IAC-FH- NL -V1

Upper Tribunal
(Immigration and Asylum Chamber)

Latif (s. 120 – revocation of deportation order) [2012] UKUT 78 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 rd January 2012	.....

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MUHAMMAD LATIF

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation :

For the Appellant: Mr Nazir Ahmed of Counsel instructed by H & V Solicitors

For the Respondent: Mr A Sheikh, Home Office Presenting Officer

An individual who is the subject of a deportation order must apply for revocation of the order before making an application for entry clearance if he/she is not to be subject to a mandatory refusal under paragraph 320(2). He/she is not able to raise revocation in the grounds of appeal and rely on s. 120 of the Nationality, Immigration and Asylum Act 2002, since, whilst s. 120 requires the Tribunal to consider all of the grounds upon which an appellant wishes to rely, it is not a mechanism which permits an appellant to make an entirely new application to the Tribunal.

DETERMINATION AND REASONS

1.
This is the appellant's appeal against the decision of Immigration Judge Broe made following a hearing at Birmingham on 9 August 2011.

Background

2.

The appellant, a citizen of Pakistan born on 1 November 1963, has a complex immigration history. He married his former wife Nahid Akhtar on 18 March 1990 and on 17 April 1993 he arrived in the UK as her spouse. There were two children of the marriage. The appellant lived with his former wife at the marital home but the marriage broke down and he was unable to make an application for indefinite leave to remain within the probationary period since his wife did not support the application. He overstayed.

3.
On 7 October 1994 the respondent made a deportation order against him as an overstayer under s. 3(5)(a) of the Immigration Act 1971. The appellant appealed and his appeal was dismissed following a hearing on 3 July 1995, although the Immigration Judge recommended that enforcement action against the appellant be deferred for six months in order that he could clarify his position in relation to contact with his children.

4.
On 30 January 1996 the respondent signed the deportation order but it could not be served because the appellant's whereabouts were unknown. He had moved to Scotland.

5.
The appellant's divorce was made absolute on 19 May 1999 and he subsequently met his fiancée, the present sponsor, who has a son Ishmail from her former marriage. They had an Islamic marriage on 7 April 2003 and a civil ceremony on 27 October 2003. The couple have a daughter together, Saba, born on 25 March 2004

6.
The appellant applied for leave to remain as a spouse but was refused on 17 November 2005. He was refused on the grounds that he was an overstayer, and his marriage did not predate the service of notice of liability to removal. His subsequent appeal was dismissed following a hearing on 13 February 2006. The Immigration Judge stated that he had been invited to revoke the deportation order and said that there was nothing as matters presently stand which would justify its revocation. Although it is not clear from the determination it appears that it emerged during the hearing that the present sponsor was not free to enter into marriage with the appellant because she was not divorced from her former husband.

7.
The appellant voluntarily returned to Pakistan in September 2006 at his own cost.

8.
The appellant and sponsor lived together in Pakistan from 18 June 2007 to 24 November 2008 and Ishmail came to live there with them during his school holidays. The sponsor and the appellant's daughter then returned to the UK in order to start pre-school nursery.

9.
On 16 July 2010 the appellant, advised and assisted by his present solicitors, made an application for settlement in the UK as a fiancé, with the intention of entering into a civil ceremony with the sponsor on his arrival. At that stage she had obtained her decree nisi which was subsequently made absolute. The appellant disclosed the fact that he had been deported from the UK, and indeed his immigration history generally, in the application form.

10.

The Entry Clearance Officer refused the application on the 3 November 2010 under paragraph 320(2) because the appellant was currently subject to a deportation order signed on 30 January 1996. In view of his immigration history the Entry Clearance Officer also refused the application under paragraph 320(11). Finally, the appellant had provided no evidence of contact with his sponsor since a visit in November 2008 which in the Entry Clearance Officer's view cast serious doubt as to the true nature of his relationship and he was not satisfied that the appellant genuinely intended to live with his sponsor as required by paragraph 281(iii) of HC 395.

