



**The Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal numbers: IA/23908/2014  
IA/27608/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 January 2015**

**Determination promulgated  
On 4 February 2015**

**Before**

**Upper Tribunal Judge Pinkerton**

**Between**

**MRS BRIGID OLUWAFUNMILAYO ADENIRAN  
MISS CYNTHIA ADENIKEANJOLAOLUWA ADENIRAN**

**Appellants**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

**For the Appellants: Mr M Blundell**

**For the Respondent: Ms A Holmes**

**REASONS FOR FINDING THAT TRIBUNAL MADE AN ERROR OF LAW,  
SUCH THAT ITS DECISION FALLS TO BE SET ASIDE**

1. The two appellants are mother and daughter. They applied respectively for a residence card on the basis of being a parent/carer and as a dependent child of an EEA national child claiming to be exercising treaty rights under the Immigration (European Economic Area) Regulations 2006. Their applications for derivative rights of residence were refused. Importantly, their applications were refused on the grounds that they had

not provided evidence in the form of a valid national passport as evidence of their identity. In the case of the mother her passport had been retained by the Home Office. It expired on 8 December 2012 and there was said to be nothing preventing her from obtaining a new one.

2. The appellants appealed and in a joint determination promulgated on 30 October 2014 First-tier Tribunal Judge Nixon decided that neither appellant had a right of appeal because the documents produced did not fall within the requirements of Regulation 26(2) of the 2006 Regulations. This appears to have been a mistake because Regulation 26(2) refers to EEA nationals appealing under the Regulations and neither of the present appellants claims to be an EEA national. It has to be assumed that the judge was referring to Regulation 26(3A) which states as follows:-

- “3A. If a person claims to be a person with a derivative right of entry or residence he may not appeal under these Regulations unless he produces a passport and, either -
- a. An EEA family permit; or
  - b. Proof that -
    - (i) Where the person claims to have a derivative right of entry or residence as a result of Regulation 15A(2) he is a direct relative or guardian of an EEA national who was under the age of 18;
    - (ii) Where the person claims to have a derivative right of entry or residence as a result of Regulation 15A(3) he is the child of an EEA national;
    - (iii) Where the person claims to have a derivative right of entry or residence as a result of residence under Regulation 15A(4) he is a direct relative or guardian of the child of an EEA national;
    - (iv) Where the person claims to have a derivative right of entry or residence as a result of Regulation 15A(5) he is under the age of 18 and is a dependant of a person satisfying the criteria in (i) or (iii).
    - (v) Where the person claims to have a derivative right of entry or residence as a result of Regulation 15A(4A) he is a direct relative or guardian of a British citizen.”

3. As recorded by the judge at the hearing both advocates raised the issue of the right of appeal. Mr Doyle, who represented the appellants, stated that the Duty Judge had granted such a right of appeal and the judge who heard the appeals did not seek to go behind that decision. However, after the hearing there was an e-mail exchange about which the judge noted as follows:-

“3. ....Following the hearing I received an e-mail from Mr Box, (who represented the Secretary of State) which confirmed that Mr Doyle was aware of the correspondence and its contents. Mr Box stated that Mr Doyle had made a mistake stating that a right of appeal had been granted and the respondent therefore returned to their initial standpoint that there was no right of appeal.”

