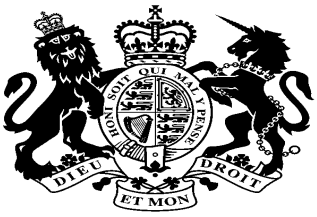


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13617/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3 January 2019	**On 07 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

EJOVWOKE [O]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Herself
For the Respondent: Mr S Walker (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Ejovwoke [O], a citizen of Nigeria born 28 December 1982, against the decision of the First-tier Tribunal of 11 October 2018 dismissing her appeal, itself brought against the Respondent's refusal of her human rights claim of 17 August 2017.

2. The immigration history supplied by the Respondent sets out that she entered the UK on 22 September 2009 as a Tier 4 General student with leave until 17 January

2011, extended under the Post Study work category until 15 February 2013. On 18 February 2014 she was encountered in Woolwich and arrested as an overstayer, and served with papers alerting her to her removability. She applied for an EEA residence card, which was refused on 31 March 2015; an appeal against that decision was dismissed on 15 September 2016.

3. The present application was based on her parental relationship with her son [TET], a joint Polish/Nigerian national, the son of her former husband [TJT], who she had married in June 2014 and from whom she separated in November 2014; she was now her son [TET]'s sole carer. The Respondent refused the application because it was not accepted that she would face very significant obstacles to integration in Nigeria, and as, though her relationship with her son was accepted, he was not British or seven-years resident, and there was nothing to suggest that her departure from the UK would be unjustifiably harsh having regard to the fact that it was not established that the father had any relationship with the son.

4. The First-tier Tribunal noted the Appellant's evidence that she spoke English and Yoruba, whereas her son spoke only English. He was in nursery school. She had no income and was reliant on state benefits. She had no UK-based family; her relatives all lived in Nigeria. She maintained that her son should have an opportunity to achieve settled status in the UK as an EU national. He had been referred to the community paediatrician due to behavioural problems, though he had not so far received any diagnosis.

5. The First-tier Tribunal listed the factors it considered relevant to the balancing exercise, which it listed: the need to maintain immigration control, the economic well-being of the UK, the desirability of consistent treatment between applicants, the Appellant's likely reliance on public funds in the UK, the fact her private life was established whilst her immigration status was precarious, the likelihood that she could access the help of her family in Nigeria with finding work, accommodation or medical treatment, and her presumed ability to maintain any friendships in the UK remotely. In her favour, she could speak English. The sole mention of her son's circumstances in the balancing exercise is the statement that [TET] was young and could be expected to adapt to life in Nigeria.

6. The Tribunal accordingly found that the immigration decision involved no disproportionate interference with Article 8 rights, and dismissed the appeal, noting that it was open to the Appellant, if she wished to argue EU rather than human rights points, to make an application under the EEA Regulations, as the Respondent had advised her in a letter of 22 March 2018.

7. Grounds of appeal argued that

   (a) The best interests and welfare of the Appellant's son had not been considered in the balancing exercise – her son continued to await a diagnosis for his special needs and his health visitor and the school continued to have concerns as to his needs;

(b) Her son was an EU national with an expectation of obtaining settled status if he remained in the UK, and he would lose this opportunity if he departed sooner – she had taken legal advice, from which she learned she could not afford to make an application on EU derivative rights grounds, and that to do so would in any event be fruitless, as she would not qualify as she lacked the funds to be self-sufficient or to pay for comprehensive sickness insurance cover, and in any event residence on that ground was uncertain in the light of the possibility of "Brexit".

8. Permission to appeal was granted on 12 November by the First-tier Tribunal, on the basis that the section 55 duty to consider the best interests of a child had not been adequately addressed in the decision, and nor had the line of authority indicating that it might be unreasonable to make an immigration decision that resulted in the effective expulsion of an EU citizen child from the European Union.

9. Before me the Appellant was unrepresented. She relied on further evidence, which Mr Walker agreed should be admitted to be considered should I find an error of law in the decision, by way of a report from her son's school, which stated that he had serious behavioural problems, though had managed to make some progress with his studies and to make friends.

10. Mr Walker realistically accepted that the failure to give overt consideration to the best interests of the child as potentially in favour of the Appellant's departure from the UK being disproportionate was a material error of law. He invited me to finally determine the appeal on the basis of all the available evidence, acknowledging that the best interests of the child necessarily considered the impact of the loss of residence in the European Union.

Findings and reasons

11. I accept that there was indeed a material error of law in this appeal. Remarkably, the child's best interests are neither assessed, nor weighed in the balance, in the decision below. A litany of public policy reasons that might legitimately be thought to count in favour of the public interest in the Appellant's expulsion were identified by the Judge below. The sole reason said to count in her favour was said to be the fact of her speaking English.

12. However, it is clear that a child who has spent a significant part of their life living in the UK *might* well be disadvantaged by departing the country. That is a question that demands reasoned adjudication for its appropriate place in the balance to be assessed. The proper approach to the assessment of a non-seven year resident child's presence is shown by Jackson LJ in *EV (Philippines) & Ors* [2014] EWCA Civ 874 at [35] stated: "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or

other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life ..."

