IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08078/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 9 July 2015

Determination & Reasons Promulgated
On 14 September 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE McGINTY

Between

MADALO CHINTALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe, Counsel instructed by Coventry Law Centre
For the Respondent: Mr D Mills, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Following a hearing on 18 November 2014 before First-tier Tribunal Judge Gurung-Thapa the appellant's appeal against a decision to remove her was dismissed. The decision to remove her dated 30 September 2014 followed an asylum claim which was refused.

2. The appellant's appeal against the decision of the First-tier Tribunal came before the Upper Tribunal on 25 February 2015. Following that hearing, Upper Tribunal Judge

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Kopieczek concluded that the First-tier Tribunal had erred in law in its decision concerning Article 8 of the ECHR. The First-tier Tribunal's decision was set aside, to be re-made in the Upper Tribunal. Thus, the appeal came before us.

3. The error of law decision which gives the further background to the appeal and the basis on which the re-making was to take place is set out as follows:

"DECISION AND DIRECTIONS

1. The appellant is a citizen of Malawi born on 21 August 1981. She made an asylum claim on 26 September 2012. The claim was refused and a decision made on 30 September 2014 to remove her.

2. The appellant's appeal against that decision came before First-tier Tribunal Judge Gurung-Thapa at a hearing on 18 November 2014. Following the hearing, in a determination promulgated on 9 December 2014, the appeal was dismissed on all grounds, that is to say asylum, humanitarian protection, human rights (Articles 2, 3 and 8 of the ECHR) and under the Immigration Rules. Permission to appeal was granted by a Judge of the First-tier Tribunal and thus the appeal comes before me.

3. The grounds of appeal to the Upper Tribunal on behalf of the appellant raise various issues including, but not limited to, the question of whether the First-tier Judge should have made a finding in terms of the paternity of the appellant's child who was born on 17 December 2013. The father of that child has indefinite leave to remain, apparently having been granted on 14 December 2004. It is asserted on behalf of the appellant that by operation of law, that is to say Section 1(1) of the British Nationality Act 1981, the child, whom I shall call 'J', is a British citizen. One of the contentions on behalf of the appellant is that the judge did not deal with the issue of J's paternity, simply confining herself to asking whether an application had been made for his registration as a British citizen and finding that there was no documentary evidence to suggest that the father had submitted such an application.

4. On behalf of the appellant reliance is placed on the Immigration Rules, in particular paragraph EX.1, which is not a freestanding paragraph but in conjunction with the other provisions of what I can describe as the parent route, and having regard to Section 117B of the Nationality, Immigration and Asylum Act 2002, would entitle the appellant to leave to remain, or at least the right not to be removed, because of her relationship with a British citizen child.

5. Judge Gurung-Thapa made a number of findings although in my judgement her findings were incomplete. No criticism is made of her decision in relation to the asylum grounds. The issue before me solely relates to her decision in relation to Article 8 of the ECHR.

6. There was evidence before the First-tier Judge from Mr Gurl Anderson Thompson, who is said to be J's father, but he did not attend to give evidence.

7. Judge Gurung-Thapa concluded that given the appellant's overall credibility she did not accept that the appellant was currently in a relationship with Mr Thompson. There was a birth certificate on which Mr

Thompson's name is recorded as the father but it was submitted on behalf of the respondent that the birth certificate does not prove paternity and the respondent did not accept that the appellant's child is a British citizen or settled in the UK.

8. At [70] of the determination Judge Gurung-Thapa stated that she did not accept that the appellant's child is a British citizen or is settled in the UK as claimed. She noted, as I have already indicated, that there was no documentary evidence before her to suggest that the child's father had submitted the application for a British passport, notwithstanding the assertion that he was in the process of doing so.

9. Mr Smart relied on the respondent's 'rule 24' response to the grounds of appeal. It was submitted that the judge did not need to make a finding on paternity, only to decide if the child was a British citizen. It was accepted that to some degree the judge had perhaps "missed crossing a't' or dotting an 'i'" but it was noted by the judge that the father was not living with the child. It was submitted that the judge was entitled to conclude at [70] that the evidence did not establish that J is a British citizen or settled in the UK.