11.
The appellant appealed. In his grounds of appeal he stated that the application fell to be considered as an application for the revocation of a deportation order and the Entry Clearance Officer should have referred the matter to the Secretary of State for consideration of the issue and had erred in failing to do so. It was argued that there had been a significant material change in circumstances which justified the revocation of the deportation order, namely, in the absence of any criminal conviction or there being any risk to the public, the signing of the deportation order was a disproportionate measure and contrary to law. There was no justification within the decision for the reasons behind the deportation order still remaining in force. There had been a passage of time and significant developments in case law within the context of Article 8 and the human rights of the family unit all needed to be taken into consideration. The refusal under paragraph 320(2) was contrary to law and incompatible with Article 8. With respect to human rights the Entry Clearance Officer had failed to give any consideration to s. 55 of the Borders, Citizenship and Immigration Act 2009 which imposes a duty to have regard to the need to safeguard and promote the welfare/interests of children.

The Immigration Judge's decision

12.
The Immigration Judge set out the evidence which he had heard and the submissions including an argument from the appellant's representative that the deportation order should be revoked. With respect to that issue the Immigration Judge wrote as follows:

"I will deal firstly with the Respondent's decision under paragraph 320(2) which provides that entry clearance is to be refused where the applicant is currently subject to a deportation order. This Rule is expressed in a way which allows no discretion.

There is no dispute that the Appellant is subject to a deportation order. Indeed it is part of his case that the Respondent erred in not referring the matter to the Secretary of State for the order to be revoked. He also asks for a finding that the order should be revoked. There is no evidence before me to show that he asked for it to be revoked and the Respondent has not had an opportunity to make a decision on the issue.

I am dealing with a decision to refuse to grant entry clearance not a decision to refuse to revoke a deportation order. I am not persuaded that the application for entry clearance should be regarded as an application to revoke the order. It is not for me to revoke the order or to make a finding that it should be revoked until the Respondent has had an opportunity to consider the evidence and make a reasoned decision under the provisions of paragraph 390. I have noted that the judge who dealt with the Appellant's appeal against the refusal to revoke the order in November 2005 found that there was no basis for the revocation of the order.

The issue before me is straightforward; at the time of the decision the Appellant was subject to a deportation order, paragraph 320(2) provides that an application is therefore to be refused and it follows that the Respondent was right to do so."

13.
The Immigration Judge then concluded that the respondent was right to refuse the application with respect to paragraph 320(11). He set out the appellant's immigration history and wrote as follows

"I am therefore satisfied that the appellant remained in this country knowing that a deportation order had been made and that his appeal had been dismissed. He managed to avoid the respondent until making his application in May 2004 over eight years after he should have left the country. He has not had valid leave to remain since the expiry of his initial leave to enter on 17 April 1994. I am therefore satisfied that he contrived to frustrate the immigration rules. I find that the Respondent was right to refuse the application on these grounds."

14.
He made no findings on whether there was a subsisting relationship between the couple and no findings on paragraph 281(iii). He accepted that family life existed and that the sponsor was effectively a single mother and shouldering the burden of earning a living and raising her children. However he said that there was no suggestion that the children were not thriving and family life was currently enjoyed by way of telephone contact with the appellant and there was no reason why that should not continue. There was also no reason why the sponsor and children could not visit the appellant. He saw no reason to depart from the findings made in the last appeal and concluded that the decision to refuse entry clearance was proportionate to the need to maintain immigration control.

The Grounds of Application

15.
The appellant sought permission to appeal on the grounds in the following terms. The application for entry clearance made by the appellant fell to be considered and treated as an application for revocation of the deportation order alongside the application for entry clearance under the Immigration Rules and also under Article 8 of the ECHR. This was the point made by the appellant within the Grounds of Appeal. There is no set form of application in relation to an application for revocation of a deportation order and the respondent was required to refer the matter to the Secretary of State for the Home Department to take a decision on the revocation of the deportation order before taking a decision under paragraph 290 of HC 395 and Article 8 of the ECHR. The decision of the Entry Clearance Officer was therefore not in accordance with the law. The subsequent findings of the Immigration Judge could not be sustainable in the absence of a decision by the Secretary of State on the revocation of the deportation order. Accordingly the correct approach for the Immigration Judge to take was to have allowed the appeal to the limited extent for the Entry Clearance Officer to remit the matter to the Secretary of State to take a decision on the revocation of the deportation order and for a fresh decision to be taken by the Entry Clearance Officer under paragraph 290 of HC 395.

