Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07149/2015**

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision Promulgated**
On 3rd May 2016	**On 6th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

S A M S
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A M Ismail, Eurasia Legal Services (Birmingham)
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

The First-tier Tribunal made an anonymity direction in relation to the appellant because of the nature of the case. I consider it appropriate to make a similar order in the Upper Tribunal under Procedural Rule 14(1) to prohibit the disclosure or publication of any matter likely to lead members of the public to identify the appellant. To give effect to this order the appellant is to be referred to by the initials above.

1. Before I can discuss the substance of this appeal I must address two preliminary matters.
2. The appellant sought to recover her costs in relation to the aborted hearing that was due to take place on 21 March 2016. I have no power to

award such costs because the appeal was adjourned as no judge was available, the judge who was due to hear the appeal being unable to attend at very short notice.

3. The appellant sought an adjournment of the hearing on 3 May 2016 so she could be represented by counsel of choice, Mr Jafferji. The reason for the request was to save the appellant additional expense since Mr Jafferji had been instructed previously and was familiar with the case. An earlier application was refused on papers because there was no reason why the appellant should have counsel of choice and there was time to instruct another advocate. The repeat application was opposed by Mr Mills on the grounds that Mr Ismail was capable of presenting the appellant's case and he was present at the hearing.

4. I refused to adjourn for the following combination of reasons. I was not satisfied that the appellant's legal representatives have properly searched for an alternative advocate following the earlier refusal to adjourn. Mr Ismail confirmed he had approached only one or two other preferred counsel rather than making wider and more appropriate enquiries. I was not satisfied, therefore, that no alternative advocate could be found. I was satisfied Mr Ismail was able to represent the appellant, having had conduct of the appeal in the First-tier Tribunal. Further delay would not be in the interests of either the appellant or the respondent. After announcing my decision, I gave Mr Ismail time to liaise with his client and to finalise his preparations.

5. The appellant was born on 5 September 2001 and is a citizen of Bangladesh. She came to the UK on 17 July 2013 as a child visitor. She came to the UK with her mother. Since coming to the UK, the appellant's mother has established that she is a British citizen by descent and therefore has a right of abode. The appellant sought asylum to remain in the UK and at the same time relied on her relationship with her mother.

6. On 10 April 2015 the respondent refused the appellant's protection and human rights claims. Her appeal against those decisions was dismissed by First-tier Tribunal Judge Graham in a decision and reasons statement that was promulgated on 24 September 2015.

7. It is against this decision the appellant applies, permission to appeal having been granted by Designated Judge Garratt on 22 October 2015.

8. I turn to the grounds of appeal. The appellant does not seek to challenge Judge Graham's findings that she is not a refugee or otherwise in need of international protection. The appeal to the Upper Tribunal centres on three issues, which are interrelated to some extent. The first is that the judge erred in her assessment of the best interests of the appellant who was (and is) a child. Secondly, that the judge erred in finding that article 8 of the human rights convention was not engaged. Finally, the judge erred by not making any findings in relation to whether the appellant benefited from the Zambrano principle.

9. Having heard from Mr Ismail and Mr Mills, I have reached the following conclusions.

10. The appellant raises two specific criticisms of Judge Graham's findings in relation to the assessment of the appellant's best interests. The first is that the judge was wrong to limit herself to the approach taken by the Upper Tribunal in Azimi-Moayed. Although I acknowledge that the case law of the Upper Tribunal and senior courts in relation to best interests of children is extensive, there is nothing to suggest that the approach set out in Azimi-Moayed is not a good approach to adopt. In fact, it identifies an approach which is consistent with that suggested by the Court of Appeal in EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874. In light of these considerations, I reject the appellant's claim that the judge should not have followed Azimi-Moayed. It sets out general principles and is consistent in approach with a litany of cases dealing with such issues.

11. The second complaint is that the judge failed to give appropriate weight to the nature of the relationship between the appellant and her mother, who is a British citizen living in the UK. The appellant argues that her mother has been her primary carer throughout her life and that to expect the appellant to return to Bangladesh into the care of her father disregards this. In light of how the argument is now presented, the issue is whether Judge Graham was right to find that the appellant had failed to establish that her relationship to her mother was particularly strong (see paragraph 45 of Judge Graham's decision).

12. I am satisfied there is nothing in this complaint because it was open to Judge Graham to reach the conclusions she drew from the lack of evidence provided. The appellant had failed to show that it was in her best interests to remain with her mother. Although the appellant has been in the care of her mother since arriving in the UK, there was nothing to establish that this was the case when the family lived together in Bangladesh or that her father in Bangladesh could not adequately care for her there. This was a case where the parents had chosen to live in separate countries and this gave rise to the question of with whom the child should live. The evidence did not show she should remain in the care of her mother.

13. It follows from the above that I do not find any error of law in the way Judge Graham assessed the best interests of the appellant and how she decided the appeal in relation to those issues. Recalling that the appellant entered the UK on 17 July 2013 as a child visitor and therefore she could not benefit from paragraph 276ADE(1)(iv), the issue of her removal had to be considered under article 8 directly. It is clear from paragraphs 42 to 49 of her decision and reasons statement that this is exactly what Judge Graham did and that she followed all relevant legal guidance.

14. I accept, however, that Judge Graham did not engage with the appellant's argument relating to Zambrano. Although it is not clear this argument was actively pursued at the hearing, there is no indication that it was withdrawn. The points appear in paragraph 16 of the appellant's skeleton argument dated 7 August 2015 and I can only conclude that Judge Graham did not have regard to that argument even though she indicates at paragraph 27 that she took the skeleton argument fully into account.

15. Failing to engage with a relevant argument is an error of law. This conclusion does not mean that the decision and reasons statement is set

aside. It falls to me to decide whether the failure is material to the outcome.

16. It is difficult to see how the principles established by the Court of Justice in Zambrano can benefit the appellant. The Court of Justice concluded that a Union citizen should not be required to leave the territory of the EU if doing so would deprive them of enjoyment of their rights as Union citizens. In the specific case, the Court of Justice concluded that expelling the parents of Union citizens children (who were not themselves Union citizens) would amount to constructive deportation of the Union citizen children as it was in the best interests of the children to be with their parents. The Court of Appeal has indicated that the Zambrano doctrine has a narrow application (see Damion Harrison (Jamaica) and another v SSHD [2012] EWCA Civ 1736).

17. In the present case, it is the mother who is a Union citizen and not the child. The child has no rights under the Treaty on the Functioning of the European Union as she is not a Union citizen and her mother is not exercising a right of residence in the UK, the UK being the country of nationality. There is nothing to show that the appellant's mother could not continue living in the UK even if the appellant is expelled. As indicated, I have upheld Judge Graham's findings in relation to the best interests of the appellant and there is no reason she cannot return to Bangladesh into the care of her father. Bearing in mind the Court of Justice's finding in Shirley McCarthy, this is not a case where the appellant's mother would be required to give up her rights of citizenship were the appellant removed.

18. For these reasons, I conclude that the failure of Judge Graham to consider the arguments relating to Zambrano, on the findings made, means she could only conclude that there was no merit in the argument presented. For this reason I find there was no material error of law and her decision stands.

Decision

Any error on a point of law in the decision and reasons statement of First-tier Tribunal Judge Graham is not material to the outcome and therefore I have decided the decision should not be set aside and her decision is upheld.

Signed Date 6 June 16

Judge McCarthy
Deputy Judge of the Upper Tribunal