IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000950
First-tier Tribunal No:
EA/04924/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 May 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Faima Akther
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr C Timson of Counsel
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard by remote video at Field House on 17 April 2023

DECISION AND REASONS

1. At the conclusion of the hearing before me on 17.4.23, and after hearing submissions on behalf of both parties, I reserved my decision and reasons to be provided in writing, which I now do.

2. The appellant, a citizen of Bangladesh, sought an EU Family Permit to enter the UK as the mother and primary carer of FH, a British citizen born in the UK but now resident with the appellant in Bangladesh, pursuant to the Immigration (EEA) Regulations 2016.

3. Although born in the UK and British, in 2007, at age 6 months, the child returned to Bangladesh with the appellant, where both have since remained. The father of the child and the applicant divorced in 2011. The appellant asserted that the father is in the UK, has had no contact with the child, and has provided no

financial support. It is argued that the child cannot enjoy her rights as a British citizen without the appellant being with her in the UK.

4. The respondent refused the application under the amendments to the Regulations intended to conform with the CJEU judgement in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265. However, Regulation 16(5), specifically requires the British citizen to be resident in the UK. In addition, the respondent did not accept that the appellant was the primary carer or that the child would be unable to reside in the UK without the appellant, finding the evidence submitted in support insufficient.

5. The appeal turned on whether the appellant had a *Zambrano*-type derivative right of entry given that she had chosen to leave the UK. The respondent's case at the First-tier Tribunal was that as the child is outside the UK, *Zambrano* principles do not apply and the appellant cannot meet the requirements of the Regulations. The respondent relied on SD (British citizen children – entry clearance) Sri Lanka [2020] UKUT 00043 (IAC), which involved a third-country appellant living outside the UK with her two British citizen children. It was also submitted that the child could come to the UK alone to reside with family members who will accommodate and support her. The sponsor had given evidence that he provided some financial support to the appellant in Bangladesh (which the judge accepted), and stated that he would accommodate and support both the appellant and the child but could and would not care for the child alone in the absence of the mother.

6. The appellant relied on Campbell (exclusion; Zambrano) [2013] UKUT 00147 (IAC), which held at [3] that there was no reason in principle why *Zambrano* principles cannot have application in entry clearance cases, as in both in-country and out-of-country cases the Member State must ensure that "any refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union"" Derici & Others (European citizenship) [2011] EUCJ C-256/11." However, it is critical that in Campbell, the appellant was out of country and the British citizen child and mother in the UK.

7. Applying Patel v Secretary of State [2019] UKSC 59, which held that what lay at the heart of the *Zambrano* jurisprudence was the requirement that the British citizen would otherwise be compelled to leave the UK, the judge considered that the *Zambrano* principles could not apply to those already outside the UK. The judge noted that at [76] the Court of Appeal in Patel stated that "The Zambrano principle cannot be regarded as a back-door route to residence by such non-Eu citizen parents," which was not criticised in the Supreme Court.

8. The First-tier Tribunal accepted that the appellant and the father of the child are divorced, that the father is settled in the UK, and that the appellant is the primary carer of the child. However, the judge did not accept that there had been no contact between father and child since 2007. At [27] the judge concluded that the father still had parental responsibility for the child and found "no reason why the father should not be considered as a carer for FH if she wishes to enter and remain in the UK." The judge considered that there was no evidence that the father would refuse to provide accommodation and support to the child but in any event found that the sponsoring brother of the appellant would accommodate the child if there were no other option.

9. In summary, the grounds first argue that the First-tier Tribunal erred in law by concluded that the appellant's former husband and child's father, or other relatives in the UK could care for the appellant's daughter. Secondly, it is asserted

that the finding that the child could come to the UK alone was irrational as she is a minor and the appellant is her primary and only carer.

10. Permission to appeal to the Upper Tribunal was granted by UTJ Lindsley on 19.1.23, the judge considering it arguable that "the findings that the appellant's ex-husband, and father of her British citizen child, is settled in the UK and that the child would have other relatives who could become her primary carer at paragraphs 28 to 30 of the decision are insufficient(ly) reasoned and arguably errors of fact amounting to errors of law. In light of these arguable errors it is arguable that the appellant's minor British citizen child is prevented from being permitted to reside in the UK if the appellant is not permitted to enter the UK contrary to the conclusions of the First-tier Tribunal at paragraph 49 of the decision. All grounds may be argued."

11. It is important to note that this was a EEA Regulation appeal, not a human rights article 8 ECHR claim. It does not appear than any article 8 claim was pursued in argument before the First-tier Tribunal, though the judge did address it at the conclusion of the decision. I note that article 8 does not feature at all in the grounds of appeal to the Upper Tribunal. Even if article 8 is engaged, the appellant is at present enjoying family and private life with her child in Bangladesh and it is difficult to see how the respondent's decision interferes with her qualified ECHR rights or disproportionately so. Mr Timson stated that he did not abandon the article 8 issue but did not make any positive submissions to me in relation to it. It follows that the appeal before the First-tier Tribunal could only ever have succeeded under the EEA Regulations.

