Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: AA/03226/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 14 June 2017	**Decision & Reasons promulgated on 26 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

[BOLANLE O.]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Mohzan of Schaws Solicitors Ltd
For the Respondent: Mr Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision dated 31 March 2017 Deputy Upper Tribunal Judge Renton found an error of law in the decision of the First-tier Tribunal and set that decision aside. Directions were given for the matter to be listed for a Resumed hearing and a judicial transfer order made. The appeal comes before this Tribunal for the purposes of that further hearing after which the Tribunal will either allow or dismiss the appeal.

Background

2. The appellant, a citizen of Nigeria, was born on 27 July 1977. The appellant has three dependent children [C] born on [ ] 2005, [A] born on [ ] 2007 and [J] born on [ ] 2012. The first two children are Nigerian citizens, the child [J] is a German citizen.
3. The appellant applied for leave to enter the United Kingdom as a visitor which was refused on 29 December 2006. A further application made on 29 October 2009 succeeded after which the appellant entered the United Kingdom as a visitor.
4. On 20 May 2014, the appellant claimed asylum which was refused on 9 January 2015 and a direction made for the appellant's removal from the United Kingdom pursuant to section 10 Immigration and Asylum Act 1999.
5. The appellant's appeal against the refusal came before First-tier Tribunal Judge C Chapman sitting at Sheldon Court in Birmingham on 18 May 2015. Having considered the evidence provided Judge Chapman dismissed the appeal of protection and human rights grounds.
6. Permission to appeal was granted to the appellant on the basis the grounds submitted that in issue was the nationality of the appellant's child in relation to whom there was a copy of the child's German passport in the bundle to which Judge Chapman made no reference. It was found to be arguable that Judge Chapman should have had regard to the child's passport given the EU law implications following any finding which might be made if the appellant's child was an EEA national.
7. The Error of Law hearing came before Deputy Upper Tribunal Judge McCarthy sitting at the Birmingham Employment Tribunal on 5 January 2016. The Presenting Officer, Mr Mills, acknowledged that the appellant's appeal bundle contained a copy of a German passport of the appellant's son. It was accepted Judge Chapman had made no findings as to whether the appellant's son was German and what rights he and the appellant might have as a result, which was accepted as amounting to a material error since the grounds of appeal and the statement of additional grounds mentioned EEA rights. In light of the conceded error it was agreed it was appropriate for the appeal to be remitted to the First-tier Tribunal for findings to be made on the relevant issues, in relation to which, Mr Mozhan accepted that the issues in any rehearing would be limited to the matters set out at [8] which are said to be:

    a. Issues relating to whether the appellant has a right of residence as a result of her son being an EEA national. This will of course depend on whether the appellant's son has a right of residence under the provision of the 2006 EEA Regulations, which is by no means obvious since the father is no longer resident here and it is unclear how he might have

obtained a retained or derivative right of residence given his young age and lack of financial evidence.

b. Issues relating to whether the appellant's proposed removal will be a disproportionate interference with her private and family life rights and those of her daughters and son.

8. It was noted by Judge McCarthy at [9] that the issues would need to be explored carefully, particularly in light of the Court of Appeals reference of certain questions to the Court of Justice of the European Union in SSHD v NA (Pakistan) [2015] EWCA Civ 140 which it is said might have a bearing on the outcome. Those questions considered the interplay of article 8 ECHR and EEA nationality and residence rights.

9. The appeal was listed before First-tier Tribunal Judge Robertson who on 19 July 2016 produced her decision dismissing the appeal under Article 8 ECHR. Judge Robertson noted an adjournment request by Mr Mohzan for the matter to be stayed pending the outcome of the referral mentioned by Judge McCarthy above although the adjournment request was refused. Judge Robertson noted the application at [6] in the following terms:

> 6. Mr Mohzan requested an adjournment, submitting that this matter should be stayed pending the outcome of the decision of the Court of Justice of the European Union (CJEU) on the reference of the issues set out in **NA (Pakistan) [2015] EWCA Civ 140** by the Court of Appeal. He submitted that the case before me was on all fours with that case and the Court of Appeal found a reference was necessary, although he had no timescale as to when the CJEU was likely to hear the case or issue its decision. However, in the cases before the Court of Appeal, both minor appellants were in education and there was a preserved finding of fact that removal of the appellants would result in a breach of their Article 8 rights. [J] was not in education and there was no finding of fact that removal of the Appellant would result in a breach of his Article 8 rights. Mr Mozhan submitted that [J] was at a nursery and that this was education. However, 'education' is defined as excluding nursery education (EEA Regs, Reg 15A(6)(a)).

10. Judge Robertson did not find it was necessary to adjourn as the matter could be fairly decided on the evidence before her. It was also noted to be contrary to the overriding objectives for the case to be stayed indefinitely.

11. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal on the basis the grounds of appeal complained that Judge Robertson misdirected herself in relation to both EEA law and Article 8. No arguable error of law was found for in a thorough and careful decision Judge Robertson is said to have given clear reasons for findings open to her.

12. Permission to appeal was granted on a renewed application by Upper Tribunal Judge Smith on 5 October 2016, on the grounds it was arguable that absent evidence that the appellant's other two children could be admitted to Germany (there being no apparent basis in EU law for them to be admitted) the finding at [24] of the decision that

the family could return as a whole to Germany, and that therefore the appellant is not entitled to a derived right of residence, contained an error of law. Judge Smith was less persuaded by the ground concerning the Article 8 consideration but as this issue would be affected by the question whether the appellant had a derived right, the limit of the grant of permission was not restricted.

