



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02693/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 23 August 2018

Decision and Reasons Promulgated
On 04 September 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

IMRAN [Y]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr K Forrest, Advocate, instructed by Norman Lawson & Co,
Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant applied to the respondent for a residence card, under cover of a letter from the representatives acting for him at the time, dated 14 August 2015. The circumstances were explained in the letter and accompanying documents, and reliance was placed on *Zambrano* C-34/09, [2011] All ER (EC) 491.
2. The respondent refused that application by a letter dated 16 February 2016.

3. FtT Judge Handley dismissed the appellant's appeal by a decision promulgated on 21 September 2017.
4. On 27 May 2018, UT Judge Plimmer granted permission to appeal to the UT, for these reasons:

“It is arguable that the FtT failed to address the *Zambrano* principle as recently considered in *Patel v SSHD* [2017] EWCA Civ 2028.

This is material because the EEA child's mother had died, and the child might therefore be compelled to leave the EEA with his non-EU father.”
5. The history of the appellant, his late partner and his son is rather complicated, including the annulment in Norway of her forced marriage to someone else in Pakistan. The principal facts in relation to entitlement to a residence card are these:
 - (i) The appellant is a citizen of Pakistan, and of no other country, born on 23 June 1983. He came to the UK on a visit visa in 2005 and has remained here since then, without establishing any right to remain since that visa expired.
 - (ii) The appellant was in a relationship with [MS], a citizen of Norway, from 2003. He met her firstly in Pakistan, and later in the UK. They had an Islamic marriage ceremony in 2005.
 - (iii) The appellant and [MS] had a son, [AI], born in the UK on 5 October 2006. He is a citizen of Norway.
 - (iv) [MS] died on 25 February 2010.
 - (v) A dispute thereafter between the appellant and the parents of the late [MS] over custody led to an outcome in favour of the appellant by around July 2010.
 - (vi) The appellant has been the only primary carer of [AI] since at least July 2010.
6. One reason given in the respondent's decision is that the appellant had not shown in terms of the Immigration (EEA) Regulations 2006 that [MS] was a “qualified person” in the UK prior to her death. Judge Handley found at paragraph 15 that she was, which the respondent has not sought to dispute, so that issue is settled.
7. Another reason in the decision is that the appellant had not shown legal custody of [AI]. That was a poorly taken point, as custody was indisputable for purposes of the application. Judge Handley at paragraph 16 decided it in the appellant's favour, and the respondent no longer disputes this issue either.
8. The respondent's third reason under the regulations was that [AI] (then not 4 years old) was not in an educational course in the UK immediately before [MS] died, as required by regulation 10 (3) (a). There is no dispute that such was the fact.
9. The theme of the submissions by Mr Forrest was that the decision should be reversed, not on the terms of the regulations, but on “broad *Zambrano* principles”, its circumstances being the clearest possible example of such a case.

10. Mr Govan's submissions were these. (i) The appellant had not argued in the FtT a case based on *Zambrano*, going beyond the strict terms of the regulations. (ii) The regulations applied as amended following *Zambrano*, to comply with that case, and so correctly governed the outcome. (iii) Even if the FtT had erred, so as to require the decision to be set aside, the appellant had not shown that he and his son could not reside in Norway, the country of his son's nationality. Without excluding that possibility, [AI] might have to leave the UK, but he did not have to leave the EEA, which was crucial. The decision should not be reversed, but should be remitted to the FtT, where that matter could be tested by evidence.
11. I reserved my decision.
12. Three points are incidental, but I think worth recording.
 - (i) The appellant says that his son cannot enter Pakistan, not being a citizen. That seems doubtful, as he might have that entitlement through the appellant. It was mentioned earlier in the proceedings that [AI] was about to obtain UK citizenship. Whether he has yet done so is unknown. However, for present purposes only his undoubted Norwegian citizenship is significant.
 - (ii) There was some debate on whether it would be appropriate to require an application to the respondent under article 8 of the ECHR, as held in the respondent's decision and by the judge. Mr Forrest submitted the case had gone on so long that it should have a final resolution in the tribunal without that requirement. However, if the matter came to article 8 issues, the authorities are clear. Article 8 would be for separate application, not for these proceedings.
 - (iii) Norway is in the EEA (and in EFTA), but not in the EU. Neither party gave this any significance, and the regulations refer to the EEA, so I take it that the same principles apply as if the appellant were a citizen of an EU member state.
13. On the first submission by Mr Govan, the covering letter makes it clear that the application was based not on the strict terms of the regulations, but on applying *Zambrano* principles to the facts of the case, which were rather unusual.
14. On the second submission, the regulations were amended following *Zambrano*, but I am not persuaded that the amendments were such that no case might thereafter ever be outside the regulations and yet within *Zambrano* principles.
15. Those principles and their application are complex: see the discussion in *Macdonald's Immigration Law and Practice*, 9th ed, vol 1, 6.77 onwards; 1st supplement thereto; and the case cited in the grant of permission. However, I think it is unnecessary to go beyond *Zambrano* at paragraph 45, as cited by Mr Forrest:

"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon 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.”

16. No doubt the requirement of having been in education is designed to comply with *Zambrano*, and will often be decisive. I do not find it decisive where the qualifying parent is deceased, and the application comes to be decided some years later, after resolution of a custody dispute, when the child is in education, and in the care of the surviving parent.
17. Applying *Zambrano*, there is only one parent; if the appellant left the EEA, [AI] would have to go with him; [AI] cannot in principle be expected to do so; and to refuse residence to the appellant would deprive [AI] of the substance of the rights attaching to his status as an EEA citizen. The outcome is then subject only to the alternative of Mr Govan’s third submission, that the appellant has to show why those rights could not be exercised in Norway.
18. I accept that, as Mr Govan said, it was for the appellant throughout to establish his case. However, the appellant advanced his position in the letter of application as based in part on having no right to reside in Norway. If the respondent thought the Norway alternative was another good reason for refusal, that should have been in the decision. The respondent did not make the point to the FtT, not being represented.
19. Whether the Norway option is available and reasonable might have been a legitimate subject of debate. Norway will admit [AI], and in consequence might admit his sole surviving parent. However, as matters have developed until the hearing in the UT, the appellant was entitled to take it that was not in issue. The submission that the case should be remitted implicitly recognises that the appellant could not have been expected to eliminate that possibility by evidence in the FtT. In short, this comes far too late.
20. The principle laid down in *Zambrano*, applied to the facts of this case, requires the decision of the FtT to be **set aside**, and the appeal, as brought to the FtT, to be **allowed**.
21. No anonymity direction has been requested or made.



23 August 2018
Upper Tribunal Judge Macleman