12. In relation to the *Zambrano* issue, the CJEU in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265, was concerned solely with deprivation of the genuine enjoyment of the substance of the rights attaching to the substance of European Union citizens of children residing in a Member State. The threshold set was said in SD to be a high one, namely whether, because of the denial of that right, such children "*would have to leave the territory of the European Union* in order to accompany their parents," *Zambrano* para [44]. The Court did not identify any right or threshold for an entry clearance case. At [45] the CJEU stated,

> "*Accordingly, the answer to the questions referred is that article 20 TFEU … is to be interpreted as meaning that it precludes a member state from refusing a third country national on whom 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*."

13. The derivative rights jurisprudence primarily involves cases where the British citizen in question is in the Member State (now, the UK). I recognise that Campbell held that *Zambrano* could apply to an entry clearance case. However, the appellant in Campbell was out of country and the child and mother in the UK. In MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380, the Upper Tribunal held that:

> *"(1) In EU law terms there is no reason why the decision in Zambrano could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the*

United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship."

14. The Upper Tribunal in SD was clear for the cogent reasons there set out that even if there was a *Zambrano* issue, it could not assist the appellant on the facts of that case. In reference to the passage from MA and SM cited above, the Upper Tribunal panel in SD stated at [128], "*However, we do not understand by so holding that the panel was suggesting that there was an automatic basis established by Zambrano for parents of British citizen children living abroad to be admitted under EU law*." In that case, the child outside the UK was intending to travel to the UK, whether or not the mother was granted leave to do so, and the situation for the child if the parent was not permitted entry to the UK was said to be exceptional.

15. MA and SM related to the 2006 Regulations, but the appellant was seeking entry to join her husband in the UK and the appeal would have been allowed under article 8 if not allowed under the Regulations. It was also a case decided long before the 2016 Regulations and the *Zambrano* amendments to the 2016 Regulations.

16. However, I note that Regulation 11(5)(e) of the 2016 Regulations provides a right of admission to the UK of a person who is not an EEA national but is a person who meets the criteria in paragraph (5), which includes at (e) a person who is accompanying a British citizen to, or joining a British citizen in, the UK and would be entitled to reside in the UK under Regulation 16(5) were that person and the British citizen both in the UK. Regulation 16(5) is, in effect, the *Zambrano* entitlement of the primary carer of a British citizen where that British citizen would be unable to reside in the UK or in another EEA State if the person seeking entry left the UK for an indefinite period.

17. Whilst I pointed out to Mr Timson that the appeal could not have succeeded under Regulation 16(5), as the child is not in the UK, I was not directed to the provisions of Regulation 11(5)(e), which do not appear to have been considered by the First-tier Tribunal or either of the parties. The respondent did not reference that provision, but that omission may not be surprising given that part of the respondent's case was that there was insufficient evidence to discharge the burden of proof, on the standard of the balance of probabilities, that the appellant was not the primary carer, and that the child would not be able to reside in the UK with another family member.

18. Given that the First-tier Tribunal found at [30] and [48] that the appellant is the primary carer of her British citizen child, a finding not now challenged by either party, the appellant would be entitled to entry under Regulation 11(5)(e) when accompanying the child even if the child is not presently in the UK - but only if the child when in the UK would be unable to continue to reside in the UK if the appellant left for an indefinite period. However, on that question the First-tier Tribunal found at [49] that the child could still reside in the UK if the appellant was not granted entry clearance. The appellant has challenged that finding as unsupported by adequate reasoning, which was Mr Timson's primary submission to me.

19. At [30], the judge found that as the child, 14 years of age, had no exposure to British society, her physical and emotional needs would be best met by her mother rather than her father. In the same paragraph, after finding the appellant to be the primary carer, the judge stated, "*I also find the appellant has failed to satisfy me that there are no other relatives in the UK that could take on that role*

should (the child) choose to come to the UK without her mother." I am satisfied that adequate reasoning for that finding is set out in the careful discussion set out in the decision between [26] and [30] of the decision. The judge was not satisfied on the evidence, taken as a whole, that the father had no contact with the child. At [27] of the decision, the judge found that, despite his statements to the contrary, the sponsor would in fact accommodate the child in the UK if there were no other option. The judge also raised the prospect of the father's involvement, finding that he retained parental responsibility and noted that there was no statement from him that he would refuse to support and accommodate his child.

20. I must bear in mind that it was for the appellant to discharge the burden of proof, not for the respondent to prove that there were family members able to care for the child in the absence of the appellant. On the facts of the present case, I am satisfied that adequate reasoning was provided for finding that the child would not be forced to leave the UK if the mother is not granted entry clearance. The challenged findings were not irrational and were unarguably within the range of findings open to the First-tier Tribunal on the evidence. It follows that the respondent's decision does not prevent the child from coming to the UK to exercise her rights of British citizenship and there was reasonable evidence of other family members willing to support and accommodate her, should she choose to do so. *Zambrano* does not assist the appellant, even if applied to entry clearance cases where the child is outside the UK. It follows from those findings that the appeal could not have succeeded under the Regulations, whether under 16(5) directly or in association with 11(5)(e). Furthermore, there was no prospect of the appeal being allowed on article 8 grounds, given this was an EEA Regulation appeal.

21. In the circumstances and for the reasons set out above, I find no material error of law.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appellant's appeal against the respondent's decision remains dismissed.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 April 2023