Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17910/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 14 July 2015 **On 27 August 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL K DRABU CBE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

And

MR ADIL SHAH
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms A Fujiwala, Senior Presenting Officer
For the Respondent: Mr T Khan of Lincolns Solicitors.

DECISION AND REASONS

1. The respondent is a national of Pakistan and his given date of birth is 2 September 1986. His application made on 12 February 2013 for leave to remain under "EEA – Zambrano- Direct Family Member" was refused by the Secretary of State for reasons given in her letter of 28 March 2014. Judge of the First Tier Tribunal Hussain at Richmond heard the respondent's appeal against the decision on 27 November 2014. After receiving documentary evidence and hearing oral evidence from the respondent and his spouse Judge Hussain allowed the appeal for reasons given in his written determination dated 31 December 2014.

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2. The Secretary of State sought permission to appeal to Upper Tribunal on 5 January 2015. Judge Chambers, a Judge of the First Tier Tribunal refused to grant permission for reasons given I his decision dated 10 February 2015.

3. On 25 February 2015, the Secretary of State renewed her application before Upper Tribunal. Upper Tribunal Judge Clive Lane granted permission stating in his decision dated 26 May 2015, "It is arguable that the First-tier Tribunal Judge erred in law that, only because her mother works, the child would be "unable" to reside in the United Kingdom, if the appellant was required to leave."

4. At the hearing of the appeal Ms Fujiwala argued that Judge Hussain had applied an incorrect test and asked me to look with care at the legal principles set out in the decisions in MA & SM, making particular reference to Paragraph 41 thereof. She submitted that the child of the appellant would not be compelled to leave the United Kingdom and if he were to leave, that would be because of the choice of the parents. She asked that I should also look at the decision I Hines (paragraphs 23 and 24) in so far as the Judge had given no consideration to the sponsor reducing her work hours to take care of the child. She said that Judge Hussain should have dismissed the appeal.

5. In response Mr Khan for the appellant argued that the findings made by Judge Hussain were perfectly correct and sustainable. He drew my particular attention to Paragraphs 11, 12 and 15 of the determination. He relied on the principles set out in Sanada. He submitted that the decision of Judge Hussain does not disclose any error of law and it should not be disturbed.

6. Ms Fujiwala asked me to note by way of clarification that the impugned decision does not require the mother and child to leave the United Kingdom.

7. I have given close and careful consideration to the grounds of appeal upon which the appellant relied in its application for permission to appeal made before the First-tier Tribunal and which was refused and the grounds advanced before the Upper Tribunal, which led Judge Clive Lane to grant permission. I have also studied the determination of Judge Hussain carefully noting the findings of fact made by him and which I note have not been challenged in the proceedings before the Upper Tribunal. The findings made by Judge Hussain are well reasoned and fully supported by the evidence before him. The Judge correctly identified the issues before him. He found that the appellant was indeed the primary carer of the infant child. Quite properly taking account of the "happily married relationship" the Judge noted that when the sponsor was asked what would happen if the appellant was not allowed to stay in this country, she said, "they would have to move as a family." The Judge accepted the sincerity of that statement. The Judge then went on to consider whether the child who was at the time less than two years old would have to move to Pakistan, the Judge said, "Bearing in mind that the child is only one and

a half years old and bearing in mind that the best interests of children is to remain with both their parents, it seems to me the conclusion inescapable that the child would have to leave with his parents."

8. I note that Judge Chambers, a Judge of the First-tier Tribunal in refusing permission to appeal said in his decision, "The Judge considered the Regulation (paragraph 11), the circumstances of the child and its parents (paragraphs 12 -18) and took into account the options for a child who was only one and a half years old. It is not in such circumstances surprising that the Judge on the facts reached such a conclusion stating it was an inescapable conclusion."

9. I also note that the reason given by Judge Clive Lane for granting permission. Having looked at all the evidence that was before Judge Hussain, there was no way he could have made a sustainable finding that the child would be able to reside in the United Kingdom if the appellant was required to leave. Judge Hussain had heard oral evidence from the mother of the child as well as the appellant and he found the evidence of both witnesses credible. There was no evidence before him that the child could be taken care of by anyone other than the parents and primarily by the appellant. The appellant (Secretary of State) was represented at the hearing before Judge Hussain and had the opportunity to probe the two witnesses on what network of support, if any, they had in the United Kingdom. In the absence of such evidence the Judge could not have speculated as to whether the child could be looked after by someone other than his father and/mother. The criticism levelled against Judge Hussain that "he failed to give consideration to the sponsor reducing her work hours" is misguided and misconceived given that the evidence before him was that under the existing work arrangements of the mother of the child when the evidence before him was "She has to work the hours she has chosen in order to bring in sufficient funds."

10. I have studied paragraph 56 of the Upper Tribunal decision in **MA and SM (Zimbrano: EU children outside EU Iran [2013] UKUT 00380).** I unhesitatingly reject the submission made by Ms Fujiwala that in determining this appeal Judge Hussain applied the incorrect legal test. Of course the child would leave the United Kingdom because the parents would have no option but to take him with them. He is of a very tender age and needs constant care and attention. The removal of the appellant would make it impossible for the mother to take care of the infant without recourse to public funds. That cannot and is not in the public interest nor is in the best interests of the child to be separated from his father in the circumstances of this case.

11. I have also taken into consideration the contents of paragraphs 23 and 24 of the decision in **Hines [2014] EWCA Civ 660** upon which Ms Fujiwala placed reliance. I see nothing in the Court of Appeal decision that makes the decision made by Judge Hussain or his reasoning in support of his decision to allow the appeal, even arguably flawed let alone in material error of law. If anything the contents of the two paragraphs support the

decision of Judge Hussain. At the end of the day decisions in all cases are made based on the facts of the case in question as was the decision made by Judge Hussain in this case.

12. For the sake of completeness I should record that I have taken due account of the written skeleton argument of the respondent wherein reference has been made to the decision in **Sanade (British Children – Zambrano – Dereci) [2012] UKUT 00048 (IAC).**

13. In my judgement the decision of Judge Hussain was not in material error of law and therefore his decision to allow the appeal must stand as must his order on Fee Award.

Judge K Drabu CBE
Deputy Judge of the Upper Tribunal.

24 August 2015