



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/31578/2014**

Appeal Numbers:

1588/2014

IA/3

1594/2014

IA/3

1602/2014

IA/3

THE IMMIGRATION ACTS

**Heard at Field House
On 24th November 2015**

**Decision & Reasons
Promulgated
On 16th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**D N W (FIRST CLAIMANT)
S N M A (SECOND CLAIMANT)
O Y W (THIRD CLAIMANT)
K K W (FOURTH CLAIMANT)
(ANONYMITY DIRECTION MADE)**

Claimants

Representation:

For the Appellant: Miss Willocks-Briscoe, Senior Home Office Presenting Officer
For the Claimants: Miss E Greenwood of Liyon Legal Limited

DECISION AND REASONS

1. The Claimants, the Appellants in the original hearing before the First-tier Tribunal, are the father (First Claimant), mother (Second Claimant) and two children (Third and Fourth Claimant) of a single family unit. The First, Second and Fourth Claimants are all citizen of Sri Lanka. Post the making of the decisions in respect of the Claimants the Third Claimant became a British citizen. As the case involves the status and rights of minor I consider it appropriate to make an anonymity direction.

Immigration History

2. The First and Second Claimants entered the United Kingdom on 27th September 2003 as working holidaymakers. They had leave from 9th September 2003 until 9th September 2005. Since 9th September 2005 they have not had any valid leave to remain in the United Kingdom.
3. Shortly after entry the Second Claimant became pregnant and she appears never to have worked. In respect of the First Claimant he by comparison appears to have worked full-time all the time. Such would be in breach of the conditions of a working holiday visa, which proscribe that visa holders worked for less than twelve months in a total of a two year period.
4. On 1st April 2004 O Y W was born in the United Kingdom. He has lived continuously in the United Kingdom since his birth and therefore for at least ten years, the only break being a period of holiday in Sri Lanka when the child was but a few months old. By reason of Section 1(4) of the British Nationality Act 1981 O Y W having been born in the United Kingdom and having lived here continuously for ten years became entitled to be registered as a British citizen. The child was duly registered as a British citizen in October 2014. As a British citizen he is not subject to immigration control and cannot be removed by immigration decision from the United Kingdom.
5. The Fourth Claimant was born on 23rd June 2006. He also has never left the United Kingdom but clearly at this point does not have ten years' continuous lawful residence.
6. Having come to the United Kingdom on a working holiday visa the First Claimant appears to have commenced work for an IT company. He appears to have worked throughout at the same IT company. With the end of his working holiday visa approaching in or prior to September 2005, his employers attempted to obtain a work permit for the First Claimant. However that application was refused in 2006. The First Claimant therefore did not have any leave to remain in the United Kingdom after the expiration of his visa. With regard to the Second Claimant it appears that she herself did not make an application and her visa came to an end.

7. Despite having no visa to work the First Claimant continued to work for the same IT company as an IT engineer until 2014. He claims that in or about 2014 he left the company to establish his own business. However he did not have leave after 2006 and did not have leave to work.
8. In or about 2010 the First Claimant made an application for leave to remain for himself and his family. That application was refused and no right of appeal was given (for the full circumstances see paragraph 8 of the error of law decision dated 11th September 2015).
9. The Claimants not having been given a right of appeal it appears that judicial review proceedings were issued. It seems likely that those judicial review proceedings were compromised on the basis that a decision would be taken giving the Claimants an in-country right of appeal.
10. Thereafter on 17th July 2014 the present decisions were taken to remove the Claimants from the United Kingdom back to Sri Lanka. The Claimants appealed the decisions and the appeals were heard in the first instance by Judge Wyman on 4th March 2015. By decisions promulgated on 20th March 2015 Judge Wyman dismissed the appeals under the Immigration Rules but allowed the appeals on Article 8 grounds.
11. The SSHD applied for leave to appeal to the Upper Tribunal and that appeal appeared before me on 11th September 2015. By decision issued thereafter I ruled that there was a material error of law in the decision of Judge Wyman and directed it be listed for a further hearing before me in the Upper Tribunal at which evidence may be given but in principle to deal with two issues:-
 - (a) Given the effect of the 2006 Immigration (EEA) Regulations specifically Regulation 15A and the case of **Ruiz Zambrano [2011] ECR 1-0000 Case C-34/09** given the fact that the Third Claimant was now a British citizen whether or not all or any of the Appellants could be removed or whether it would constitute a breach of the Third Claimant's right as an EU citizen to be present and living in the EU.
 - (b) Whether or not the decisions were proportionately justified in accordance with **Razgar [2004] UKHL 27**.