My assessment

10. It seems to me to be clear from the determination that although the judge found that there was no relationship or family life between the appellant and Mr Thompson, there was no actual finding in relation to paternity.

11. In my judgement a finding on paternity was crucial for two reasons. Firstly, because it has a bearing on the citizenship of J. Secondly, it has a bearing on the extent to which it could be said to be proportionate to remove the appellant, whose child would probably necessarily go with her, and the extent to which that would affect any relationship between Mr Thompson and the child. Thus, I am satisfied that the First-tier judge erred in law in that there is no finding in relation to paternity.

12. I also take the view that [71] and [77] are inconsistent. At [71] the First-tier Judge stated that she did not find that the appellant's child will be required to leave the UK with the appellant if it were to be accepted that the child is a British citizen. She said that there was no evidence before her to suggest that J's father cannot and will not care for him and that it was the appellant's evidence that both of them parent well together. She concluded then, that she was not satisfied that J would be compelled to leave the UK to follow the appellant.

13. However, at [77] it is stated that J is almost 1 year old and the appellant claimed that she is J's carer. She went on to state that:

"If this were to be accepted then I find it reasonable to conclude that it is in the child's best interests to be with the mother and that it would be reasonable to expect the child to leave the UK with the appellant".

14. As I say, in my judgement the findings in these respects, at [71] and [77], are inconsistent. Either of those errors of law is sufficient to require the decision to be set aside.

15. The decision will have to be re-made. I indicated, without dissent from either party, that the re-making will take place in the Upper Tribunal and a further hearing will therefore be arranged.

16. The following Directions reflect those given orally to the parties at the hearing, with the addition of that at 3.

<u>DIRECTIONS</u>

1. Any further evidence to be relied on by either party is to be filed and served no later than 14 days before the next date of hearing.

2. If it is proposed to rely on any further evidence, the party concerned is to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

3. Except in so far as infected by error of law, the findings of fact made by the First-tier Tribunal are to stand. The parties must be in a position at the next hearing to make submissions as to what findings are to be preserved."

4. Mr Pipe indicated that there was no oral evidence to be called on behalf of the appellant although there was further evidence in the form of DNA test results. We summarise the submissions below.

Submissions

5. On behalf of the respondent Mr Mills accepted that the DNA evidence established that the appellant's child, J, born on 17 December 2013, is the son of Mr Gurl Anderson Thompson, who was granted indefinite leave to remain on 14 December 2004.

6. Mr Mills submitted that the question to be answered with reference to paragraph EX.1 of the Immigration Rules and Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, ("the 2002 Act") is whether it would be reasonable to expect J to leave the UK with the appellant.

7. Taking into account Home Office guidance, the appellant's poor immigration history is relevant. Furthermore, the finding at [71] of the First-tier Tribunal's determination that there was no evidence that J's father could not or would not care for the child is a finding that is to stand.

8. Although the appellant's skeleton argument relies on the decision in *Sanade and others (British children – <u>Zambrano</u> – <u>Dereci</u>)* [2012] UKUT 00048 (IAC) in support of the proposition that the Secretary of State could not require the appellant's child to leave the UK, here the child is not required to leave because he can stay with his father. It is the parents' choice as to whether or not the child leaves. Although there was a concession on behalf of the respondent in *Sanade* on this issue, that is not now the respondent's position. The rules now envisage circumstances where it would be reasonable to expect a child to leave the UK, and EX.1 expressly includes such a situation.

9. With reference to paragraph 11.2.3 of the guidance, the relatively small window the respondent can rely on is the appellant's very poor immigration history.

10. So far as that is concerned, in brief, she arrived in the UK in 2003 as a visitor. In 2011 she made applications for leave to remain which were rejected. She had therefore overstayed by several years. The asylum claim that she made in September 2012 was rejected as a fabrication by the First-tier Tribunal. She had therefore, sought leave to remain by deception.

