Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06728/2014
IA/08097/2014
IA/08098/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 16 December 2014	**On 21 January 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

LLB
KMcC
ELC
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Mr E Tuburu of Ty Arian Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal

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(Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Doyle) allowing the appellants' appeals under Article 8 of the ECHR against refusals to extend their leave to remain in the UK and to remove them under s.47 of the Immigration, Asylum and Nationality Act 2006.

3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

4. The appellants are citizens of the USA. The first appellant is the mother of the second and third appellants. The three appellants were born respectively on 26 January 1983, 22 February 2007 and 26 January 2006. The second and third appellants are therefore 7 and 8 years old respectively.

5. The first appellant entered the UK in September 2006 with a student visa and her leave was extended on a number of occasions until 2009. By that time, the first appellant had entered into a relationship with a British citizen. As a result, in 2009 she was granted leave to remain as the unmarried partner of that British citizen.

6. When the first appellant came to the UK in September 2006 she was accompanied by the third appellant who was then aged 8 months old. The second appellant was born in the UK in February 2007 and has lived in the UK since that time.

7. The first appellant had a third child whilst living in the UK, ("KGS") who was born on 28 March 2009. He is a British citizen.

8. In September 2012, the first appellant's relationship with her British partner, who is the father of KGS, ended.

9. In December 2012, the three appellants, together with KGS, travelled to France for a holiday. On 1 January 2013, they sought re-entry to the UK. In doing so, the first appellant told an Immigration Officer that her relationship with KGS's father had come to an end. On the basis of that information, the leave of each of the appellants was cancelled and each was granted leave to enter as a visitor for 6 months until 1 January 2013.

10. On 30 May 2013, the three appellants applied for limited leave to remain in the UK. The first appellant relied on her relationship with KGS (who is a British citizen) and the second and third appellants relied on their relationship with the first appellant.

11. On 16 January 2014, the Secretary of State refused each of the appellants' applications. As regards the first appellant, she could not meet the eligibility requirements in Appendix FM, R-LTRPT3.1 as she had leave as "as visitor". Further, she could not meet the requirements of paragraph 276ADE based upon her private life in the UK as she had not been in the UK for at least 20 years and had not lost all ties with her home country. Finally, the Secretary of State considered that there were no "exceptional circumstances" to justify the grant of leave under Article 8 outside the Rules.

12. In relation to the second and third appellants, their applications under Appendix FM failed because the first appellant's application had been refused under Appendix FM. Further, neither appellant had been in the UK for 7 continuous years at the date of application and the Secretary of State considered that it would not be unreasonable to expect the second and third appellants to leave the UK as part of a family unit.

The First-tier Tribunal's Decision

13. The appellants appealed to the First-tier Tribunal.

14. Judge Doyle concluded that none of the appellants could meet the requirements of Appendix FM or para 276ADE. Those findings were not challenged before me. However, Judge Doyle allowed each of the appellants' appeals under Article 8.

15. The Judge's reasoning is set out in a number of sub-paragraphs at para 15(a)-(n). His decision rested, as he recognised in paragraph 15(a), "almost entirely on the welfare of the first appellant's youngest child"- that is KGS. It was accepted that there was a genuine subsisting relationship between the first appellant and all her children (i.e. the second and third appellants and KGS). At paragraph 15(b) Judge Doyle stated:

> "Family life exists because the appellants live together. The respondent argues that family life and private life can continue in the USA. The essential flaw with the respondent's argument is that for family life to continue out-with the UK, it would be necessary for a British citizen to turn his back on the UK and live in the USA. I do not know what is required of a British citizen to secure the right to reside in the USA. The respondent does not appear to have considered that, and certainly offers no evidence of what is required."

16. At paragraph 15(d) Judge Doyle concluded that:

> "The harsh fact is that implementation of the respondent's decision is likely to force separation on the appellants and the first appellant's youngest child….. "

17. At paragraph 15(h), Judge Doyle referred to and cited the well-known decision in ZH (Tanzania) v SSHD [2011] UKSC 4 and s.55 of the Borders, Citizenship and Immigration Act 2009 which requires that a child's best interests are taken into account as a primary consideration.

