Upper Tribunal
(Immigration and Asylum Chamber)

Campbell (exclusion; Zambrano) [2013] UKUT 00147 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 January 2013	.....

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE JORDAN

Between

DELROY CAMPBELL

Appellant

and

ENTRY CLEARANCE OFFICER, KINGSTON

Respondent

1. *Exclusion decisions are not be confused with exclusion orders.*

2. *It is settled law that the Secretary of State has the power to make an exclusion decision: see R (on the application of Naik) v Secretary of State for the Home Department [2011] EWCA Civ 14 and there is nothing unlawful in such a decision being made after a claimant has made a voluntary departure from the UK.*

3. *There is no reason in principle why Zambrano principles (Zambrano v Office National de l'Emploi (ONEm) [2011] All ER (EC) 4) cannot have application in entry clearance cases: in both in-country and out-of-country cases the Member State must ensure that any "refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the*

substance of the rights conferred by virtue of his status as a citizen of the Union": Dereci & Others (European citizenship) [2011] EUECJ C-256/11, 15 November 2011, para 74.

Representation:

For the Appellant: Mr D Chirico, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica. On 3 September 2010 First-tier Tribunal (FtT) Judge B A Morris dismissed his appeal against the decision made by the respondent on 3 February 2010 to refuse his application for entry clearance to join his spouse, (Susan Campbell whom he had married in Jamaica on 19 September 2008) in the UK for settlement. The sole ground of refusal was stated to be that, by virtue of the fact that the appellant was "subject to an exclusion order where the Secretary of State on 18th September 2008 had personally directed that his exclusion was conducive to the public good", he stood to be refused under paragraph 320(6) of the Immigration Rules which states that entry clearance is to be refused "where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good". It is as well to clarify at this point that the reference in the ECO decision to an "exclusion order" was incorrect. As is made clear in the UKBA document "Exclusion decisions and exclusion orders" v1.0 valid from 5 July 2012, "exclusion orders" refer to decisions made under regulation 21(5)(c) of the Immigration (European Economic Area) Regulations 2006, whereas "exclusion decisions" are made by the Secretary of State against non-EEA nationals in the exercise of her extra-statutory power preserved by s.33(5) of the Immigration Act 1971 (we leave aside her special provisions for persons coming from the Common Travel Area). It is settled law that the Secretary of State has the power to make an exclusion decision: see R (on the application of Naik) v Secretary of State for the Home Department [2011] EWCA Civ 14. Exclusion is also one of the "… grounds of public good" identified in s.98 of the Nationality, Immigration and Asylum Act 2002.

2. The background to the appellant's application for entry clearance was that he had previously been in the UK, having first entered in September 2001 on a visit visa. From 25 September 2001 he became an overstayer. On 27 March 2008 he was arrested on suspicion of using a false document and on 20 May 2008 he was charged with possession of a false identity with intent, contrary to s25(1) of the Identity Cards Act 2006. He pleaded guilty and was sentenced to seven months' imprisonment, the sentencing judge recommending that he be deported and the respondent set in train proceedings to deport him. Having signed a form on 12 July 2008 waiving

his appeal rights against deportation, he was considered for a "Facilitated Return". On 23 July 2008 the section of the Criminal Case Directorate dealing with the Facilitated Returns Scheme wrote to him to say that it had been decided to allow him to return to Jamaica under this scheme. This letter noted that "[y]ou will not be deported but the Home Office will consider whether you should be excluded from the UK. Should you be excluded from returning to the UK you can apply to have this revoked [at] any time". On 1 September 2008 the appellant made a voluntary departure. Subsequently (when back in Jamaica) he learnt that the Secretary of State had personally directed that he should be excluded from the UK on the ground that his presence would not be conducive to the public good for reasons of criminality, specifically his criminal conviction for being knowingly involved in possession and use of a false instrument and that as a consequence he should not attempt to enter the UK. It is not entirely clear when the appellant was first notified of this, but from the letter sent by his then representatives, IAS, dated 2 October 2010 it is at least clear that he had been informed of it by January 2009 when he had been in contact with ECO, Kingston; this accords with his own evidence of having received a refusal of entry clearance prior to the one under appeal.