13. Deputy Upper Tribunal Judge Renton sets out the following summary of the issues before him at that stage in the following terms:

> 3. The Judge dismissed the appeal because she was not satisfied that the principles set out in the decision in **Zambrano Case C-34/09 [2011] ECR 1-0000** applied. This was because [J] as a German citizen had a right to enter Germany, where his father lived, and therefore would not be forced to leave the territory of the EU. Under **Zambrano**, the Appellant as [J]'s primary carer would also have the right to enter Germany, and the German authorities would be bound to also admit the Appellants two dependent daughters as it would be disproportionate to exclude them. Therefore [J] did not have a derived right of residence in the UK under Article 12 of Regulation 1612/68 and the Appellant did not have a derived right of residence as his primary carer under Regulation 15A of the EEA Regulations 2006.
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> 4. The Judge dismissed the appeal on Article 8 ECHR grounds because it was not contrary to the best interests of the children to live in Germany, where their father would have greater access to them, and overall it would not be disproportionate for the Appellant and her family to reside in Germany.
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> 5. At the hearing, Mr Mohzan referred to his Skeleton Argument and submitted that the Judge had erred in law in reaching her decision. The Judge was wrong to find that the decision in **Zambrano** did not apply to the Appellant following the decision in **Ahmed (Amos; Zambrano; Reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC).** The Judge had relied on speculation that the Appellant and her two daughters would be able to enter and reside in Germany along with [J]. Further, there was no requirement for children such as [J] to be a British citizen as opposed to a citizen of any other EEA state for the purposes of EU law and the principle established in **Zambrano**. This error infected the Article 8 ECHR decision as it was made on the assumption that the Appellant and her two daughters could enter and reside in Germany with [J].
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> 6. In response, Mr Mills referred to the Rule 24 response and argued that there was no such error of law. The Judge found that the principles established in **Zambrano** did not apply as a consequence of her finding of fact that [J] as a German citizen would not have to leave the territory of the EU. The decision in **Ahmed** did not contradict this finding as it was made on a different factual matrix. It was open to the Judge to find that the Appellant as [J]'s primary carer would be able to enter and reside in Germany, and that her two other children could accompany her there. There was no evidence before the Judge to the contrary. The Judge was able to make the inference that that was the case. It was for the Appellant to show that it was not the case. At worse [J]'s siblings would have a very strong claim to live with him and their mother in Germany.
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> 7. At the hearing I reserved my decision which I now give. I do find an error of law in the decision of the Judge which I therefore set aside. Regardless of the technical arguments as to whether the appellant could rely on the **Zambrano** principle, it was an essential part of the judge's decision in respect of both the Appellants derivative rights and Article 8 ECHR that [J]'s minor sisters will be able to accompany him and their mother to Germany and reside there.

> However, there was no evidence before the Judge that this was the case. It may have been a reasonable assumption for the Judge to make, but that would still amount to speculation, and it is an error of law for the Judge to rely upon such.

14. The removal direction issued against the appellant on 9 January 2015 is set to Nigeria.
15. The protection claim was dismissed on an earlier occasion and is not a live issue before this Tribunal which relates solely to the two issues identified by Mr Mohzan before Deputy Upper Tribunal Judge McCarthy.
16. In addition to the appellant, her two Nigerian national children and [J], the other relevant person is [AA], a German national resident in Berlin who is [J]'s father and from whom [J] obtains his German nationality.

Submissions

17. As there is no factual dispute in relation to the key players or the appellant's immigration history there was no need to receive further evidence. The matter proceeded by way of further submissions being made by the advocates.
18. Mr Mohzan sought clarification from Mr Mills regarding the Secretary of State's intentions, for if the family were to be returned to Germany it was submitted that the removal direction would require amendment. It was submitted that the appellant cannot go to Germany as there is no removal direction to that country.
19. Mr Mohzan referred to the fact that if the children's names were included in a removal direction and were removed to Germany they would need accommodation and subsistence but there was no provision for this within the documentary evidence emanating from Germany that he provided, leaving the appellant with no source of income. Mr Mohzan also argued that in domestic legislation a country residence permit was limited in time.
20. Mr Mohzan submitted that under Regulation 15(4)(a) and the **Zambrano** principle the appellant can remain as a primary carer of an EU national child and that as the child is in the UK the appellant can remain on the basis of a derivative right. It is argued that the fact [J] was born in the UK is relevant as per the decision in **Amos.**
21. This is Mr Mozhan's primary case. His alternative position relates to the problems the appellant would experience in Germany if she is able to obtain the relevant permit. It was submitted the appellant would need to have a passport and obtain a right to go to Germany which would have to be under provisions contained in German domestic law.
22. It was submitted under EU law the appellant could reside in Germany if she was self-sufficient but she is not. Also, her daughters are Nigerian citizens and they cannot enter Germany. It was also submitted that even if the appellants could meet the self-sufficiency test, they could not meet any other test.
23. Referring to section 28 of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, Residence Act,

issued by the Federal Ministry of Justice and Consumer Protection in Germany, Mr Mohzan submitted this provision only deals with the appellant and not her daughters and that under German domestic law the two children will not be permitted entry.