The EEA Issue

12. The legal framework under consideration is set out in the case of **Zambrano [2010] EUECR 1-0000 Case C-34/09**. There is reference therein to the Treaty on the Functioning of the European Union, specifically Article 20. There is also reference to Article 24 of the Charter of Fundamental Rights of the European Union.
13. Article 20 of the TFEU states:-

- “1. Citizenship of the union is hereby established. Every person holding the nationality of a member state shall be a citizen of the union. Citizenship of the union shall be additional to and not replace national citizenship.
2. Citizens of the union shall enjoy the rights and be subject to the duties provided for in the treaties.”

The Charter of Fundamental Rights of the European Union Article 24 states:-

“Article 24

1. Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children whether taken by public authorities or private institutions the child’s best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

14. In the case of **Zambrano**:-

- (a) Mr Zambrano and his wife Colombian nationals arrived in Belgium in 1999 accompanied by their first child on visas issued by the Belgian Embassy in Bogota. Whilst subsequently they sought to claim asylum and otherwise made applications for residence permits such applications were refused. It appears that Mr Zambrano obtained employment and worked for a company for five years from 2001 even though he had no work permit. During the time that they were in Belgium two children were born to the family. Pursuant to the Belgian Nationality Code both children acquired Belgian nationality. As a result of the birth of the children Mr Zambrano obtained a residence registration certificate. There were ongoing appeals with regard to the refusal of residence permits but that did not stop Mr Zambrano obtaining the residence registration certificate.
- (b) In or about October 2005 Mr Zambrano’s employment contract was temporarily suspended. He applied for temporary unemployment benefits but was refused. The application resulted in checks being made and it being established that he did not have a work permit and the authorities in Belgium issued an order for the immediate termination of Mr Zambrano’s employment.

- (c) Mr Zambrano applied for unemployment benefit in Belgium. He was again refused payment of the benefit.
- (d) Subsequently Mr Zambrano appears to have a renewable residence permit as well as a work permit but such were not retrospective.
- (e) From paragraph 98 onwards the court considered that the two Belgian citizen children had rights to move and reside freely within the territory of member states but in practical terms they could not exercise those rights independent of their parents because of their age. At paragraph 99 of the judgment the following is concluded:-

“If Mr Ruiz Zambrano cannot enjoy a derivative right of residence in Belgium ... he will have to leave the member state of which his children hold the nationality. Given their age ... his children will have to leave with him. They will be unable to exercise their right to move and reside within the territory of the European Union. ... They need to be able to remain physically present within the territory of the European Union in order to move between member states or reside in any member state.”

- 15. As a result it was concluded that Mr Ruiz Zambrano and his wife had a derivative right of residence in order to protect the rights of the two Belgian children citizens to reside as union citizens within the European Union. Whilst the case goes on to consider whether or not the decision can be justified the principle was established that the derived right of residence was an important principle within EU law. It was found also that interference may be permissible in certain circumstances and it had also to consider whether or not interference would be proportionate.
- 16. In making submissions in respect of this matter both parties have relied upon the case of Ayinde and Thinjom (Carers - Reg.15A - Zambrano) [2015] UKUT 560. With respect the case has a difference in the sense that the European citizens in question were both adults and were seeking either to protect and preserve their rights as EU citizens by reliance upon a carer in one instance a son and in the other a spouse. Reliance was placed upon the judgment in Zambrano in the Grand Chamber specifically paragraphs 41 to 45. In dealing with the matter Upper Tribunal Judge Jordan emphasised the fact that there is a demarcation between the rights created and preserved by the TFEU and those rights created and preserved by national law. In the light of that in the case under consideration what was sought to be expanded was whether or not a forced removal was a necessary element within the preservation of the rights.
- 17. Attention was drawn to the case of Damion Harrison and AB v SSHD [2012] EWCA Civ 1736. There it was clear that the principle that the effect of the decision had to force the EU citizen to leave was an element necessary to exist before there would be a breach of EU citizen rights. The

conclusions of the principles to be extracted from the case are set out from paragraphs 38 to 42. The situation is different in the sense that the EU citizens were adults and therefore not dependent upon others.