3. Following a grant of permission to appeal to the Upper Tribunal, an Upper Tribunal panel (Mr Justice Coulson and Upper Tribunal Judge Storey) decided that the FtT had materially erred in law, and set aside its decision: see Annex for this decision in full. In essence the errors identified related to the judge's failure, when considering the appellant's Article 8 circumstances, (i) to make an assessment of whether it was reasonable to expect the appellant's wife and daughter, K, to go and live with him in Jamaica; (ii) to make a proper assessment of the best interests of the children with whom the appellant had some involvement; and (iii) to assess and weigh in the balance the likelihood that the appellant would re-offend.

4. We should note that in the course of its error of law decision the Upper Tribunal panel rejected an attempt by the appellant's Counsel on that occasion (Ms Hooper) to persuade it that the FtT had also erred in law in failing to consider whether the prior decision of the SSHD to exclude the appellant from the UK was "in accordance with the law" because of the circumstances in which he left the UK. We set out here what the Upper Tribunal panel said about this matter at paras 8-9:

> "8. Having heard both parties' submissions we are satisfied for a number of reasons that the scope of this appeal must be confined to Article 8. In the first place, the appellant has had ample opportunity since 26 August 2008 - when he was served with a letter informing him in writing by the Home Office that the Home Secretary had personally directed that he should be excluded - to challenge that decision by way of judicial review. He failed to do so. Secondly, the grounds appear to rely in part on a misunderstanding of the status of an exclusion decision. They refer to the lack of evidence of the Secretary of State

having made an 'exclusion order', but to our understanding exclusion is a non-statutory power exercised by the Home Secretary acting in person to prohibit entry to the UK in respect of certain categories of person, including foreign national prisoners who have taken up the offer of assistance as part of the facilitated returns scheme. Such a decision does not need to be made in the form of an order; it can be made simply by way of a letter, as was done in this case. Thirdly, the grounds appear to consider that the exclusion decision was unlawful because, having been warned that he might be deported, the appellant in fact left voluntarily. Leaving aside that it would appear that the appellant's departure was not wholly voluntary (Mr Melvin's skeleton argument describes it as having been an escorted departure), it is apparent that exclusion is a different process from deportation and that leaving voluntarily is no bar to an exclusion decision.

9. Thirdly, now that we have a fuller picture of the appellant's immigration history, we see no proper basis for considering a ground of appeal that the appellant himself, after his legal representative had been granted a brief adjournment to consider the matter, no longer wished to advance before the FTT (it was not a ground, in any event, that formed part of the written grounds of appeal to the FTT). Fourthly, it is entirely clear that the appellant was aware of the threat, if not the fact, of an exclusion decision, when he signed a form dated 12 July 2008 stating that he intended to leave the UK and did not wish to exercise any rights of appeal. Ms Hooper did not suggest that it was not the appellant's signature on this form. It is true that this pro forma form made reference to withdrawal of a right of appeal against 'deportation', but he cannot have been in any doubt that he was waiving rights of statutory appeal against any aspect of the removal process. It is also true that he did not tick the further box which stated 'I understand that I may be excluded from the United Kingdom following my departure', but it remains the fact that the form contained this warning and the fact that he did not tick this box does not alter the fact that he must have read the letter. Further and in any event, (and this brings us back to our first point) he did not have any right of appeal against an exclusion decision although, as he was subsequently informed of that prior to his removal (on 26 August 2008), he was clearly in a position prior to departure to exercise a judicial review challenge."

Evidence

5. Mr Chirico said that he did not intend to call any witnesses but would rely on the further witness statements from both the appellant and his wife and, in relation to the issue of the exclusion decision, the DPU file produced by the respondent in response to a subject access application from the appellant's representatives. The previous Upper Tribunal panel dealing with error of law had stated that the FtT had recorded the oral evidence given before it and noted recent statements bringing the appellant and his family's circumstances up to date. It was not a case where there was any significant dispute about the factual circumstances.

