



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

Appeal Number: IA/40960/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 18 March 2015**

**Decision & Reasons Promulgated
On 25 March 2015**

Before

**MR JUSTICE MALES
DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

Between

**ASVALON HADASSAH ARLENA ANDALCIO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Chinwuba, Phillip Priscilla solicitors

For the Respondent: Mr Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Trinidad and Tobago and her date of birth is 21 January 1981. She made an application for leave to remain on 21 June 2013. That application was refused by the Secretary of State in a decision of 24 September 2013. The appellant appealed against that decision and the appeal was dismissed by Judge of the First-tier Tribunal A M Black in a decision that was promulgated on 11 July 2014 following a hearing on 7 July 2014.

2. The appeal was dismissed under the Immigration (EEA) Regulations 2006 (“the 2006 Regulations”), the Immigration Rules and Article 8.
3. The relevant facts are that the appellant has a young daughter who was born on 17 March 2012 and who like her father is a British citizen. The judge made extensive findings. She found that there was no contact between the daughter and the British citizen father albeit he made a financial contribution. The judge found that the appellant was the child’s primary carer and that it is in the child’s best interests to remain with her mother.
4. Judge of the Upper Tribunal Grubb granted permission on 16 December 2014 on the basis that the First-tier Tribunal had not considered the appeal under regulation 15A (4A) of the 2006 Regulations which applied to primary carers of British citizen children. She had considered the appeal under regulation 15 as it applied to EEA national children. The grant of permission was on this EU point of law only.
5. We heard oral submissions from Mr Clarke who conceded that the judge had made an error of law for the reason identified in the grant of permission, but he maintained that this was not material because (as he put it) the best interests of the child are, as found by the judge, to return to Trinidad with her mother. He made submissions in the context of the Rule 24 response and argued that in these circumstances the 2006 Regulations can be deviated from. He relied on a number of cases relating to the child’s best interests and the Article 8 assessment generally. Miss Chinwuba relied on her skeleton argument.
6. We indicated at the hearing that that is our judgment that the judge made a material error of law and we indicated that this would be followed by an oral judgment later that day.
7. The determinative issue in this case is whether or not the appellant’s daughter would be unable to reside in the UK or another EEA state if the appellant is required to leave. On the unchallenged findings of fact made by the judge it is obvious that the consequences of the appellant’s removal would be that her daughter would accompany her to Trinidad. There is no contact between the child and her British citizen father and no other relatives have been identified who can take care of her. We have considered the decision of the Upper Tribunal in **MA and SM (Zambrano: EU children outside EU) Iran [2013] UKIAT 00380**. At paragraph 50 the Upper Tribunal found it is no answer to a claim under the **Zambrano** principle that the child could exercise his rights of residence in the EU by being adopted or placed in care. It was not put forward by Mr Clarke that this would be an alternative in any event.
8. Mr Clarke did not argue that the appellant was unable to meet the requirements of the 2006 Regulations. On the contrary he accepted that she does. The argument, as we understand it, is that the Regulations do

not apply to this case in the light of the judge's findings in relation to the child's best interests and Article 8.

9. We reject Mr Clarke's submissions. Any assessment of the child's best interests and proportionality in the context of Article 8 is not material to a finding under the 2006 Regulations. The appeal is under EU law. The Regulation gives effect to the CJEU's decision in **Zambrano** and there is no legal authority to suggest that there is a discretion contained in the Regulations to refuse a right of residence to a person who fulfils all their requirements. In any event, the judge found nothing more than that if the appellant was to be removed to Trinidad, it was in the child's best interests to be with her. There was no finding that it was in the child's best interests to return to Trinidad.
10. Pursuant to section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") we set aside the decision of the First-tier Tribunal to dismiss the appeal under the 2006 Regulations. We remake the decision pursuant to section 12 (2) (b) (ii) of the 2007 Act and allow the appeal under the 2006 Regulations.

Notice of Decision

11. The appeal is allowed under the Immigration (EEA) Regulations 2006

No anonymity direction is made.

Signed Joanna McWilliam

Date 23 March 2015

Deputy Upper Tribunal Judge McWilliam