16.
Permission to appeal was granted by Designated Immigration Judge Zucker for the reasons stated in the grounds.

Submissions

17.
Mr Ahmed relied on his grounds. The application for entry clearance as a fiancé included an implied application for revocation of the deportation order since the appellant could not gain entry clearance to the UK as a fiancé unless the deportation order was revoked. The appellant had made known to the respondent in his application form that he was a person subject to a deportation order and the respondent should have considered the application as one for a revocation of the order alongside the application for entry clearance since the appellant could only secure entry clearance under the Immigration Rules following revocation of the deportation order.

18.
The Notice of Appeal specifically contended that the application by the appellant should have been considered as an application for revocation of the deportation order and invited the Entry Clearance Officer to rectify the error. The decision remains outstanding. Furthermore the appellant's instructing solicitors also wrote to the Secretary of State on 15 December 2010, after the refusal, requesting that consideration be given to the revocation of the deportation order but no response has been received. The Immigration Judge should have found that the Entry Clearance Officer's decision was not in accordance with the law.

19.
Furthermore there was a common law duty of fairness in such cases for the Entry Clearance Officer to act fairly and to consider the issue relating to the revocation of the deportation order and to afford the appellant a reasonable opportunity to make further representations to be submitted before taking a decision on the application.

20.
Mr Ahmed also sought permission to argue that the decision with respect to paragraph 320(11) was legally flawed, and that the respondent had failed to discharge his duties under s. 55 of the 2009 Act in relation to the children. He relied on ZH (Tanzania) [2011] UKSC 4 and the decision of the CJEU in Ruiz Zambrano (European citizenship) [2011] EUECJ Case C-34/09. He submitted that the appellant had a right of residence under Community law and the deportation order was invalid.

21.
Mr Sheikh submitted that there was no error of law in the decision. Both the Entry Clearance Officer and the Immigration Judge had looked at the application substantively. The appellant had made a previous application to revoke the deportation order whilst in the United Kingdom and it therefore could not be said that he did not know how to do it. If an applicant who was overseas wanted to have a deportation order revoked the correct procedure was to make an application to the Entry Clearance Officer who would refer it to the Secretary of State, and the appellant had not done so.

22.
The Immigration Judge was entitled to agree with the Entry Clearance Officer that refusal with respect to paragraph 320(11) was justified in view of the appellant's immigration history, and he had also properly considered all relevant matters with respect to Article 8 including the best interests of the children.

23.
By way of reply Mr Ahmed submitted that there was nothing in the Rules which required an applicant to make a separate application for revocation which should be taken to be implied in the application which was made and in respect of the claim under Article 8. He also relied on the Tribunal's decision in SZ (Applicable Immigration Rules) Bangladesh [2007] UKAIT 00037 which held that whilst there

was no general duty on the Tribunal to consider whether a claimant's case might have succeeded on a different basis from that on which the application was made, exceptionally the terms of a notice of decision may require the Tribunal to consider the appeal on a number of alternative bases.

Paragraph 320(2)

24.
Under paragraph 390 of HC 395 an application for revocation of a deportation order will be considered in the light of all of the circumstances including –

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

25.
Under paragraph 391 in the case of any applicant who has been deported following a criminal offence, continued exclusion will normally be the proper course. In other cases revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

26.
Paragraph 392 makes it clear that revocation of a deportation order does not entitle the person concerned to re-enter the UK; it renders him eligible to apply for admission under the Immigration Rules. An application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.

27.
The IDIs relating to the revocation of deportation orders also state that applications may be made at any time either directly to the Home Office or through a post overseas by a deportee or his representative. Once a person has been deported he or she must successfully apply for the deportation order to be revoked before applying for entry clearance in order to lawfully return to the UK.