24. It was submitted under EU law there is a need to show dependency as an extended family member which neither the appellant nor her children have.
25. Mr Mohzan also submitted that Section 12a of the Residence Act, entitled 'Residence Rule', is a domestic provision which states that to obtain residence it is necessary for an individual to work which the appellant would find difficult.
26. In relation to Article 8 ECHR, the two Nigerian children were born in the UK and have been here for seven years. The EEA national was born in the UK and it was submitted it was not proportionate to expect the children to leave.
27. Mr Mills submitted the challenge to the decision of Judge Robertson was due to the position of [J]'s sisters although Judge Renton did not dispose of the **Zambrano** point. It was accepted that if there is no evidence [J]'s sisters can live in Germany then it will not be possible to move the appellant and [J] as the child cannot be forced to leave the territory of the EU.
28. Mr Mills provided two translated documents he had obtained relating to German legislative provisions. The first is a shorter document headed Act on the General Freedom of Movement for EU Citizens, Freedom of Movement Act/EU in which the German government incorporate the Free Movement Directive of 2004 into their legislation, in a similar way the UK incorporated such material into the Immigration (EEA) Regulations 2006. It is accepted the Freedom of Movement Act has not been amended to include the judgment in **Zambrano** in the same way in which UK domestic legislation has, as illustrated by the Immigration (EEA) Regulations 2012.
29. The Free Movement provisions do not therefore appear in one document, as a result of which the Freedom of Movement Act does not arguably assist as this is not a traditional free movement case.
30. The German government incorporated the judgment in **Zambrano** in its domestic legislation within the provisions of the Residents Act referred to above. Mr Mills submitted that the relevant provisions of that Act enabled the appellant to succeed in being able to settle with [J] and for his siblings, the appellant's other children, to join the appellant and [J] in Germany, and for the family to be provided with suitable financial support and accommodation. These provisions are discussed in further detail below.
31. In reply, Mr Mohzan claimed section 28 of the Residents Act referred to a derogation from section 5 (1) but that the appellant would still be required to show she could meet the subsistence precondition for entry before she applied.
32. Although Mr Mohzan submitted that Section 28 required the appellant to demonstrate an ability to satisfy a maintenance requirement, when challenged by Mr Mills and asked to point out where within that

section such a requirement existed, Mr Mohzan accepted Mr Mills submission that Section 28 did not require proof of maintenance and accommodation, but then claimed that this is an exceptional that will only take effect if the appellant and [J] are in Germany, i.e. he has to physically be there. It was submitted that the parent cannot automatically go to Germany with the child and a derogation from the maintenance and other requirements would only apply if the German child is ordinarily resident in Germany.

33. Mr Mohzan submitted that as the appellant could not rely on section 28 she could not hold temporary residence and there was no answer to the question of the requirement for ordinary residence within Germany.
34. Mr Mohzan repeated his submission that the judgment in **Zambrano** applied to the UK following the decision in **Amos** in relation to article 20, and that the facts of this case are similar to those in **Amos**.
35. Mr Mozhan further submitted the appellant could only enter Germany if she was self-sufficient and that as she could not make out the same she could not go to Germany.

Discussion

The European element (excluding article 8 ECHR)

36. It is not disputed [J] is a German national as evidenced by his passport. [J]'s birth certificate names both the appellant as his mother and [AA] as his father. Paternity is not disputed. [J] was born in the United Kingdom on 12 November 2012 and resides with his mother at her address in Birmingham.
37. Under the Free Movement Directive, a national of a member state has a right to reside in another member state of the EU for an initial period of three months but thereafter needs to establish that they are a qualified person under the Directive or terms of Regulations made by the host member state incorporating the minimal requirements of the Directive into domestic law.
38. [J] as a child is not exercising a right of Free Movement from Germany as it is argued that he has never lived in Germany although he is a national of that State.
39. It was not submitted by Mr Mozhan that [J]'s father had worked in the United Kingdom recently or exercised treaty rights or continues to do so at the relevant dates. It is understood that [J]'s father works and is settled in Germany.
40. The appellant claims to have a derived right to reside in United Kingdom such that the respondent's direction for her removal is unlawful as being contrary to EU law. The concept of a derived right arose from the decision in **Zambrano** which has been incorporated into Regulation 15A of the EEA Regulations in the United Kingdom.
41. The appellant claims a derived right on the basis she is the primary carer of [J]. Regulation 15A(7) states that a person, P, is to be regarded as a "primary carer" of another person if (a) P is a direct

relative or a legal guardian of that person; and (b) P— (i) is the person who has primary responsibility for that person's care; or (ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

42. In **Ayinde and Thinjom (carers - Reg 15A - Zambrano) [2015] UKUT 00560** it was held that (i) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in Zambrano [2011] EUECJ C-34/09 is limited to safeguarding a British citizen's EU rights as defined in Article 20; (ii) The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union; (iii) The requirement is not met by an assumption that the citizen will leave and does not involve a consideration of whether it would be reasonable for the carer to leave the United Kingdom. A comparison of the British citizen's standard of living or care if the appellant remains or departs is material only in the context of whether the British citizen will leave the United Kingdom' (iv)The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle.

43. The phrase "effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state" is only partly applicable in that [J] is not a British citizen, and neither are any other family members, although the effect of removal to Nigeria will prevent [J] from living in the UK but not necessarily in another EEA state.