11. Her child is very young and has no particular ties outside the home and her mother. It is reasonable to expect the child to leave the UK.

12. On behalf of the appellant it was submitted that paragraphs E-LTRPT. 2.3. and 2.4., the eligibility criteria, are met. Thus, one is able to move straight to EX.1. This was accepted on behalf of the respondent.

13. So far as [71] of the First-tier's determination is concerned, the findings in that paragraph are in fact infected by the error of law since the error of law decision itself concluded that [71] and [77] of the determination were inconsistent. Mr Pipe submitted that it would not be reasonable for the child's father to take care of him. They do not live together. He is a coach driver and works away from home for long hours. The child is 18 months old.

14. So far as *Sanade* is concerned, the respondent's own policy document underlines the concession that was made in *Sanade*, demonstrating that the concession was correct. On page 55 of the guidance, the examples of circumstances in which it may not be appropriate to grant leave to the primary carer or the parent relate to circumstances where separation may be justified. It does not indicate that it would be appropriate for the child to be required to leave the EU. In any event, the child in this case is British by birth and has regular contact with his father. We were referred to the evidence before the First-tier Tribunal in relation to Mr Thompson's evidence before the First-tier Tribunal.

15. The decision in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 indicates that the issue in relation to the child should not be determined by his mother's immigration history. It is true that the appellant had overstayed and had made a claim for asylum based on being trafficked and ill-treated. However, what is said in the guidance about circumstances which could permit separation from a parent, are merely examples, such as the very poor immigration history. Furthermore, as was explained in *Mahad v Entry Clearance Officer* [2009] UKSC 16, the guidance could not be used as a way of interpreting EX.1.

16. It was then submitted that a failure to follow the guidance, being a policy, would mean that the decision was not in accordance with the law. That would allow for the possibility for the appeal to be allowed outright where the respondent's policy had not been followed. However, we were not invited to take that course of action, it being submitted that the true basis of the argument in favour of the appellant related to EX.1 and S.117B(6).

Our assessment

17. It is as well to set out the legislative framework within which our decision must be made. This involves, principally, Section EX.1. of Appendix FM of the Immigration Rules. It provides as follows:

"EX.1. This paragraph applies if -

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who –

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner."

18. The relevant provisions of the 2002 Act are ss.117A-B. They provide as follows:

"117A: Application of this Part

(1) This part applies where a court or Tribunal is required to determine whether a decision made under the Immigration Act –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under Section 6 of the Human Rights Act 1998.

(2) In considering the public interest question the court or Tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in Section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C.

(3) In sub-Section (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B: Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

That is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

19. It is accepted between the parties that the appellant has a genuine and subsisting relationship with a child who comes within the provisions of EX.1.1. J is under the age of 18 years, is in the UK, and is a British citizen. Aside from his father having indefinite leave to remain, it is said on behalf of the appellant that on 3 March 2015 J was issued with a British passport. That is not disputed.

20. It was similarly agreed between the parties that the question to be determined is whether it would be reasonable to expect J to leave the UK.

21. In considering whether it would be reasonable to expect J to leave the UK, on behalf of the appellant the decision in *Sanade* is relied on. Although we were not referred to the specific paragraphs of that decision, we understand the following paragraphs to be those from which, on the appellant's behalf, assistance can be derived. They are [93]-[95]. We set them out as follows:

"93. Finally, we note that a further question on which we asked for the respondent's assistance was in these terms:

'Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?'

94. To this Mr Devereux replied on 24 November 2011:

'We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the European Convention on Human Rights'.

95. We shall take this helpful submission into account when we consider the application of Article 8 to each appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."

22. Mr Mills submitted that whatever may have been said in *Sanade* by way of apparent concession on behalf of the respondent, no longer reflects the Secretary of State's position, as reflected in the Immigration Rules and s.117B(6). Mr Pipe however, relies on the guidance in relation to Appendix FM entitled "Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0(b) Family Life (as a Partner or Parent) and Private Life: 10-Year Routes" dated April 2015, an extract from which was provided to us. We set out paragraph 11.2.3 as follows:

"11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?

Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

…

Where a decision to refuse the application would require a parent or primary carer to return to a country **outside the EU**, the case must always be assessed on

the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer."

23. It was submitted that contrary to the submissions made on behalf of the respondent before us, the respondent's own guidance mirrors exactly the concession made on behalf of the respondent in *Sanade* at [94].

24. Notwithstanding the reliance on behalf of the appellant on the case of *Sanade* we are not inclined to accept as a general proposition that there cannot be circumstances in which it would be reasonable to expect a British citizen child to leave the UK. In the first place, that such an eventuality can be contemplated is evident not only from the Immigration Rules (EX.1) but also in primary legislation (s.117B(6)). In the second place, the proposition that it would or would not be *reasonable* to expect a British citizen child to leave the UK is different from a *requirement* for the child to leave, which would be contrary to domestic and European law.

25. It seems to us that this is an issue that should properly to be determined within a wider consideration of Article 8, if necessary, once consideration has been given to the Article 8 Immigration Rules.

26. In any event, in the context of this appeal, we do not consider it necessary to resolve any apparent conflict between the requirements of the Immigration Rules in EX.1., s.117B(6) and the decision in *Sanade*, for reasons that will become apparent in our conclusions.

27. The assessment under EX.1 of whether it would be reasonable to expect the appellant's child to leave the UK involves an assessment of various factors, including the public interest. Before any consideration of the public interest, or other factors, it is necessary to make an assessment of what is in the J's best interests. That best interests consideration is to be divorced from any consideration of the public interest. It must be a self-contained assessment of where those best interests lie.

28. We consider it uncontroversial to conclude that J's best interests lie with being with the appellant. The appellant is J's primary carer, a matter not disputed by the respondent. J is just 18 months old.

29. The evidence from J's father is summarised at [39] of the First-tier Judge's determination. The evidence is that he works as a coach driver and is often away for a week or more at a time, otherwise seeing J almost every day. The evidence from Mr Thompson's witness statement is that they are very close and that he buys things for J such as clothes, shoes, food and so forth. His evidence was that his job made it impossible for him to be a sole parent for J. He and the appellant are in a relationship but not ready fully to commit to each other. This is in the appellant's witness statement.

30. We note that at [67] of Judge Gurung-Thapa's determination it is recorded that the appellant's representative accepted that her relationship with her partner is "sketchy". In the same paragraph the judge said that in the light of the appellant's

overall (lack of) credibility she did not accept that she was then in a relationship with J's father. That finding is not infected by the error of law and there is no evidence before us which indicates that the position is now any different.

31. Mr Pipe, correctly in our view, suggested that the findings made at [71] could no longer stand. There Judge Gurung-Thapa concluded that there was no evidence to suggest that J's father could not and would not care for J. The conclusion was that in those circumstances J would not be compelled to leave the UK with the appellant.

32. No submissions were made to us on behalf of the respondent in terms of suggesting that J does not have a relationship with his father. Although there was no oral evidence from Mr Thompson before the First-tier Tribunal, there was a letter from him referring to the closeness of his relationship with J, as well as with the appellant.

33. It is difficult on the basis of the evidence before us to make an assessment of the extent to which Mr Thompson is involved in J's life. His claim that he is in a relationship with the appellant was rejected by the First-tier Tribunal and even the appellant's representative at that hearing conceded that the evidence of the relationship was "sketchy", by which we infer that it was accepted that the evidence was not strong. Nevertheless, we must make the assessment on the basis of the evidence before us.

34. Since the determination of the First-tier Tribunal J has been registered as a British citizen. We were not informed of the process involved in such registration but it is reasonable to conclude that co-operation from J's father would have been necessary. Although claims by the appellant and Mr Thompson that they are in a relationship were not accepted, there is nothing in the evidence to indicate, for example, absence of contact between Mr Thompson and J or an abdication of any responsibility by him for J.

35. We are satisfied that the evidence is sufficient to enable us to conclude that J's best interests lie in maintaining contact with his father, and the opportunity to strengthen and develop their relationship.