13. These factors were not addressed below. The strongest factor is undoubtedly the child's Polish citizenship. *Zambrano* [2011] All E R (EC) 491 establishes that Article 20 of the Treaty on the Functioning of the European Union "is to be interpreted as meaning that it precludes a member state from refusing a third country national upon which his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen".

14. As shown by the headnote of the Upper Tribunal decision in *Ahmed* [2013] UKUT 00089 (IAC), "The principles established by the Court of Justice in *Zambrano* … and subsequent cases dealing with Article 20 of the Treaty on the Functioning of the European Union (TFEU) have potential application even where the EEA national/Union citizen child of a third-country national is not a national of the host Member State: the test in all cases is whether the adverse decision would require the child to leave the territory of the Union."

15. Young [TET] is a national of Poland, with no primary carer who could look after him in the UK absent any extant relationship with his father (that being the Secretary of State's own finding on the case, which the Appellant confirmed before me was accurate). Thus the Appellant's expulsion from the UK would inevitably lead to her son's departure alongside her.

16. Although the Secretary of State and the First-tier Tribunal have previously taken the view in this case that the EU citizenship of a child is a separate consideration from matters arising under the Human Rights Convention, that does not accurately reflect the authorities, as Mr Walker rightly accepted.

17. *Agyarko* [2017] UKSC 11 §67 demonstrates the potential relationship between the *Zambrano* principle and the considerations identified in the Immigration Rules, Lord Reed stating

> "In the event that a situation were to arise in which the refusal of a third-country national's application for leave to remain in the UK would force his or her British partner to leave the EU, in breach of article 20 TFEU, such a situation could be addressed under the Rules as one where there were "insurmountable obstacles", or in any event under the Instructions as one where there were "exceptional circumstances". Typically, however, as in the present cases, the British citizen would not be forced to leave the EU, any more than in the case of *Dereci*, and the third-country national would not, therefore, derive any rights from article 20."

18. That reasoning applies *a fortiori* to the case where it is not a partner, but a child, who would be forced to leave the country. It is also the case that at the date of decision in this appeal, the Respondent's Guidance - the Immigration Directorate

Instruction - *Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes*" stated, at 11.2.3: Would it be unreasonable to expect a British Citizen Child to leave the UK?

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in *Zambrano*.
>
> ...
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> • criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
>
> • a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

19. Having had regard to this Guidance, in *SF Albania* [2017] UKUT 120 (IAC) the Upper Tribunal states §13:

> "10. … it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.
>
> 11. If the Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.
>
> 12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the

> Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

20. It can be seen that *Zambrano* considerations are clearly considered relevant by the Home Office Guidance. As explained in *SF*, the need for consistency between judicial and executive decision making suggests that that policy should be given effect on appeal. So it is clear that, whether flowing directly from EU law or via the transposition of aspects of EU law thinking into domestic guidance, a child's citizenship can be relevant – and indeed decisive – when private and family life arises in the context of a human rights grounds of appeal. The First-tier Tribunal was wrong to think otherwise.

21. Thus there are two clear material errors of law in the decision of the Judge below. Firstly there is the failure to assess the child's best interests, and then to balance that finding against immigration control considerations if those interests are in favour of remaining in the UK; and secondly, there is the failure to take account of the child's nationality as a relevant consideration.

22. Having found these material errors of law, I accordingly proceed to determine the appeal finally, there being no requirement for any further hearing. I can be relatively concise as Mr Walker took a pragmatic view of the strength of the child's links with the UK given his EU citizenship, and did not advance any reasons that would tend towards dismissing the appeal.

23. As a matter purely of domestic law, there are of course various public interest factors that count against the Appellant remaining in the UK: her dependence on public funds, the precariousness of her residence, and the fact that she has overstayed her leave to remain. However, these considerations must be balanced against her son's best interests. In some cases, this might result in a relatively complex exercise.

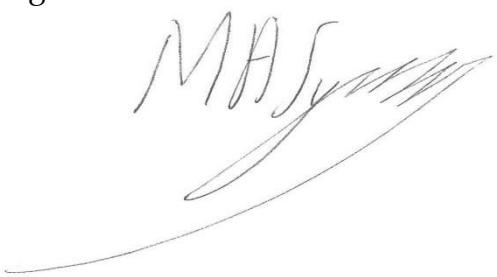
24. However, once one takes account of the consequences of constructive expulsion of an EU national child from the European Union as explained in *SF (Albania)* and by analogy with the observations in *Agyarko*, it is clear that carrying through the immigration decision would represent a disproportionate interference with [TET]'s private life, given there are no public interest factors present reaching the relevant threshold in the UKVI Guidance.

25. I accordingly allow the appeal, because the interference with the Appellant's son's Article 8 rights would be disproportionate given that it would frustrate his right to live in the European Union, this being a consideration which both Home Office Guidance and the case law demonstrates can be relevant to an appeal brought on Human Rights Convention grounds.

Decision

The appeal is allowed.

Signed Date 28 January 2019



Deputy Upper Tribunal Judge Symes