28.
This is therefore not a case which is analogous to that in SZ in which the Tribunal recognised that there could be situations where there is an obvious link or connection between one Rule and another, and therefore that will mean that there is an obligation on the Tribunal to consider and apply another Rule if fairness requires it to do so. The appellant did not fail to apply under the correct Rule. He wished to come to the UK to join his sponsor, but he had not contracted a valid marriage with her since at the time of the religious ceremony she was not free to marry. Accordingly he could only apply for entry clearance as a fiancé. There was no other relevant Rule applicable to him.

29.
The problem for the appellant was that he made an application for settlement which was bound to fail because he was still the subject of a deportation order, and therefore the subject of a mandatory refusal. Paragraph 390 contemplates that representations will need to be made in order to support an

application for revocation. Paragraph 392 makes it clear that it is a two stage process. Had he or his representatives checked either the Immigration Rules or the IDIs it would have been abundantly clear that it was necessary for the appellant to apply to have the deportation order revoked before he would be able to succeed in a fiancé application.

30.
It must be remembered that the appellant is the author of his own misfortune. It was his conduct which led to his deportation. That is no doubt the reason why there is a two stage procedure for persons who are subject to a deportation order. The purpose behind making a person who is subject to a deportation order apply for revocation is so that proper consideration can be given to an individual's circumstances as set out in paragraph 390 of HC 395, i.e. whether it is right in all the circumstances for the deportation order to be revoked, prior to any application for entry clearance. If Mr Ahmed's argument were to succeed it would mean that any person who is subject to a deportation order would be in no different a position from any other person seeking entry clearance.

31.
Whilst Mr Sheikh submitted that the appellant had previously made an application for revocation that does not appear to be right. It seems to have been raised by the representatives at the hearing before the Immigration Judge in 2006, in an attempt, as now, to raise the question of revocation at a late stage in the proceedings. However Mr Ahmed is simply wrong to state that there was nothing in the Rules and procedure which requires a person to apply for revocation separately to an application for entry clearance. Whether or not there is a specific form, the Rules and the IDIs are entirely clear.

32.
In his skeleton argument Mr Ahmed states that there was nothing before the Immigration Judge to suggest that the Entry Clearance Officer had raised any specific objection to the issues raised in the case, by which I take it to mean the revocation of the deportation order. That is not surprising because no application had ever been made.

33.
He also argues that the Entry Clearance Officer failed to give consideration or take any action in relation to the revocation of the deportation order and a decision on this aspect of his claim remains outstanding. It does not because he never made any application.

34.
The Entry Clearance Officer made the only decision which was open to him. It was clearly lawful.

35.
It is also, in effect, although not cited by him, Mr Ahmed's argument that s. 120 requires the Immigration Judge to look at the merits of the application for revocation of the deportation order since it was pleaded in the Grounds of Appeal, and therefore that his decision was unlawful.

36.
Under s. 120 of the Nationality, Immigration and Asylum Act 2002 the appellant may be required to state –

(a) his reasons for wishing to enter or remain in the UK.

(b) any grounds on which he should be permitted to enter or remain in the UK, and

(c) any grounds on which he should not be removed from or required to leave the UK.

37.
In the Grounds, inter alia , the appellant stated that the application fell to be considered as an application for a revocation of a deportation order.

38.
Under s. 85(2) of the Nationality, Asylum and Immigration Act 2002, if an appellant under s. 82(1) makes a statement under s. 120 the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in s. 84(1) against the decision appealed against.

39.
Under s. 85(3), subsection (2) applies to a statement made under s. 120 whether the statement was made before or after the appeal commenced.

40.
Under s. 85(4) on an appeal under s. 82(1) [83(2) or 83A(2)] against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

41.
However subsection (4) is subject to the exceptions in s. 85A. Exception 1 is that in relation to an appeal under s. 82(1) against an immigration decision of a kind specified in s. 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.

42.
An application for entry clearance is an immigration decision of a kind specified in s. 82(2)(b).

43.
The first point to make is that the requirement in s. 85(2) to consider any matter raised in a s. 120 notice is restricted to grounds against the decision appealed against. The decision appealed against was the refusal to grant entry clearance as a fiancé, and the appellant was refused, inter alia, on the grounds that he was the subject of a mandatory refusal under paragraph 320(2). The grounds did not address that issue by, for example arguing that the appellant was not subject to a deportation order. Instead they sought, within the grounds, to make a new application which had never been made to the Entry Clearance Officer.