44. **Chavez-Vilchez and others v Raad van Bestuur van de Sociale verzekeringsbank and others (Case C-133/15)** the CJEU were considering the circumstances in which a Netherlands national child would, in practice be forced to leave the Netherlands and hence the EU, if the right of residence was refused to their third country national mothers. The CJEU held that it was important to determine which parent was the primary carer of the child and whether there was in fact a relationship of dependency between the child and that parent. As part of that assessment the authorities should take into account the right to respect for family life as per Article 7 of the Charter of Fundamental Rights to be read in conjunction with the obligation to take into consideration the best interests of the child. That the other parent, a Union citizen, was actually able and willing to take responsibility for the child was a relevant factor, but it was not a sufficient ground for a conclusion that there was not, as between the child and the third-party national parent, such a relationship of dependency that the child would indeed be compelled to leave the EU if the third-party national were refused the right of residence. Such an

assessment must take into account the best interests of the child concerned, all the specific circumstances including the age of the child, the child's physical and emotional development, the extent of his emotional ties to both parents and the risks which separation from the third-country parent might entail for the child's equilibrium. Although the burden of proof was on the third-country national to prove that a refusal of the right of residence would oblige the child to leave the EU, it was for the competent national authorities to undertake on the basis of the evidence provided by the third-country national the necessary enquiries in order to be able to assess, in the light of all the circumstances, whether the refusal would oblige the child to leave the EU.

45. Article 7 of the Charter of Fundamental Rights relates to the need for respect for private and family life and states that everyone has the right to respect for his or her private and family life, home and communications.

46. This case is not on all fours with the current case but perhaps answers the question posed in the early hearing concerning the relationship between respect for right to family life and the free movement provisions in which all aspects, including the best interests of the child concerned, have to be factored into the decision-making process.

47. The Secretary of State's stance is that under European law [J] will not leave the EU as he has a right to reside in Germany.

48. It has not been shown [J] himself retains a right to reside on the basis that he is in education in the United Kingdom as case law relating to this topic does not suggest that is a freestanding right available to an EEA national in isolation.

49. In **Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 89 (IAC)** the Tribunal held that notwithstanding inability to satisfy new regulation 15A(3)(c) of the Immigration (European Economic Area) Regulations 2006 as amended with effect from 16 July 2012, the parent of a child of an EEA national who has been employed in the UK when the child was also residing here can have a derived right of residence under Article 12 of Regulation 1612/68 (now Article 10 of Regulation No 492/2011) even though the EEA national parent is no longer a worker in the UK at the time the child commences education: see Case C-480/08 Teixiera [2010] EUECJ, 23 February 2010.

50. Mr Mills submitted that in **Ahmed** the Secretary of State made a concession in the appellant's favour that the appellant had no status in Germany, the relevant country in that appeal too. At [68] the Upper Tribunal note:

> 68. We accept that nothing said by the Court of Justice in any of the Article 20 TFEU cases excludes the potential application of Zambrano principles to 3rd country national parents if the practical effect of a refusal decision is that the children are obliged to leave the territory of the Union as a whole, notwithstanding that the children are not, as in **Zambrano**, citizens of the host member state. That was also the stated position of Mr Deller, Ms Asanovich and Mr Weiss. Ordinarily in such a case it would be necessary for applicants to prove that the children concerned were

> prevented from living in the territory of their host Member State (of nationality) together with their parent (s) and that may not be easy to do, given that for a child to have acquired citizenship of a Member State his or her third country national parent will often have lived there lawfully in the past. In the appellant's case, however, there is no suggestion of the children being able to live with their father and Mr Deller said that he accepted that it was not realistic to expect that she could live in Germany with her children. He also accepted that for her and her children there was no alternative Union territory location other than the UK. In our view Mr Deller was right to make that concession. The appellant did not have any immigration status in Germany nor could she rely in Germany on any EU right of residence (to our understanding she would only be entitled to reside in Germany as a matter of EU law if able to show (as she clearly could not) that she was a self-sufficient parent in accordance with the principles set out by the Court of Justice in **Chen [2004] ECR 1-9925**). Accordingly, in our judgment the appellant is able to rely on her children's Article 20 right of Union citizenship under the Treaty.

51. I have also noted the Opinion of the Advocate general in **SSHD v NA Case C-115/15 (previously NA (Pakistan) [2015] EWCA Civ 140)** in which the Advocate General Opinion suggests that victims of domestic violence should retain EU law rights of residence even where the EU citizen was not exercising treaty rights in the country concerned at the time of divorce. Although this is appeal not a divorce case, paragraph 2 of the opinion refers to Articles 20 and 21 of the Treaty of the Functioning of the European Union (TFEU) and how they should be interpreted. The three sections of the opinion state:

(1) In cases where divorce is consecutive to acts of domestic violence, Article 13(2(c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC does not require that a European Union citizen who is the spouse of a third country national should himself be resident in the territory of the host Member State, in accordance with Article 7(1) of that directive, at the time of the divorce in order for that third country national to be able to retain a personal right of residence under that provision.

(2) Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude a Member State from denying a third country national a right of residence in its territory where that national has sole responsibility for children who are Union citizens and who have resided with him/her since their birth but who do not possess the nationality of that Member State and have not made use of their right to freedom of movement, in so far as those Union citizens satisfy the conditions laid down in Directive 2004/38 or, failing that, in so far as such a refusal deprives those citizens, in practice, of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens, a matter which it falls to the referring court to determine in the light of all of the circumstances of the present case. If there has been a judicial finding that the removal of the Union citizens concerned would infringe Article 7 of the Charter of Fundamental Rights of the European Union or Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, the national court must take that finding into account.

(3) Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community must be interpreted as meaning that a child and, in consequence, the parent having custody of that child enjoy a right of residence in the host Member State where the parent who is a Union citizen and has worked in that Member State has ceased to reside in that Member State before the child enters education there.