SUBMISSIONS

The exclusion decision

6. At the hearing Mr Chirico acknowledged that the terms of the Upper Tribunal's error of law decision made it difficult for him to re-argue that the respondent's exclusion decision was "not in accordance with the law". However, he maintained that this remained a live issue and it was at least necessary, in order for the Tribunal to re-make the Article 8 decision, to have a correct understanding of the circumstances in which the appellant had come to be excluded from the UK. In this context he said that the Upper Tribunal has been mistaken in considering that the respondent made an exclusion decision against the appellant on 28 August 2008. The correct date was 18 September 2008, by which time the appellant had left the UK (he left on 1 September 2008). The significance of the fact that the exclusion decision was not taken prior to departure was that the appellant never knew about it. It was also critical that the appellant had chosen to leave voluntarily so he could improve his prospects of regularising his position in the UK by way of applying for entry clearance.

7. Mr Melvin submitted that even though the Tribunal may have been misled by a letter wrongly dated 28 August 2008 by the respondent, the Tribunal should not re-visit the issue of the lawfulness of the exclusion decision in any shape or form as the previous Upper Tribunal panel had not accepted it was a ground that could be argued and it was not until some ten months later, without proper notice, that Mr Chirico was seeking to re-open it.

Article 8

8. Both parties accepted that as this was an out-of-country appeal the focus had to be on the facts as they stood at the date of decision in February 2010, even though that was nearly three years ago.

9. Mr Chirico said that it was important to note the failure of either the Secretary of State before the appellant's departure from the UK or the Entry Clearance Officer afterwards to address his Article 8 circumstances. There had simply been no Article 8 inquiry until the hearing before the FtT.

10. Mr Chirico submitted that the evidence showed that the appellant had strong family life ties in the UK. He had been in a relationship with Susan Campbell, a British citizen, since 2004. They had cohabited since then up until the date of his departure from the UK. She had gone out to Jamaica to marry him. The appellant's departure from the UK had had an adverse impact on her: she suffered from depression and had a drinking problem.

11. The appellant had a close relationship with K, who is his child. K is a British citizen. It was to be recalled that according to Strasbourg case law there was presumptive family life between a child and her natural father. Prior to his departure and since K's birth he had been her primary carer as his wife had gone back to work. When she had gone to Jamaica to marry,

K had gone with her and indeed had stayed with the appellant for a period, albeit short, when she had gone back to the UK before returning to pick up her daughter.

12. In addition, the appellant played a stepfather role in relation to his wife's two children by a previous relationship, C and A. C, born on 14 September 1992 and so 17 at the date of decision, was a teenage boy who needed a father figure in his life. A, born on 14 June 1995, was 3 years younger.

13. A further factor in favour of the appellant concerned the circumstances of his departure from the UK. It was to his credit that he had chosen to leave voluntarily. Further, as already observed, the fact that the exclusion decision was only made after he left the UK meant he never had the chance to challenge it. The first he knew of it was in October 2009 when he received his first refusal of entry clearance.

14. Asked by us to address the possible relevance to the appellant's case of Ruiz Zambrano v Office National de l'Emploi (ONEm) [2011] All E R (EC) 4 and other Court of Justice cases dealing with Article 20 of the Treaty on the Functioning of the European Union (TFEU), Mr Chirico said that it reinforced the appellant's Article 8 argument because clearly his wife could not be expected to relocate to Jamaica as this would entail depriving her British citizen child, K, of enjoyment of her rights as a Union citizen.

15. Whilst Mr Chirico accepted there were factors weighing in the scales against the appellant, including the fact that he had not sought to regularise his stay whilst living in the UK unlawfully, his criminal sentence (7 months) was less than twelve months and the sentencing judge's remarks confirmed there was no previous criminal history. The offence did not involve violence, sexual misconduct or drugs. It was his only offence. He was undoubtedly at a low risk of re-offending.

16. Asked by the panel whether he thought that in assessing the proportionality of the entry clearance refusal decision the Tribunal should ask itself what would be a reasonable length of time to expect someone excluded from the UK to stay outside the UK, Mr Chirico said that the period of time between the appellant's departure and his refusal decision was seventeen months and where there were family life considerations there should be no fixed periods. For the appellant's child K, seventeen months was seventeen months too long and in ZH (Tanzania) [2011] UKSC 4 the Supreme Court had said that children should not be punished for the wrongdoings of their parents.