18. The distinction can be seen in the case of Abdul (section 55 – Article 24(3) Charter) [2016] UKUT 106. In the case of Abdul Mr Justice McCloskey dealt specifically with Article 24 of the EU Charter of Fundamental Rights and was satisfied that that created a freestanding right although that such right was not absolute. In the case consideration was being given to the rights of two children aged 11 and 13 both British citizens but both the daughters of a 41 year old Nigerian who had committed a series of frauds. In January 2012 the sentence of four and a half years' imprisonment had been imposed. Whilst not ruling that the decision to deport was wrong the court emphasised that care had to be taken to look not only at the best interests of the children but also consideration given to Article 24(3). They were satisfied that that was a discreet right which required consideration. Clearly the right is not an absolute right and it may be that in considering proportionality the right does not hold against the interests of society as such. However it is a right that has to be considered.
19. During the course of the hearing before me I asked that the two representatives submit written submissions. I received those written submissions finally in January 2016.
20. In the present case Regulation 15A is relied upon. It is suggested first and foremost that the rights protected by Regulation 15A do not extend beyond EA nationals. The argument being that Regulation 2 defines an EEA national as a national of an EEA state, who is not also a British citizen. With respect if that is the effect of the Regulations then the Regulations do not properly transpose either the requirements under the case of Zambrano or under Article 24 as referred to above. Reliance is placed upon Regulation 2 and it is argued that that in referring to an EEA national has to exclude references to British citizens which the Third Claimant is.
21. The Claimants' representative made reference to Regulation 15(4A). That specifically provides:-
 - "A person (P) satisfies the criteria in this paragraph if -
 - (a) P is the primary carer of a British citizen ('the relevant British citizen');
 - (b) the relevant British citizen is residing in the United Kingdom; and
 - (c) the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave."
22. That Regulation is clearly relevant to British citizens and does reflect the case law.

23. As an alternative it was argued that the burden was upon the Claimants to prove that the result of the decision would be that the Third Claimant would not be able to reside in the United Kingdom. It is suggested that the only evidence presented to suggest that the Third Claimant would not be able to reside in the United Kingdom was a self-serving statement and the oral evidence of the First Claimant. It is suggested that the evidence given discloses that there are other family members within the United Kingdom who the child could reside with. Reference was made to a brother and sister of the First Claimant who resides in the United Kingdom. The evidence from the First Claimant was to the effect that that brother would be unwilling to look after the Third Claimant. It suggested that little weight should be given to such.
24. It is suggested because there are family members that are capable of looking after the Third Claimant would not be compelled to leave the United Kingdom.
25. It is clear that the provisions of Article 24(3) of the EU Charter creates a freestanding right although not absolute to have direct contact with a parent. The best interests of the Third Claimant require that the child be brought up in a stable steady home environment by his parents consistent with Article 24 and Article 8.
26. Whilst I have taken account of the fact that there are other family members in the United Kingdom I find in the circumstances that the consequence to the Third Claimant of removing the First and Second Claimants would be that the Third Claimant would have to leave the United Kingdom and would thereby be deprived of his rights under the Articles, Treaties and Regulations referred to above. In that event I find that the First and Second Claimants are entitled to remain in the United Kingdom on the basis of Regulation 15(4A). I find having regard to the interests of the Third Claimant that removal of the first and second Claimants would not be a proportionate response and would breach the rights of the Third Claimant.
27. Whilst I accept that the Fourth Claimant is not a British citizen still he is a member of the family. He clearly has a family and private life with the parents. The decision I am satisfied would significantly interfere with that family and private life. There are no prospects that he could be removed by himself given his age. There is no evidence that anybody would be available to look after him back in Sri Lanka. I am satisfied therefore that Article 8 is engaged. Whilst the decision may ostensibly be in accordance with the law and for the purposes of maintaining immigration control, taking account of all the facts I find that the decision is not proportionately justified. This is a child of parents who have been found to be entitled to remain in the United Kingdom. The child should be entitled to remain with the parents. To make any other find I find is disproportionate interference with the rights of this family to Article 8 rights.

28. For the reasons set out I allow the appeals of the first and second Claimants. For the reasons set out I allow the appeal of the fourth Claimant. The third Claimant being a British citizen, he cannot be removed from the UK and the decision made against him is not in accordance with the law.

Notice of Decision

29. The appeal of the first and second claimant are allowed on EEA grounds

30. The appeal of the third claimant is allowed

31. the appeal of the fourth claimant is allowed on Article 8 grounds

Signed

Date

Deputy Upper Tribunal Judge McClure

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

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

To the Respondent

Fee award

No fee is paid or payable and therefore there can be no fee award

Signed

Date

Deputy Upper Tribunal Judge McClure