52. It is again relevant to note in the Opinion the phrase "so far as those Union citizens satisfy the conditions laid down in Directive 2004/38 or, failing that, in so far as such a refusal deprives those citizens, in practice, of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens,". These issues are to be determined by the domestic court on a fact specific basis.
53. Mr Mohzan made no submissions demonstrating the appellants were able to satisfy the requirements of Directive 2004/38 and whilst [J] could arguably be deprived of his rights as an EU citizen if moved to Nigeria, this would not be the position if he was able to live in Germany.

UK domestic law

54. The position under UK domestic law is that the EEA Regulations incorporate into UK jurisprudence the minimum standards set out in the Directive 2004/38 together with any provisions that confer a greater right/benefit upon a qualifying individual.
55. As the Directive sets out the right of an EU citizen to move freely within the territory of a Member State for the purposes of exercising treaty rights the ability of an EU national to live within the United Kingdom is dependent upon their establishing such a right.
56. Family members of EU nationals also have a right to reside in the United Kingdom if they can satisfy the requirements of the Regulations but this is not a freestanding right but a right that flows from the right of the EU citizen to be able to exercise treaty rights free from anything that may prevent or inhibit them from doing so, which is felt may be the case if they were unable to have their family members accompany or join them within their existing family unit.
57. Extended families have no such right although can be permitted to remain within the family unit of an EEA national exercising treaty rights at the discretion of the Member State.
58. In relation to UK domestic law in isolation, basic general principles apply, which is that a person who is not a British citizen or a person who has an automatic right to reside in the United Kingdom requires permission of the Secretary of State for the Home Department to enter or remain in the UK. A person is able to apply for such a right on a temporary basis such as a student or visitor or a more permanent basis such as an application for indefinite leave to remain or settlement in any other capacity.
59. It has not been made out that the appellant or any members of this family group have a right to remain in the United Kingdom under UK

domestic law. For that reason, the application made by the appellant to the Secretary of State was for leave to remain as a refugee and/or on human rights grounds outside the Immigration Rules. Both applications have been rejected.

German domestic law

60. It is not disputed that [J] has a right to reside in Germany as he is a German national. The main issue that requires detailed consideration is whether the appellant and [J]'s siblings will be entitled to live with him in Germany and if adequate support is available to endure their basis needs of housing and subsistence are met.
61. There was some disagreement between the advocates regarding the provisions of the domestic German law leading, at one point, to Mr Mills asking whether it would assist Mr Mohzan if he was allowed to set out his understanding of the relevant provisions upon which submissions could be made. Such invitation was not taken up by Mr Mohzan although he was able to respond by exercising his right of reply.
62. As stated above, the Act on the General Freedom of Movement for capping EU Citizens is not directly applicable. The relevant legislation is the Residence Act. The purpose of this act is set out in section 1 (1) in the following terms:

> "this act shall serve to control and restrict the influx of foreigners into the Federal Republic of Germany. It shall enable and organise immigration with due regard to the capacities for admission and integration and the interests of the Federal Republic of Germany in terms of its economic and labour market. At the same time, the Act shall also serve to fulfil the Federal Republic of Germany's humanitarian obligations. To this end, it shall regulate the entry, stay and economic activity of foreigners and the integration of foreigners. The provisions contained in other acts shall remain unaffected.

63. Mr Mohzan referred in his submission to the issue of preconditions for the granting of a 'residence title' set out in Section 5 of the Act which are in the following terms:

(1) the granting of a residence title shall generally presuppose

1. that the foreigners subsistence is secure;
1a that the foreigners identity is established, as is his or her nationality, if he or she is not entitled to return to another state
2 that there is no public interest in expelling the foreigner
3. That, if the foreigner has no entitlement to a residence title, the foreigners residence does not compromise or jeopardise the interests of the Federal Republic of Germany or for any other reason and
4. That the passport obligation pursuant to Section 3 is met

(2) The granting of a temporary residence permit, a permanent settlement permit or an EU long/term residence permit further presupposes that the foreigner

1. Has entered the country with the necessary Visa and
2. has already furnished the key information required for granting the title in his or her Visa application.

These requirements may be waived if the pre-requisites qualifying a foreigner for the granting of a residence title are met or if special circumstances relating to the individual case concerned render a subsequent Visa application procedure unreasonable.

(3) Application of subsection 1 and 2 shall be waived in the case of issuance of a residence title pursuant to Section 24 or Section 25 (1) to (3); application of subsection 1, nos. 1 to 2 and 4 and subsection 2 shall be waived in the cases of Section 25 (4a) and (4b).
Application of subsections 1 and 2 may be waived in the other cases of issuance of a residence title pursuant to Chapter 2, Part 5. Where application of subsection 1, no. 2 is waived, the foreigners authority may point out that expulsion is possible on account of certain public interests in expelling the foreigner forming the subject of criminal or other proceedings which are still in progress, whereby such interests are to be specified individually. Application of subsection 2 shall be waived in the event of a residence title being issued pursuant to Section 26 (3).

(4) A residence title shall be refused if there is a public interest in expelling the foreigner within the meaning of Section 54 (1) no. 2 or no. 4. Exemptions from sentence 1 may be approved in justified individual cases, if the foreigner divulges said activities or allegiances to the competent authorities and credibly distances himself or herself from his or her actions posing a threat to security. If justified in individual cases, the Federal Ministry of the Interior or a body designated by the Federal Ministry of the Interior may permit exemptions from sentence 1 before the foreigner enters the country for the purpose of crossing the border, and for a subsequent stay of up to 6 months.