44.
In AS (Afghanistan) [2009] EWCA Civ 1076, Moore-Bick LJ held at paragraph 79 that there is a duty on the Tribunal to consider any matter raised in a s. 120 statement:

“insofar as it constitutes a ground of appeal of a relevant kind against the decision under appeal. Thus far it seems to me the natural meaning of these provisions is to impose on the Tribunal a duty to consider matters raised by the Appellant insofar as they provide grounds for challenging a substantive decision of a kind identified in section 82 that affects his immigration status.”

45.
Thus whilst AS (Afghanistan) requires the Tribunal to consider all of the grounds upon which an appellant seeks to rely in challenging the decision of the Entry Clearance Officer or the Secretary of State, it is not authority for the proposition that the issues raised in a statement under s. 120 are to be treated as a fresh application to the Tribunal. The issues raised are to be treated as an additional or expanded ground of appeal against the decision which has been made. It is not a mechanism which permits an appellant to make an entirely new application to the Tribunal.

46.
Further, in this particular case, to allow the appellant to raise a fresh application in his grounds would negate the purpose of s. 85A which restricts the Tribunal's considerations in entry clearance cases to circumstances appertaining at the time of the decision, and therefore neither the fact that the appellant's solicitors wrote to the respondent after the refusal seeking revocation of the order, nor the fact that revocation was raised in the Grounds of Appeal can assist him because they were not circumstances appertaining at the date of the decision - at the date of the decision the appellant was the subject of a deportation order.

47.
To hold otherwise would be to circumvent the procedure which has been set down in the Immigration Rules namely that unless there has been a successful application for revocation of a deportation order, any application will be subject to a mandatory refusal.

48.
With respect to the argument that the appellant has been treated unfairly, the Entry Clearance Officer was faced with an application which attracted a mandatory refusal. The appellant had not been deprived of any opportunity to argue his case. He had not applied under the wrong Rule. He had made an application which could not succeed. There was no obligation on him to advise the appellant that he needed to make an application for a revocation of the deportation order before applying for settlement or to defer making a decision in order to allow him to make further representations. It is not the duty of an Entry Clearance Officer to advise the appellant but the duty of his representatives. The requirements for entry clearance are made public and plainly set out in the Immigration Rules and the IDIs. It cannot be said that there is anything intrinsically unfair in an Entry Clearance Officer refusing an application which was bound to fail.

49.
The cases in which it has been held that a decision maker has acted unfairly have been in limited circumstances, where, for example, in the case of Patel (revocation of Sponsor's licence – fairness) India [2011] UKUT 211 (IAC) a student has been deprived of an opportunity to meet the case against him, or most recently Naved (student – fairness – notice of points) Pakistan [2012] UKUT 14 (IAC). But there is no such deprivation of an opportunity here. The Rules are clear and the Appellant has not abided by them.

50.
In conclusion, the Immigration Judge did not act unlawfully in stating that he was not persuaded that the application for entry clearance should be regarded as an application to revoke the deportation order since the appellant is not permitted by virtue of s. 120 to raise a fresh application in the grounds of appeal.

Paragraph 320(11)

51.
Although not specifically pleaded in the grounds Mr Ahmed submitted that the decision with respect to paragraph 320(11) was not sustainable and that the refusal under paragraph 320(11) fell to be construed in line with the exceptional provisions under paragraph 320(7C) and accordingly the decision was legally flawed.

52.

Paragraph 320(7C) specifically refers to paragraph 320(7B) which requires mandatory refusal in certain circumstances. However, it was the clear intention of the Rules in paragraph 320(11) to provide a discretionary ground for refusal in circumstances such as these where an appellant, who would otherwise not be caught by the refusal provisions in paragraph 320(7B) because he is seeking entry on the basis of marriage, or prospective marriage, has overstayed for a considerable period of time, in this case over eight years.

53.
Moreover whilst in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) the Tribunal held that the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal in cases where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is dis-applied by paragraph 320(7C), the Tribunal did not say that paragraph 320(11) cannot ever be justified.