36. Having concluded therefore, that it is in J's best interests to be with his mother (see [27] above, and to maintain and develop his relationship with his father, this inevitably means that J's best interests are to remain in the UK. That is of course, aside from the very important consideration of his British citizenship, with all that that entails.

37. Having identified where J's best interests lie, we move on to consider whether it could be said to be reasonable to expect him to leave the UK. It seems to us that that question can be answered without reference to the respondent's guidance. The guidance does however, reinforce our view that it would not be reasonable to expect J to leave the UK.

38. Although J's best interests are a primary consideration, they are of course not the only consideration. British citizenship is not a "trump card". It is true that the

appellant has had no lawful immigration status for many years. It is also true to say that the First-tier Judge found, in effect, that her asylum claim had been fabricated. There was no challenge to her conclusions in this respect.

39. We do consider that the appellant's immigration history is a poor one, consisting of overstaying and making a false asylum claim. As against that, her child is a British citizen who has a relationship with his father. It is not suggested on behalf of the respondent that Mr Thompson would be able to leave the UK and live in Malawi with the appellant. Apart from anything else, the First-tier Judge found that the appellant and Mr Thompson were not in a relationship. Secondly, Mr Thompson has employment in the UK. The appellant's evidence before the First-tier Tribunal recorded at [66] is that Mr Thompson has a child aged three or four from a previous relationship, although there is no evidence that he is involved with that child's life. Nevertheless, in order for the assessment to be made that it would be reasonable for J to leave the UK with the appellant, the conclusion would have to be reached that it would be reasonable for him to forego the opportunity of maintaining and developing a relationship with his father. It would also involve the conclusion that it would be right to deprive him of the rights and advantages of British citizenship until be was of an age when he would be able to exercise his own judgement or freedom to return to the UK. We do not consider that either of those propositions is tenable.

40. Although we come to that view without reference to the respondent's guidance on Appendix FM, at 11.2.3 which we have quoted above, as we have said it does reinforce our conclusion.

41. The guidance goes on to refer to cases where it may be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU. It states that circumstances envisaged "could cover amongst others", criminality falling below the threshold set out in paragraph 398 of the Immigration Rules or a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

42. Clearly therefore, the guidance itself is predicated on the basis that it should in principle be unreasonable to expect a British citizen child to leave the EU with the primary carer.

43. However, we do not consider that the guidance represents any sort of policy, which a failure to follow may result in a decision being found to be not in accordance with the law.

44. The essential question arising in this case requires an assessment only of whether it would be reasonable to expect J to leave the UK. For the reasons we have given it would not. That does not involve any assessment of whether J's father would be able to care for him.

45. However, in case it could be said that because Mr Thompson could care for J there is no expectation within EX.1 that J should leave the UK, we have considered whether the evidence establishes that he could care for J.

46. As we have already indicated, there was no dispute as to the appellant's evidence that Mr Thompson's employment requires him to work away from home for periods of days at a time. That in itself would seem to us to rule out his potential as a full-time carer for J. There is nothing to indicate that there is any other person who could assist with J's care whilst Mr Thompson does his job. There is simply no basis for suggesting that he could be J's full-time carer.

47. Apart from anything else, there would have to be some basis from which to conclude that it would be appropriate and lawful to separate J from his mother. Even on the basis of the respondent's own guidance, we cannot see that that is a sustainable proposition. Mr Mills himself described the respondent's case in this respect as the "relatively small window" of the appellant's very poor immigration history. In our judgement the case for separation between J and his mother is vanishingly small.

48. In these circumstances, we are satisfied that the appellant has established that EX.1 does apply and that the appeal therefore must succeed under the Immigration Rules with reference to Appendix FM. Thus, we do not need to go on to consider Article 8 in its wider context.

49. It was accepted on behalf of the respondent before us that the outcome of the appeal under EX.1 and within a consideration of s.117A-B of the 2002 Act would be the same.

Decision

50. The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision having been set aside, we re-make the decision, allowing the appeal under the Immigration Rules

Upper Tribunal Judge Kopieczek 7/09/15