64. Mr Mohzan also referred to the provisions of Section 12a described as the Residence Rule which is written in the following terms:

(1) In order to promote their sustainable integration into the way of life in the Federal Republic of Germany, foreigners who have been recognised as being entitled to asylum, having refugee status within the meaning of Section 3 (1) of the Asylum Act, who have been granted subsidiary protection within the meaning of Section 4 (1) of the Asylum Act or who have been granted an initial temporary residence permit pursuant to Section 22, Section 23 or Section 25 (3) shall be obliged to take up their habitual residence (place of residence) for a period of three years as from recognition or issuance of the temporary residence permit in that Land to which they have been allocated for the purposes of the asylum procedure or in the context of their admission process. Sentence 1 shall not apply where the foreigner, his or her spouse, registered domestic partner or minor child take up or has taken up employment, of at least 15 hours per week with full Social Security coverage, on account of which that person has an income amounting to at least the average monthly needs for individual persons pursuant to Section 20 and 22 of Book Two of the Social Code, or that person takes up or has taken up vocational training or is pursuing his or her studies or is in a training relationship.

(2) A foreigner who is subject to the obligation under subsection 1 and who is living in a reception centre or other temporary accommodation may within six months following recognition or admission, but no later than the expiry of the period referred to in subsection 1, be obliged, for the purposes of providing him or her with suitable accommodation, to take up residence in a specific place if this is not precluded by the promotion of his or her sustainable integration into the way of life in the Factual Republic of Germany. In so far as, in an individual case, it was not possible to allocate suitable accommodation within six months, such allocation pursuant to sentence 1 may be made within a further six months on one occasion.

(3) In order to promote their sustainable integration into the way of life in the Federal Republic of Germany, foreigners who are subject to the obligation pursuant to subsection 1 shall be obliged, within six months following recognition or the first issuance of a temporary residence permit, but no later than the expiry of the period applicable in accordance with subsection 1, to take up residence in a specific area if this can facilitate

1. Having provided with suitable accommodation,
2. there are acquiring sufficient oral command of the German language pursuant to Level A2 of the Common European Framework of Reference for Languages and
3. their commencing paid employment, taking account of this local conditions on the vocational training and labour market.

(4) Foreigners who are subject to the obligation under subsection 1 May, in order to prevent social exclusion, also be obliged up until the expiry of the period applicable under subsection 1, not to take up residence in a specific area, in particular if it is to be expected that they will not use German as the key lingua franca at that place. Account is to be taken of the situation of the local vocational training and labour market when taking this decision.

(5) An obligation imposed or allocation made pursuant to subsection 1 to 4 is to be revoked upon application by the foreigner

1. If the foreigner furnishes proof, in the event of an obligation being imposed or allocation being made pursuant to subsections 1 to 3 to take up residence at another place, or in the event of an obligation being imposed pursuant to subsection 4 not to make his or her residence at a place, that

   a) He or she or his or her spouse, registered domestic partner or minor child is in employment with full Social Security coverage within the meaning of subsection 1, sentence 2, has an income which secures his or her subsistence or vocational training or place to study or
   b) his or her spouse, registered domestic partner or minor, unmarried children have their place of residence elsewhere
2. to prevent hardship; in particular, hardship shall exist where

   a) The competent Youth Welfare Office estimates that the effectiveness of child and Youth welfare benefits and measures pursuant to Book Eight of the Social Code would be undermined on account of the effectiveness of local child and youth welfare benefits and measures.
   b) Acceptance by another Land has been confirmed on other urgent, personal grounds or
   c) comparable unreasonable restrictions would arise for the person concerned on other grounds

in the event of revocation pursuant to sentence 1 no. 2, the foreigner is to be obliged pursuant to subsection 3 or 4, at most up until the expiry of the period referred to in subsection 1, account having been taken of his or her interests.

(6) Where dependents subsequently immigrate to be with a foreigner who is subject to an obligation imposed or allocation made pursuant to subsections 1 to 4, the obligation or allocation shall also apply to the dependents subsequently immigrate in at most up until the expiry of the period applicable to the foreigner pursuant to subsection 1, unless the competent authority has ordered a different measure. Subsection 5 shall apply mutatis mutandis to the subsequent immigrating dependents.

(7) Subsection 1 to 6 shall not apply to foreigners who were recognised or initially granted a temporary residence permit within the meaning of subsection 1 before 1 January 2016.
(8) Objections and actions filed against obligations pursuant to subsection 2 to 4 shall have no suspensory effect.
(9) Where it comes to foreigners who are subject to the obligation pursuant to subsection 1, the Lander may, by way of statutory instruments of the Land government or other Land regulations, issue regulations concerning particulars concerning the organisation, procedures and suitable accommodation relating to

1. Their distribution within the Land pursuant to subsection 2
2. the procedure for making allocations and imposing obligations pursuant to subsection 2 to 4
3. the requirements as to suitable accommodation within the meaning of subsections two, three no. 1 and subsection 5, sentence 1, no. 1 letter a), as well as the form of its proof,
4. the manner of furnishing proof of employment with full Social Security coverage pursuant to subsection 1, sentence 2, income which secures subsistence, as well as of having a vocational training place or a place to study within the meaning of subsections 1 and 5, sentence 1, no.1, letter a).
5. The obligation to be taken up by the municipality determined as his or her place of residence and the admission process.