54.
However it is right to say that there was no consideration by the Immigration Judge of the fact that the appellant had made a voluntary departure to Pakistan, nor that the family had lived there together for a considerable period of time before making the application under appeal. Indeed the sponsor and her daughter have made a significant effort to relocate and live as a family unit with the appellant in Pakistan. Moreover the sponsor has a child from a former marriage whom she cannot be expected to leave in the UK. The evidence was that he was only able to join her in Pakistan during the school holidays. The Immigration Judge's considerations are not a fair reflection of these facts and whilst it is undoubtedly true that there was a very significant period of time when the Appellant was an absconder and he had not had valid leave to remain in the UK since 1995, it is not apparent from the relatively brief treatment of the issue in the determination that the Immigration Judge had in mind the guidance in PS that great care was required to properly assess all of the relevant factors.

Paragraph 281(iii)

55.
The Immigration Judge made no findings at all with respect to paragraph 281(iii) which was one of the issues raised by the Entry Clearance Officer and which it was therefore incumbent upon him to decide. Not to do so is a clear error. In fact there is strong evidence that this is a subsisting relationship. The couple have been together for a number of years. They have a daughter. There has been significant cohabitation both in the UK and Pakistan. The sponsor has supported the application throughout the appeal process.

56.
The errors in the determination with respect to paragraphs 320(11) and 281(iii) are however immaterial because the appellant cannot succeed under paragraph 320(2).

Article 8

57.
With respect to Article 8, this again was not a matter pleaded in the original grounds but sought to be raised by Mr Ahmed at the hearing.

58.
The brief conclusion that family life could continue by way of visits and telephone contact is not consistent with the holistic view of family life as developed over recent case law. Furthermore, the

judge did not cite s. 55 of the Borders, Citizenship and Immigration Act 2009 which applies to the daughter in the UK and his comment that there was no suggestion that the children were not thriving, is not a proper reflection of his duty to consider the best interests of the child.

59.
Accordingly the decision with respect to Article 8 must be re-made.

60.
There is family life between the appellant, the sponsor and their daughter. The evidence of a subsisting relationship over many years is strong, and the couple have undergone an Islamic marriage ceremony. They intend to marry in the UK shortly after the appellant's arrival here.

61.
The decision to refuse entry clearance is an interference with that right. Family life cannot reasonably be conducted via telephone calls, emails and the occasional visit.

62.
The decision is lawful and necessary in pursuit of the legitimate aim of the economic well being of the country via the maintenance of immigration control.

63.
There are strong arguments in the appellant's favour. His relationship cannot easily be conducted in Pakistan because the sponsor has a relatively young son who, on past experience is not able to live with her there. Subject to the maintenance and accommodation requirements, it is likely that he would have a good case for entry under paragraph 281. Furthermore, there has been a considerable period of time since he made his voluntary departure from the UK.

64.
However, crucially, the appellant has a remedy for his present difficulties under the Immigration Rules. He simply has to make an application under paragraphs 391 and 392 for revocation, and then to apply as a fiancé. Where there is a clear procedure to be followed, and an appellant has chosen not to follow it, it is very hard to envisage circumstances in which it would be proportionate to allow the Immigration Rules to be circumvented by relying on Article 8.

65.
Finally, again, as an additional ground, Mr Ahmed stated that the appellant had a right of residence under community law given the ruling in Zambrano . It is unclear what is meant by this submission. Zambrano was concerned with the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union and held that 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 insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of European Union citizens. There has been no such deprivation here. The children continue to live with their mother in the UK. Zambrano is not authority for the proposition that it is impermissible to deport any third country national who has a British citizen/EU citizen child.

Decisions

66.

The appellant’s appeal against the decision to refuse to grant him entry clearance under paragraph 320(2) is dismissed.

67.
The Immigration Judge erred in law in respect of his considerations under paragraph 320(11) but the error is immaterial given the above.

68.
Similarly the Immigration Judge erred in not considering paragraph 281(iii) but again, the error is not material.

69.
The Immigration Judge’s decision under Article 8 has been set aside and re-made, again dismissing his appeal.

Signed Date

Upper Tribunal Judge Taylor

Immigration and Asylum Chamber