17. Mr Chirico said that as a consequence of leaving voluntarily the appellant was not subject to a preliminary procedure within the Immigration Rules such as applied to those against whom a deportation order had been made and who wished to re-enter. They were required to apply for and obtain revocation before they could be considered for entry clearance. This difference reinforced his view that no fixed period of time prior to

applying for entry clearance should be considered as relevant in the instant case.

18. With reference to a written skeleton argument, Mr Melvin submitted that the appellant's case was on all fours with the appeal made by the appellant in the case of Latif (s.120 – revocation of deportation order) Pakistan [2012] UKUT 78 (IAC) where the Upper Tribunal held that 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 or she is not to be the subject to a mandatory refusal under para 320(2). Where there was a two-stage procedure under the Rules an applicant was expected to apply first for revocation and then for entry clearance. If he did not follow this then, in the words of the Tribunal in Latif, "it is hard to envisage circumstances in which it would be proportionate to allow the Immigration Rules to be circumvented by relying on Article 8".

19. In oral submissions, Mr Melvin argued that even if Latif was not on all fours (because Immigration Rules did not impose a two-stage procedure in exclusion cases), the case was persuasive by analogy because in both cases the Entry Clearance Officer had applied general grounds of refusal (para 320(2) in Latif's case; para 320(6) in the appellant's case) and Article 8 consideration had to take full account of that. It was of relevance here that despite knowing for four years that he was subject to an exclusion decision neither the appellant nor his advisers made any attempt to get this decision revoked by way of an application for judicial review.

20. As regards Article 8, Mr Melvin said that no medical evidence had been submitted to support the claims that the appellant's wife suffered from depression and drink problems. She had knowingly aided the appellant in his remaining in the UK illegally since 2005, yet she still continued her relationship with him and went on to have a child with him knowing that he could be removed at any date.

21. As regards K, at the date of decision she was only 4 year old and both before and after the appellant's departure she had always lived with her mother. There was a dearth of actual medical evidence showing she had suffered behavioural problems as a result of her father's departure. After the appellant left, her mother had given up work in January 2009 to look after her. Given the lack of independent evidence to corroborate the appellant's and his sponsor's evidence that the appellant had been K's primary carer whilst he was still in the UK, the respondent did not accept he was the primary carer for any length of time after her birth. There was no evidence outside his own and his wife's statements to show that during the short time K was in Jamaica she was cared for by the appellant rather than by female members of his family. When he left the UK, K was 2 years old. There was no evidence outside the family statements that K suffered as a result of his departure. There was no Social Services' involvement.

22. In relation to the other step/grandchildren, there was no evidence up to the date of decision of their having any contact other than by way of telephone calls with the appellant since he was arrested in 2008.

23. Similar difficulties arose in relation to the application to the facts of this case of Zambrano principles. It was clear from the Court of Appeal judgment in Damian Harrison (Jamaica) AB (Morocco) [2012] EWCA Civ 1736 that this principle only applies in exceptional circumstances where the Union citizen would be forced to leave the territory of the EU. That was not the case here. Neither K nor the British citizen stepchildren, C and A, were being required or expected to leave the UK and it was not argued that it would be reasonable to expect the appellant's wife to relocate to Jamaica.

24. As regards the appellant's risk of re-offending, whilst it was accepted there was no evidence to suggest he had been in trouble in Jamaica, almost his entire history in the UK was one of unlawful stay and failure to make contact with the authorities (even after he had a child). His criminal purchase of a British passport he was not entitled to had to be seen in that context. His wife had known about his unlawful stay.

25. Accordingly, argued Mr Melvin, the circumstances of his departure did not weigh in his favour. He knew he had been subject to a recommendation for deportation. The fact that he chose the option of avoiding a deportation decision by asking for Facilitated Return (at taxpayers' expense) did not mean he had a legitimate expectation he could return. If he had chosen to stay he would have been deported. After he left he made no attempt to challenge the exclusion decision, even assuming he did not know of it until October 2009. It was up to him to take professional advice.

OUR ASSESSMENT

26. The decision in this case being a refusal of entry clearance, we are confined to considering the circumstances as they stood at the date of decision in February 2010, looking to subsequent evidence only for what light it sheds on such circumstances.