18. At paragraph 15(i) and (j) Judge Doyle quoted from the respondent's guidance and the headnote of the Upper Tribunal's decision in Sanade and Others (British Children – Zambrano – Dereci) [2012] UKUT 0048 (IAC) as follows:

> "(i) It is not disputed that the first appellant's youngest child is a British citizen. The respondent's own guidance states (numbered paragraph 13) "*save in cases involving criminality, it will not be possible to take a decision in relation to the parent of a British citizen child where the effect of that decision would be to force the British citizen child to leave the EU – This is consistent with the ECJ judgement in Zambrano*".
>
> (j) In **Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)** the Tribunal held that **Case C-34/09 Ruiz Zambrano, BAILII: [2011] EUECJ C-34/09** "*now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.* "

19. At paragraph 15(g), having cited the House of Lords' decision if Beoku-Betts v SSHD [2008] UKHL 38, Judge Doyle noted that he was required to take into account not only the rights of the appellants and KGS but also those of the first appellant's mother and sister who were British citizens living in the UK. He said this:

> "...I weigh those interests against the need for the respondent to preserve fair and effective immigration control and to keep a watchful eye on the fragile economy of this country. I find that there is no reason why a British citizen should be forced out of the UK; I can only come to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for family life, not just for the appellants, but for their close British citizen relatives."

20. That conclusion is then mirrored in the Judge's conclusions at paras 15(m) and (n) as follows:

> "(m) The appellants might be able to make an application to re-enter the UK from abroad. There is no guarantee that the appellants would be granted entry clearance when they apply to re-enter the country from abroad. The respondent's

decision might separate the first appellant from her young son.

(n) I therefore find that article 8 is engaged. I find that consideration of the first appellant's youngest child's welfare forms clear arguable grounds for consideration of this case out-with the Rules. The rights of the appellants in terms of Article 8 would be breached by the implementation of the respondent's decision. I find that the breach amounts to a disproportionate interference with the appellants' right to respect for family life and private life."

The Appeal to the Upper Tribunal

21. The Secretary of State sought permission to appeal the First-tier Tribunal's decision on a number of grounds. Permission was granted by the First-tier Tribunal (Judge Saffer) on 29 September 2014 on the basis:

> "5… It is arguable that the Judge erred in his assertion that it was for the Respondent to establish whether the British child could enter the USA. In addition it appears that little consideration has been given to any interim welfare arrangements that may be put in place for the British child (whose grandparents live here) during any period whilst the appellants apply for entry clearance if they are removed."

22. In his oral submissions, Mr Richards, who represented the Secretary of State submitted that the Judge had placed the burden of proving that KGS could enter the USA upon the respondent and that was an error. It was for the appellant to produce any evidence.

23. Secondly, Mr Richards submitted that the Judge had, in the absence of such evidence, "leapt to the conclusion" that there was a breach of Article 8 and had made no attempt to engage in the balancing exercise of weighing the interests of the relevant parties against the need for fair and effective immigration control given that the appellants could not succeed under the Immigration Rules.

24. On behalf of the appellants, Mr Tuburu submitted that there was no error of law as it was for the Secretary of State to prove that KGS could reside in the USA. In any event, he submitted that any error of law was immaterial. He submitted that on the basis of Sanade, applying Zambrano, it was simply unreasonable for KGS to relocate to the USA (in other words move outside the EU) with the appellants and that made the decision to remove the appellants disproportionate. He accepted that it was necessary to apply a "reasonableness" test in leaving the UK.

Discussion

25. Whilst the Judge's determination could, perhaps, have been more clearly worded I have concluded that the decision does not contain any material error of law.

26. First, I accept Mr Richards' submission that it was not for the respondent to establish that KGS could secure entry to the USA. That was a matter for the appellants (as in all other matters) to establish the facts upon which they relied.

27. Secondly, however, that error was not material to the decision. The circumstances of KGS were such that the removal of the first appellant was inevitably disproportionate and a breach of Article 8. In those circumstances, and it was not suggested otherwise before me, removal of the second and third appellants would be equally disproportionate.

28. KGS is a British citizen. In Sanade, the Upper Tribunal stated at point 5 in the headnote:

> "Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

29. That is the passage set out by Judge Doyle at paragraph 15(j) of his determination.

30. The Upper Tribunal in Sanade also made clear at point 6 of the headnote that:

> "The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union."

31. The first appellant is KGS' primary carer. The first appellant's removal would force KGS to leave the EU to be with his mother. The circumstances, therefore, fell squarely within the situation contemplated in Sanade.

