstein), I make the following findings of fact:
 - a) The appellant, who is a citizen of Rwanda born on [] 1976, arrived in the UK in May 2008 on an EEA family permit as the wife of a Dutch national of Rwandan origin. She was issued with a five year residence card.
 - b) The appellant was the victim of horrific abuse in Rwanda including multiple rapes.
 - c) The appellant gave birth to a son in the UK, born on [] 2012.
 - d) Her son is a Dutch national.
 - e) The appellant’s husband was abusive towards her and she spent about two years in a shelter with her son. In December 2015 she and her husband divorced.
 - f) The appellant has sole parental responsibility for her son. Her ex-husband is not involved with the care for her son and spends most of his time outside the UK (in Africa).
 - g) The appellant suffers from a number of complex and significant physical and mental health problems that profoundly impact her life. This includes, but is not limited to, being HIV positive, nerve damage to her hip, asthma, chronic pain, blackouts, hearing problems, PTSD, and depression. She requires crutches, strong pain killers and HIV medication. She receives care and support for her conditions in the UK, including counselling and medical treatment.
 - h) The appellant has a network of friends and neighbours who support her and her son and with whom she is close.
 - i) The appellant has no contact with family or friends in Rwanda.
 - j) The appellant has no contact with anyone in the Netherlands and does not speak Dutch.
 - k) The appellant and her son have a strong and loving bond.
 - l) The appellant and her son are settled in the UK and the appellant has a strong desire to remain, and raise her son, in the UK.
4. The evidence of Ms Greenstein, which I accept, is that if the appellant and her son are required to move to the Netherlands, this could have a detrimental impact on both of them, given the disruption it would cause

and the loss of the support structures and social networks the appellant has developed in the UK. Ms Greenstein stated, and I accept, that a move to the Netherlands could result in a deterioration of the appellant's mental health, which in turn could affect her ability to maintain positive parenting practices.

5. I also accept the evidence of Dr Lodge, consultant in palliative care, who in a letter has commented on the impact a move to Rwanda would have on the appellant. He considers such a move might be very detrimental, given the lack of medical care and the appellant's traumatic history in that country.
6. I also find as a fact that if the appellant were given the option of moving to either the Netherlands or to Rwanda she would move to the Netherlands. When this was posed to her in cross-examination by Mr Kotas the appellant's response was unequivocal that "of course" she would choose the Netherlands over Rwanda.
7. It was common ground that the appellant (under the Zambrano principle) would be entitled to reside in the Netherlands with her son.

Legal Analysis

8. It is well established under European Law that a third country national with a British child must be granted a right of residence in the UK if refusal would lead to the child having to leave the territory of the European Union. This finds expression in Regulation 15A of the Immigration (EEA) Regulations 2006 and was addressed by the CJEU in Ruiz Zambrano [2011] EUCJ C-34/09.
9. Ms Asanovic argued that the Zambrano principle applies in this case, even though the appellant's son is a national of another European Country (the Netherlands) and the removal of the appellant from the UK would not have the consequence of her son having to leave the UK, as he and his mother would relocate together to the Netherlands.
10. Ms Asanovic contended that the real question is not whether the appellant's son would be compelled to leave the territory of the European Union; but rather, whether by his leaving the UK he would be deprived of the genuine enjoyment of the substance of his rights as a Union citizen. She argued that the family and private life enjoyed by the appellant and her son in the UK combined with the detrimental impact on them of leaving the UK is such that the son's genuine enjoyment of his rights as a Union citizen would be undermined by relocating to the Netherlands. Ms Asanovic sought to draw support for her arguments from the following four CJEU judgments: C-356/11 O&S, C-133/15 Chavez-Vilchez, C-115/15 NA Pakistan and C-86/12 Alokpa.

11. Mr Kotas argued that the question for the Tribunal is whether, in practice, the appellant's son would be compelled to leave the Union. As he would not be, the appellant is not entitled to a right of residence under Article 20 TFEU.

12. I agree with Mr Kotas. As stated by the Court of Appeal in Damion Harrison [2012] EWCA Civ 1736:

"There is really no basis for asserting it is arguable in the light of the authorities that the Zambrano principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU."

13. In Alokpa the CJEU considered whether a third country national whose children were citizens of a different member state to the one in which the family resided was entitled to a right of residence under Article 20. At paragraph 33 the court made plain that the question to resolve was whether the consequence of refusing a right of residence would be that the EU citizen children "would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of their status".

14. The case law of the CJEU makes clear that the question for this Tribunal is whether, as a matter of reality, the appellant's son would be obliged to give up residence in the EU if the appellant were removed from the UK. The answer to this is clear: the appellant's son would not be obliged to leave the EU, as he and his mother would move, together, to the Netherlands. Accordingly, the appellant does not qualify for a right of residence in the UK under Article 20 of TFEU.

Notice of decision

15. The appeal is dismissed under the Immigration (EEA) Regulations 2006

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 29 July 2017