The exclusion issue

27. The Upper Tribunal panel who decided to set aside the decision of the FtT said that they were not prepared to accede to the request made by the appellant's representatives to vary the grounds to include a challenge to the legality of the exclusion decision. Mr Chirico accepts that he has not given proper notice of the appellant's wish to re-open this matter. Ordinarily such circumstances would cause us to refuse the application to re-open it. However there are two complications in this case. One is that the previous Upper Tribunal panel was misled by UKBA's incorrect dating

of correspondence into considering that the exclusion decision was made against the appellant before he left the UK voluntarily on 1 September 2008; in fact that decision was only made after he had left the UK. The other is that we cannot in any event shut Mr Chirico out from submitting that the true circumstances of the appellant's departure from the UK and the subsequent decision to exclude him have a bearing on the Article 8(2) issues of "accordance with the law" and the proportionality the decision. Accordingly we consider that we should examine again whether the exclusion decision was lawful.

28. On the basis of further evidence adduced before us (in the form of the appellant's immigration file) we are prepared to accept that the previous panel was mistaken on the question of whether the appellant was notified of the decision to exclude him before he left (it is now clear that a letter addressed to the appellant dated 28 August 2008 was incorrectly dated and that the exclusion decision was not made until 18 September 2008, i.e. 17 days after he had left the UK). However, we do not consider that this is sufficient to establish anything unlawful about that decision or about its surrounding circumstances. It remains the case that:

    (i) the sentencing judge recommended the appellant for deportation and the appellant was plainly aware that proceedings were in train to deport him;

    (ii) on 12 July 2008 he signed a waiver form withdrawing his right of appeal against his deportation. Although not ticked, this form contained a box stating "I understand that I may be excluded from the United Kingdom following my departure";

    (iii) on 23 July 2008 he was informed by the UKBA section of the Criminal Casework Directorate dealing with Facilitated Returns that "[y]ou will not be deported but the Home Office will consider whether you should be excluded from the United Kingdom. Should you be excluded from returning to UK, you can apply to have this revoked [sic] any time ";

    (iv) in response the appellant chose to leave the UK voluntarily under the Facilitated Return Programme;

    (v) after the appellant had made a voluntary departure from the UK, i.e. on 1 September 2008, the Secretary of State, on 18 September 2008, made a decision to exclude him;

    (vi) as already noted, the Secretary of State has extra-statutory power (preserved by the 1971 Act) to exclude persons on the grounds that their presence is not conducive to the public good: see R (on the application of Naik) v Secretary of State for the Home Department [2011] EWCA Civ para 14;

(vii) there is nothing unlawful about the Secretary of State deciding to make a decision to exclude a person from the UK after he has left and in fact that appellant was informed in the form he signed on 12 July 2008 and by the letter sent to him on 23 July 2008 that the Secretary of State might decide to take such a step;

(viii) even if (as appears likely) the eventual exclusion decision as such was not served on the appellant in Jamaica, where he had been since arriving back there on or shortly after 1 September 2008, there is no requirement for personal service and he clearly knew of it by 21 January 2009 when he received a refusal of his first application for (or inquiry about) entry clearance;

(ix) despite becoming aware of it on that date (if not before), the appellant took no steps to challenge it either by writing to the immigration authorities or seeking judicial review.

29. In such circumstances we are quite satisfied that the exclusion decision was lawful and that as a consequence para 320(6) was properly applied against the appellant. Mr Chirico's submissions that the circumstances of his departure are relevant to the consideration of his Article 8 grounds have to be considered in the light of the foregoing.

Zambrano principles

30. We see no reason in principle why Zambrano principles cannot have application in entry clearance cases: in both in-country and out-of-country cases the Member State must ensure that any "refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union": Dereci & Others (European citizenship) [2011] EUECJ C-256/11, 15 November 2011, para 74. Indeed the ruling of the Grand Chamber of the Court of Justice in this case encompassed not just the cases of those applicants who were already living in the host Member State (Austria) but Mrs Stevic who resided in Serbia: see paras 26, 35, 74.