32. Indeed, as the Judge's quotation in paragraph 15(i) illustrates, that is indeed the Secretary of State's position as set out in her guidance. For example, the IDI "Family Migration: Appendix FM Section 1.0B: Family Life (as a Partner or Parent) and Private Life: 10-year Roots" (November 2014) states at 11.23 under the rubric "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 citizen child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgement in Zambrano."

33. The Guidance then goes on:

> "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."

34. The consequence is that:

> "In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship."

35. The Guidance then goes on to deal with the exception to that approach:

> "It may, however, 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 the separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> - Criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
>
> - A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.
>
> In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. ...."

36. There is no suggestion in these appeals that the exceptions could apply. There is no question of any criminality by the appellant or that they have a poor, let alone a very poor, immigration history. They have always been in the UK with leave and, indeed, it was the first appellant's honesty on returning to the UK on 1 January 2013 that led to her leave as a partner being cancelled at port.

37. The effect of the respondent's own guidance is that it would be unreasonable to expect KGS to leave the UK which is, in effect, precisely what Judge Doyle found. The effect of removal would be an inevitable separation if the first appellant were required to leave the UK and live in the USA with the second and third appellants.

38. Given that this appeal was determined on 26 August 2014, it is perhaps curious that the Judge does not appear to have been referred to the new Part 5A of the Nationality, Immigration and Asylum Act 2002 introduced with effect from 28 July 2014 by s.19 of the Immigration Act 2014. The provisions in section 117A, 117B and 117D applied to these appeals (see YM (Uganda) v SSHD [2014] EWCA Civ 1292).

39. Section 117A applies Part 5A to a consideration of the "public interest question", namely whether any interference with a person's right to respect for private and family life is justified under Article 8.2 (see s.117A(1)-(3)). In considering the public interest question, the court must, in the context of these decisions :

> "117A(2) … (in particular) have regard –
>
> (a) in all cases, to the considerations listed in section 117B,…"

40. Pertinent to these appeals is section 117B(6) which provides that:

> "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."

41. A "qualifying child" means, for these purposes, a child under the age of 18 who is a British citizen (see s.117D(1)). KGS is, therefore, a "qualifying child". It is accepted that the first appellant has a "genuine and subsisting parental relationship" with KGS.

42. Section 117B(6) states that: "The public interest does not require the person's removal" where that genuine and subsisting parental relationship exists and "it would not be reasonable to expect the child to leave the United Kingdom" (my emphasis).

43. As the Judge in effect found, applying both the respondent's guidance and Sanade and Others, it would not be reasonable to expect KGS to "leave" the UK. In those circumstances, the public interest simply does not require the removal of the first appellant and by implication of course the second and third appellants who are her dependent children. It was, therefore, irrelevant whether KGS could enter the USA or not. It is simply not reasonable to expect him to leave the UK to live in America even if he could enter the USA.

44. In my judgement, Judge Doyle has, in effect, applied the underlying policy of s.117B(6) and reached an entirely lawful decision consistent with the respondent's own policy, the EU jurisprudence and the legislative policy reflected in s.117B(6).

45. Further, I reject Mr Richards' submission that the Judge "leapt to the conclusion" that Article 8 was breached. Apart from failing to refer to s.117B, to which he does not appear to have been referred by either representative, the Judge grasped the essential legal framework. He correctly saw the interests of KGS as being the crucial factor in the appeal and he referred to the respondent's own guidance and the EU jurisprudence that it would not be reasonable to expect a British citizen child (absent cases of criminality or the like) to relocate outside the EU. He also had regard to the interests of the first appellant's family in the UK which, as his recitation of the facts at paras 11(c)-(e) shows, includes her mother who is married to a British citizen and lives in the UK and is herself a British citizen. Her two younger siblings are in the UK. One is a British citizen and the other has ILR and is married to a British citizen and has children who are British citizens. Although the first appellant has grandparents in the USA, two aunties and two uncles and some younger cousins, the core of her close and immediate family reside in the UK either as British citizens or with ILR. These were, as the Judge recognised, further powerful factors supporting his conclusion that the removal of the appellants would be a disproportionate interference with their and their close relatives' family life in the UK.

46. For these reasons, the First-tier Tribunal did not materially err in law in allowing each of the appellants' appeals under Article 8 of the ECHR.

47. Thus, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 20/01/2015