4. It is noted also in the determination that at the hearing both advocates decided to deal with the case by way of submissions only. The judge then decided that there was no right of appeal because there had been failure to produce a valid national identity card or passport.
5. The grounds for seeking permission to the Upper Tribunal claim that there has been procedural unfairness because the parties had left the hearing room expecting the appeals to be allowed or dismissed. The appellants' representative Mr Doyle set out in the grounds, and also in a witness statement prepared for the Upper Tribunal material error of law hearing, that he had been mistaken in stating that the Duty Judge had granted the appellants a right of appeal when this is not in fact what had occurred. The unfairness was because the judge failed to afford Mr Doyle a right to respond to the Home Office Presenting Officer's communication with the judge which sought to argue that there was no right of appeal. The Home Office Presenting Officer had suggested that it was open to the judge to afford the appellants' legal representative a right to respond to the issue but the judge ignored this and went ahead to make a decision without fully consulting all the parties concerned.
6. I am not particularly impressed with this argument. In hindsight it may have been wiser for the judge to have ensured that all the e-mail correspondence had been exchanged and asked for comment or further submissions on the points raised before making a decision. However, one can understand that the judge, having looked at the position, formed her own view that the appellants had no right of appeal and this was for the reasons given in the decision. It is not clear to me that at any stage anyone had referred to or made submissions upon Regulation 29A of the 2006 Regulations to which I shall turn in a moment. It is for these reasons that I find there has been no procedural unfairness: had there been any this appeal decision would have been re-visited of necessity. In any event in the light of what I say hereafter this point in effect falls away.
7. I turn now to the second ground which is that the judge made a material misdirection in law. The judge was not referred to, it seems, and did not deal with Regulation 29A which provides that alternative evidence of identity and nationality may be produced to satisfy the Regulations in certain circumstances. Regulation 29A states as follows:-
  - "29A(1) Subject to paragraph (2), where a provision of these Regulations requires a person to hold or produce a valid identity card issued by an EEA state or a valid passport the Secretary of State may accept alternative evidence of identity and nationality where the person is unable to obtain or produce the required document due to circumstances beyond his or her control.
  - (2) This Regulation does not apply to Regulation 11."
8. It will be seen immediately that the matter is not as "open and shut" as is set out in the First-tier Tribunal Judge's decision. The judge did not deal with that Regulation and it is in the circumstances a very important point.
9. It is for this reason that I found that the judge has erred materially in law because it cannot be said that even without having made that error the

result would necessarily be the same. I therefore indicated to the parties that the determination of the judge would be set aside and the matter re-heard. I indicated that I was in a position to re-hear the appeals straightaway. After debate about this and my observation that at paragraph 32 of the grounds seeking permission to appeal it was said "The appellants were then not in a position to obtain a new and valid passport to be produced before the First-tier Tribunal at her appeal hearing because her funds were being spent on legal costs and as a single mother responsible for two young children, she had insufficient funds to also renew the passport," Mr Blundell indicated that he would wish to take instructions and obtain a full witness statement from his client. It was then late in the day and I took the decision that the matter should be returned to the First-tier Tribunal for fresh fact finding before a judge other than First-tier Tribunal Judge Nixon.

10. There was another pragmatic reason to have the hearing at a later date. I was informed that the decision in **Ahmed v Secretary of State for the Home Department [2013] UKUT 89 (IAC)** had been appealed and the hearing before the Court of Appeal took place on about 20 January 2015. The judgment was expected shortly. The outcome of that appeal may well be directly relevant to any final decision in this appeal because the appellants appear to be in a similar position to the appellants in the **Zambrano** appeal (**Zambrano v Office national de l'emploi (ONEm)**) (Case C-34/09).
11. If, therefore, the appellants do have a right of appeal then findings would need to be made on the applicability of the **Zambrano** principle which should be made clearer by the outcome of the Court of Appeal decision in **Ahmed**.

### **Decision**

12. The First-tier Tribunal Judge erred for the reasons set out above and the appeals are returned to the First-tier Tribunal for a finding on appeal rights and if successful on that point in relation to the substantive issues.

**Signed:**

**Upper Tribunal Judge Pinkerton**

## **DIRECTIONS FOR REMITTED HEARING**

1. The appeal is remitted to the First-tier Tribunal sitting at Sheldon Court Birmingham for a fresh hearing on all matters before a judge, judges or panel other than Judge Nixon.
2. Both parties have leave to file and serve updating witness statements, reports and other evidence no later than ten working days prior to the substantive hearing.
3. Such other directions as may be considered appropriate shall be made by the First-tier Tribunal.

**Signed**

**Dated 28 January 2015**

**Upper Tribunal Judge Pinkerton**