31. So far as concerns the relevance of Zambrano principles to this case, we consider that both in relation to K and to a lesser but still significant extent in relation to C and A, the appellant can be considered to have performed a parent/carer role. We noted as regards his role as a stepfather to C and A that the Court of Justice has considered that (where applicable) such persons can benefit from Zambrano principles as well as natural parents: see O & S v Maahanmuuttovirasto v L [2012] EUECJ C-356/11 (06 December 2012). However, we do not find that the key principles set out in Zambrano and subsequent cases (including O & S) assist the appellant's case. The appellant has had limited contact with his British citizen child C and it is clear that both before, during and since the period when the appellant lived in the same household A and K have continued to be cared for and brought up by their mother, Mrs Campbell. The continued

exclusion of the appellant from the United Kingdom could not be said to prevent them from continuing to exercise in the United Kingdom substantive enjoyment of their rights as Union citizens.

32. In respect of K, the appellant's wife found it necessary, upon his departure, to cease work in order to care for her, which may well have been an economic detriment (to be added to the detriment of K not having her father present in her life), but as the Court of Justice has observed in several post-Zambrano cases, economic disadvantage and family unity are insufficient factors to constitute exceptional circumstances that would require either K or his stepchildren, C and A, to leave the territory of the Union. Very pertinent to the circumstances of this case are the words of the Court of Justice in O & S:

> "50. When making that assessment, it must be taken into account that the mothers of the Union citizens hold permanent residence permits in the Member State in question, so that, in law, there is no obligation either for them or for the Union citizens dependent on them to leave the territory of that Member State or of the European Union as a whole.
>
> 51. For the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the custody of the sponsors' children and the fact that the children are part of reconstituted families are also relevant. First, since Ms S and Ms L have sole custody of the Union citizens concerned who are minors, a decision by them to leave the territory of the Member State of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present. Secondly, any decision to stay in the territory of that Member State in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers would have the effect of harming the relationship of the other children, who are third country nationals, with their biological fathers.
>
> 52. However, the mere fact that it might appear desirable, for economic reasons or in order to preserve the family unit in the territory of the Union, for members of a family consisting of third country nationals and a Union citizen who is a minor to be able to reside with that citizen in the territory of the Union in the Member State of which he is a national is not sufficient in itself to support the view that the Union citizen would be forced to leave the territory of the Union if such a right of residence were not granted (see, to that effect, *Dereci and Others*, paragraph 68).
>
> 53. In connection with the assessment, mentioned in paragraph 49 above, which it is for the referring court to carry out, that court must examine all the circumstances of the case in order to determine whether, in fact, the decisions refusing residence permits at issue in the main proceedings are liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizens concerned.

54. Whether the person for whom a right of residence is sought on the basis of family reunification lives together with the sponsor and the other family members is not decisive in that assessment, since it cannot be ruled out that some family members who are the subject of an application for family reunification may arrive in the Member State concerned separately from the rest of the family.

55. It should also be noted that, contrary to the submissions of the German and Italian Governments, while the principles stated in the *Ruiz Zambrano* judgment apply only in exceptional circumstances, it does not follow from the Court's case-law that their application is confined to situations in which there is a blood relationship between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived.

56. On the other hand, both the permanent right of residence of the mothers of the Union citizens concerned who are minors and the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are legally, financially or emotionally dependent must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status. As the Advocate General observes in point 44 of his Opinion, it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see *Ruiz Zambrano*, paragraphs 43 and 45, and *Dereci and Others*, paragraphs 65 to 67).

57. Subject to the verification which it is for the referring court to carry out, the information available to the Court appears to suggest that there might be no such dependency in the cases in the main proceedings.

58. In the light of the foregoing, it must be stated that Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain. "

33. In the same case the Court made clear in para 59 that even if applicants could not benefit from Zambrano principles, it remained that:

> "… that would be without prejudice to the question whether, on the basis of other criteria, inter alia by virtue of the right to the protection of family life, Mr O and Mr M could not be refused a right of residence. That question must be addressed in the framework of the provisions on the protection of fundamental rights which are applicable in each case (see *Dereci and Others*, paragraph 69)."