65. Mr Mills submitted that there was no requirement for the appellant to be subject to the requirements of Section 5 (1). He made this submission in relation to Section 28, a section entitled “subsequent immigration of dependents to join a German national". This section provides:

(1) the temporary residence permit should be granted to the foreign

1. spouse of a German,
2. minor, unmarried child of a German,
3. parent of a minor, unmarried German for the purpose of care and custody

If the German ordinarily residence is in the federal territory. By way of derogation from section 5 (1), no. 1, it shall be granted in the cases covered by sentence 1, nos. 2 and 3. By way of derogation from Section 5 (1) no 1, it should be granted as a general rule in the cases covered by sentence 1 no. 1. By way of derogation from Section 5 (1), no.1, the temporary residence permit may be granted to the parent of a minor, unmarried German who does not possess the right of care and custody of said child, if the family unit already exists in the federal territory. Section 30 (1), sentence 1, nos 1 and 2, sentence three and (2), sentence one shall apply mutatis mutandis in the cases covered by sentence 1, no 1.
(2) As a rule, the foreigner shall be granted a permanent settlement permit if she or he has been in possession of a temporary residence permit for three years, the family unit with the German continues to exist in the federal territory, there is no public interest in expelling the foreigner and the foreigner has sufficient command of the German language. Section 9 (2) sentences 2 to 5 shall apply mutatis mutandis. The temporary residence permit shall otherwise be extended as long as the family unit continues to exist.
(3) Section 31 and 34 shall apply subject to the proviso that the foreigner’s residence title shall be replaced by the ordinary residents of the German in the federal territory. The temporary residence permit granted to a parent of a minor and unmarried German national for the purpose of care and custody is to be

extended after the child has come of age as long as the child lives with him or her in a family household and the child is undergoing education or training which leads to a recognised school, vocational or higher education qualification.
(4) Section 36 shall apply mutatis mutandis to other dependents.
(5) (Repealed).

66. This section arguably demonstrates that the appellant has a right under German domestic law to acquire initially a temporary but thereafter a permanent residence permit as the parent of [J] who is an unmarried German, for the purposes of providing care and custody for the child. The formal requirements for permanent residence permit appearing to be the need for the appellant to speak German and have lived with [J] for three years.
67. As stated, Section 28 incorporates into German law the judgment of the European Court in **Zambrano.**
68. In relation to Jamar siblings, the appellant's non-EU national children, Mr Mills submitted that they too have a right to reside in Germany by virtue of section 32 of the Residence Act.
69. Section 32 provides:

(1) the minor, unmarried child of a foreigner shall be granted a temporary residence permit if the parents or the parent possessing the sole right of care and custody hold a temporary residence permit, and EU Blue Card, a permanent settlement permit or an EU long-term residence permit.
(2) If the minor, unmarried child is aged 16 or over and if it does not relocate the central focus of its life to Germany together with its parents or the parent possessing the sole right of care and custody, subsection 1 shall only apply if the child speaks German and appears, on the basis of his or her education and way of life to date, that he or she will be able to integrate into the way of life prevailing in the Federal Republic of Germany. The first sentence above shall not apply if

1. The foreigner possesses a temporary residence permit in accordance with Section 23 (4), Section 25 (1) or (2), a permanent settlement permit in accordance with Section 26 (3) or possesses a permanent settlement permit in accordance with Section 26 (4) after being granted a temporary residence permit in accordance with Section 25 (2), sentence 1, second alternative, or
2. the foreigner or his or her spouse living together as a family possess a permanent settlement permit in accordance with Section 19 or an EU Blue Card.

(3) Where parents share the right of care and custody, a temporary residence permit pursuant to subsections one or two should also be granted for the purpose of joining just one parent, if the other parent has given his or her consent to the child stay in Germany or if the relevant binding decision has been supplied by a competent authority.
(4) A minor, unmarried child of a foreigner may otherwise be granted a temporary residence permit if necessary in order to prevent special hardship on account of the circumstances pertaining to the individual case concerned. The child's well-being and the family situation to be taken into consideration in this connection.

70. Section 32 (4) is clearly relevant as it is arguable that special hardship on account of circumstances appertaining would arise if a residence permit was not to be granted to the appellants non-EU national children if this prevented them from continuing their family life with their mother and [J]. This is a provision contained within German

domestic statutory law not a right that would have to be pursued outside domestic provisions under Article 8 ECHR.

71. It is arguable based upon the German legal provisions set out above, that there are good reasonable prospects for the appellant and the siblings being able to settle with [J] in Germany which will enable the child to maintain his presence within the EU and to still benefit from family life within his immediate family unit.

72. Mr Mills submitted that although no effort had been made by the appellant or her representatives to approach the German authorities to ascertain their position, if this was an application by a British national minor child wishing to return to his or her home state and to enable his or her mother and siblings to enter with him for the purposes of maintaining the family unit, it is likely that leave would be granted. Mr Mills submitted there is no evidence that such an approach could not be followed by the immigration authorities in Germany. There is no evidence that this would not be the case.

73. In relation to the criticism by Mr Mohzan of the lack of a removal direction being set to Germany, Mr Mills responded by stating that the Secretary State cannot set a removal direction to Germany as the appellant is not a German citizen and that to enable her to settle in Germany with [J] she would need to make an application to the German authorities. The only place to which a removal direction could be set so far as the appellant is concerned is to Nigeria, the effect of which is to trigger the right of appeal that enabled all matters to be discussed including those relating to **Zambrano** and the relevant provisions of EU and German domestic law.