Article 8

34. Turning, therefore, to Article 8, Mr Chirico rightly points out deficiencies in the respondent's decision-making in respect of this case, in particular that the Entry Clearance Officer failed to consider the appellant's Article 8 circumstances at all. Nevertheless, in consequence of the grounds of appeal available to the appellant under s.84 of the Nationality, Immigration and Asylum Act 2002, he was able to have his Article 8 circumstances considered by the FtT and, by virtue of the set aside, he is now able to have us consider them as well.

35. It is manifest that the appellant has family life ties in the UK with his wife, his child K and also with his wife's oldest children, by her previous relationship.

Mrs Campbell

36. We accept that the couple had been in a relationship together since 2004, that they then cohabited up until the time he left the UK on 1 September 2008, that the presence of the appellant in Mrs Campbell's life until he left had a positive effect on her own well-being and kept her own difficulties with a drinking problem to a minimum, that they have had a child together (K) and that since the appellant left the UK the couple married in Jamaica and have maintained close contact with each other by telephone. Nevertheless, we consider it relevant that both parties knew when they commenced their relationship that the appellant was in the UK unlawfully with no expectation of being able to obtain lawful residence.

Ties with C and A

37. Dealing first with the appellant's ties with his other children, C and A, whilst the evidence does indicate that from some time in 2004 until his departure from the UK in September 2008, the appellant was living with their mother in the same household both of them continued to receive the love and care of their mother, as they had for all the years of their life beforehand. In the case of C, it is clear that although he had benefited from having the appellant as a father figure between 2004-2008, during this time he was developing independent interests outside the home and at the date of decision he was nearly 18. When giving oral evidence to the FtT he said he could not remember the last time he saw the appellant.

38. As regards A, the evidence (which includes her most recent witness statement of 14 January 2013) demonstrates that since the appellant began living with her mother, A came relatively soon to regard him as her stepfather. At the same time, her evidence does not suggest that prior to or since the appellant coming to live with her mother she has ever been without the love and care of her mother and there is no medical or welfare evidence to suggest that problems caused to her and her family by the appellant's departure have prevented her from pursuing studies. She made clear in her most recent statement that she feels that such problems have set back her efforts to obtain higher qualifications, but she had clearly persisted (and she noted that she was now studying for a BTEC Diploma in Business).

Ties with K

39. In relation to K, it is a premise in this case that neither K nor her mother is being expected to relocate to Jamaica, so the issue of what is in her best interests is confined to the extent to which her best interests are damaged by having her father prevented from being permitted to return to live with her and her mother and half-siblings in the UK. We think Mr Melvin goes too far in stating that there is no reliable evidence that she has suffered any detrimental effects as a result of the appellant's departure from the UK. We see no reason to doubt the family statements describing how she missed her father when he left and would be happier if she had two parents caring for her rather than one; nor do we see any reason to question A's description of her as a "stressed child". At the same time, she was only 2 when he left and there is certainly no medical or welfare evidence to show that her mother has not been able to ensure she is being brought up in a loving, caring environment. Whilst it may have been in her (and C and A's) best interests to have the appellant living with her again, his absence had not significantly impaired her welfare or interests.

Financial support

40. When considering the appellant's family life ties with his wife and her two children, it is to be noted that there is no evidence of the appellant ever having provided financial support to them, either before he left the UK or since back in Jamaica. They have never been economically dependent on him.

Private life

41. In relation to the appellant's private life ties formed in the UK (e.g. through friendships, work etc.) he has submitted little evidence of any such ties and in any event such ties have been developed at a time when he knew his immigration status was precarious.

42. From our earlier analysis of the issue of the lawfulness of the exclusion decision, it follows that we are satisfied that the decision was in

accordance with the law within the meaning of Article 8(2) of the Human Rights Convention.

43. As to the issue of the proportionality of the decision, we have already given consideration to the main factors in the appellant's favour. Turning to the weight to be attached to factors counting against the appellant, we do not have any independent evidence as to the likelihood that the appellant will re-offend, but we are prepared to accept that at the date of the decision the chances of that were low. There is no evidence that he has been involved in any criminal activities since he committed his offence in May 2008, either before he left the UK in September that year or since he has been back in Jamaica.