74. I find it has been made out for the reasons set out above that the appellant and her non-EU national children have the ability to settle with [J] in Germany in accordance with the provisions of domestic immigration law referred to above. I do not find Mr Mozhan's counterargument to have been properly made out.

75. The derogation from section 5 (1) under the **Zambrano** principles would entitle the appellant to seek social assistance from the Federal Republic of Germany who are prevented from discriminating against the appellant under principles of EU law.

76. The definition of ordinary residence within the German domestic provisions appears to be interpreted by reference to where a person lives. As [J] has a right to enter Germany that will be the place where he lives fulfilling the ordinary residence test. As stated, it would have assisted the tribunal greatly if appellant's representative had approached the German authorities and made necessary applications or engaged in discussion with them in relation to the specific matter but the Tribunal can only determine the appeal on the basis of the evidence that has been made available.

Article 8 ECHR

77. It is not disputed that the appellant and her children have family life recognised by article 8 (1). It has not been made out that interference

with such family life, if this results in the family unit being fragmented, will amount to justified interference with such family life.

78. This is therefore a family unit that shall remain together, the issue is whether moving the family to Germany will be a disproportionate interference with any private life formed in the United Kingdom as the family life that they have will continue if they are allowed to settle in Germany as a family unit.
79. [J] has been born in the United Kingdom and has lived here all his life and is clearly settled and establish as are the appellant's other children.
80. None of the children are British citizens and only [J], even though having no right to remain in the UK in his own right or under EU law, has a right to reside in another European state.
81. If [J] returns to Germany and the authorities in Germany deny the appellant or the other children the ability to live in Germany with [J], especially in light of the first appellant being [J]'s primary carer, preventing family reunification or the continuation of family life with his mother and siblings, it is unlikely that such an act could be shown to be proportionate pursuant to article 8(2) ECHR.
82. The effect of the failure by the appellant's representatives to have made an application or approach to the German authorities on the appellants behalf, to establish whether they would refuse the appellant and [J] siblings a right to enter and settled in accordance with domestic or European law, and what support, financial assistance and housing would be allocated to them, prevents this Tribunal undertaking a comparative analysis of the position of the family unit relocating to Germany or remaining in the United Kingdom.
83. It is known, for the reasons stated above, that the requirement for the appellant to be self-sufficient has no application as the derogation from Section 5 (1) of the Residents Act clearly has this effect.
84. It is accepted that expecting the appellant and the children to relocate means disrupting the lives they have in United Kingdom and having to rebuild their lives in Germany. In terms of the Immigration Rules there would be the need to assess whether the reality of such a move would be unduly harsh or unreasonable. In relation to article 8 ECHR it is whether a combination of events demonstrates that such a move will not be proportionate to the legitimate aim relied upon by the Secretary of State.
85. It appears from the information available to this Tribunal that the family will not be destitute, that they will receive assistance with housing and subsistence and, in accordance with major centres of inward migration within the European Union, assistance with integration including the acquisition of language skills.
86. Mr Mohzan produced no evidence to show the children had no command of German or could not learn German and it is known that English is spoken in Germany and that schools are available that provide instruction in English. This, arguably, would only be a temporary issue in any event for as the children improve their

command of the German language they can no doubt be educated in German.

87. It has not been made out that the appellant or children would not be able to re-establish a private life in Germany. There is no suggestion that there will be a denial of contact between another parent in the United Kingdom and, indeed, there may be the possibility that [J] is able to have contact with his father if they settle in or around the Berlin area.

88. The appellant has no status and her position in the UK has always been precarious. She has had children knowing that is the situation. Any private life the appellant seeks to rely upon therefore warrants little weight being attached to it – see section 117 of the 2002 Act.

89. In assessing proportionality generally of an Article 8 appeal, it will be necessary to factor in the statutory provisions in section 117 A-D of the Nationality, Immigration and Asylum Act 2002 so far as applicable (this not being a deportation appeal).

90. It has not been made out that with the social assistance that will be available in Germany, where it is understood the packages available are perhaps more generous than those in the United Kingdom, this family unit would not have enough to meet their needs.

91. Considering all issues in the round, and in the absence of sufficient evidence from the appellant that she and the family members would not be permitted to settle in Germany, I find that the Secretary of State has discharged the burden of proof upon her to the required standard to show that the decision to remove is a proportionate decision.

92. It goes without saying that attempting to remove the appellant or family members to Nigeria will be unlawful but that does not confer an entitlement to a grant of leave in the United Kingdom as a result of the existence of an alternative place of residence, Germany, to which his family could arguably go. Although the Secretary of State cannot set a removal direction for the appellant to Germany, for the reasons outlined by Mr Mills, it may be arguable that a direction could be made for [J]'s removal pursuant to the EEA Regulations as it has not been established that he has any arguably lawful basis for claiming to be entitled to remain in the United Kingdom. Such a decision may trigger the type of enquiries that should have been made that may advance the process further, although the appellant's representatives and/or the Secretary of State could consider liaising with the German immigration authorities without the need for formal proceedings when the facts are not in dispute, German domestic law provides a solution, and it is only the question of how matters may be practically arranged to ensure [J] has the appropriate support and assistance from his family and by way of subsistence and accommodation required, to prevent a breach of [J]'s rights as a German national and/or Article 8 ECHR rights.

Decision

93. **The First-tier Tribunal Judge has been found to have materially erred in law and her decision set aside by a Deputy Upper Tribunal Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

94. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 23 June 2017