44. That is not to say, however, that his immigration history has been exemplary; quite the opposite. Not only did he overstay his visit visa and remain in the UK without lawful permission for an extended period, but he made no effort to regularise his position prior to his criminal offence. Mr Chirico has argued that when the appellant left in 2008 he was entitled to think that he would be free to return as soon as he could in the normal way. Back then, he pointed out, there were no re-entry laws for persons who left voluntarily. We reject his submission. Three matters concerning the circumstances in which the appellant left are of particular importance. We have mentioned each before but they need re-emphasising. First, he was plainly aware from the fact that he was recommended for deportation, that the authorities were considering whether to deport him. Second, at least by July 2008 he was informed that choosing voluntary departure (as he did) would not necessarily mean he would avoid being excluded after he left. Third, he left voluntarily. It follows that he cannot have been under any illusion that if he sought to come back his previous immigration history would prove an obstacle.

45. And so it proved. He was refused, without consideration of his ability to meet substantive requirements of the Immigration Rules, under para 320(6) which is a requirement mandating refusal of a person who is currently the subject of an exclusion decision.

46. The appellant made no attempt to challenge the exclusion decision itself prior to his refusal decision, even though he knew about it at least by January 2009. Further, in his appeal before the First-tier Tribunal, he did not pursue a challenge to it on that occasion.

47. We agree with the parties that in assessing the proportionality of a refusal of re-entry to a person who is subject to an exclusion decision after leaving voluntarily, it would be wrong to impose any time period during which he or she should not expect to be granted entry clearance to return. We note that even though the UKBA document referred to earlier, "Exclusion decisions and exclusion orders", refers to a non-statutory process of "revocation of exclusion decisions", no time limits are attached to this and, indeed, in the letter to the appellant of 23 July 2008 he was informed

that should he be excluded from the UK, “you can apply to have this revoked [at] any time”. It might be thought that (under immigration rules in force before 9 July 2012) paragraph 320(7A) and (7B) offer some guidelines by analogy, but they are both subject to the proviso in paragraph (7C) (inserted from 30 June 2008 and deleted from 9 July 2012) for persons who are close family members, spouses in particular, and in respect of whom there are no fixed time limits either.

48. At the same time, it will of course be important to consider what effect the passage of time has had on the circumstances of a person who seeks to return to the UK notwithstanding that there is an exclusion decision in place against him. It is apparent that even though in respect of such a person there is no two stage process such as one finds under the Immigration Rules in respect of persons who have been made the subject of a deportation order (first applying for revocation; second, applying for entry clearance) the respondent’s own letters to affected persons does refer to there being an analogous two stage process on an extra-statutory basis, such that those affected must first apply for revocation of the exclusion decision (as the appellant’s then representatives, IAS, did after the date of decision, in October 2010). In general terms, a person who has chosen to leave voluntarily might be expected to be in a better position than a person who has been the subject of a deportation order who is required by the Immigration Rules even if both are subject in this way to a two stage process. Equally, the existence of an exclusion decision reflects that the Secretary of State considers there is a weighty public interest in the person not being able to re-enter the UK in the normal way. As regards a person’s personal and family circumstances, the effect of the passage of time will be very fact-specific; in some cases it may show that family ties are now stronger, in other cases that they are now weaker, including for extraneous reasons (e.g. divorce). In terms of the public interest side of the balancing exercise, however, in general terms it might be felt that the longer the time, the less powerful become the State’s interest in continuing to exclude.

49. So far as concerns the appellant, we do not seek to specify what we think would be a reasonable period of time before his Article 8 circumstances might justify the respondent revoking his exclusion decision and considering any application by him for entry clearance in the normal way, save to note the obvious fact that three years have now elapsed since the date of decision under appeal in this case. Some of the evidence adduced before us deals with the ways in which the appellant has kept in contact with Mrs Campbell, their daughter and her stepchildren since the date of decision, but it has not been part of our task to assess that. We are confident, however, that in the circumstances of his case the period of only seventeen months between his departure from the UK in September 2008 and the date of refusal of entry clearance in February 2010, was significantly short of a period of time that rendered refusal of his case disproportionate.

50. For the above reasons:

The First-tier Tribunal materially erred in law and its decision is set aside.

We re-make the decision by dismissing the appellant's appeal.

Signed Date

Upper Tribunal Judge Storey