Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52107/2013

THE IMMIGRATION ACTS

Heard at: Manchester
On: 3rd July 2015

Decision & Reasons Promulgated
On: 13th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

CG
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Timson, Counsel instructed by HSK Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Trinidad and Tobago and his date of birth is 30th August 1972. He appeals with permission[1] against the decision of the First-tier Tribunal (Judge Levin) to dismiss his appeal against a refusal to grant him leave to enter the United Kingdom.

[1] Permission was refused by First-tier Tribunal Judge JM Holmes on the 27th October 2014 but was granted upon renewed application by Upper Tribunal Judge Storey on the 18th December 2014.

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Case History

2. Following the Error of Law hearing on the 12th March 2015 the parties agreed that the history of this appeal is as follows.

3. The Appellant arrived in the United Kingdom on the 22nd November 2012. He sought leave to enter as a visitor; as a national of Trinidad & Tobago he did not require a visa. Following an interview and bag search the Immigration Officer at Gatwick was not satisfied that he was a genuine visitor who intended to leave the UK at the end of the period stated by him. The fact that the Appellant had, on an earlier occasion, overstayed by approximately ten days and the fact that he was coming to be with his pregnant girlfriend led the officer to conclude that he was in fact coming for the purpose of settling in the UK. The Appellant was therefore refused leave to enter but was granted temporary admission to enable him to pursue his appeal from within the UK. Removal directions were subsequently made which were challenged by way of judicial review and the matter was settled by consent with the Respondent agreeing to substantively consider the Appellant's human rights. The decision to refuse leave to enter was served on the 19th October 2013 alongside a reasoned refusal letter.

4. When the matter came before the First-tier Tribunal the decision under appeal was therefore a decision to refuse leave to enter. The grounds of appeal were human rights, and in particular the Appellant's contention that refusal to grant him leave to enter would be a disproportionate interference with his Article 8 family life with his British wife (he has now married his girlfriend), their two British children and his three British stepchildren.

The Decision of the First-tier Tribunal

5. In a detailed determination the First-tier Tribunal accepted and found as fact that the Appellant was in a genuine and subsisting relationship with his British wife and that he had a parental relationship with his two biological children and three stepchildren[2]. All five children are British[3]. It was accepted that the Appellant's wife is HIV + and that she is under the care of a multidisciplinary team at Manchester General Hospital[4]. It was expressly found that the Appellant has "far stronger" ties to the UK than he does to Trinidad and Tobago[5]. It was also found that the family are presently entirely reliant on benefits[6]. The Appellant's wife is in receipt, *inter alia*, of DLA. That was why, the Tribunal concluded, the Appellant had chosen to seek entry as a visitor rather than as a spouse, when in fact his intention all along was settlement. The

[2] Paragraph 16
[3] Paragraph 19
[4] Paragraph 17
[5] Paragraph 31
[6] Paragraph 20

determination finds that the Immigration Officer was correct to have refused entry as a visitor[7].

6. The determination goes on to consider whether the Appellant can meet the requirements of Appendix FM[8]:

> "I find that the Appellant does not satisfy the immigration status requirements of section E-LTRP.2.1 of Appendix FM for leave to remain as a partner or those of section E-LTRP.3.1 for leave to remain as a parent, both of which require that the applicant must not be in the UK as a visitor or with valid leave granted for a period of less than six months unless that leave was as a fiancé or proposed civil partner, neither of which applies to the Appellant. It follows therefore that if the Appellant is to qualify under Appendix FM he would have to meet the exceptions thereto set out in section EX of Appendix FM"

The Tribunal proceeds to consider whether the Appellant can meet the requirements set out in EX.1. A finding is made that the children are all British and that the Appellant does have a genuine and subsisting parental relationship with them. Various factors are then taken into account to conclude that it would however be 'reasonable' to expect them to relocate. This includes the fact that the Appellant's wife would be able to get treatment for her HIV in Trinidad; that there would also be treatment available for her eldest son who suffers from autism and epilepsy; that they knew the Appellant's immigration status to be precarious; that the family are reliant on public funds; and that conversely in Trinidad the Appellant would be able to work and support his family. The Tribunal did not accept the evidence of the Appellant's wife that she had no other support in this country.

7. At paragraph 44 the determination cites the "Zambrano principle", as set out in the case of Sanade and Ors (British Children – Zambrano – Dereci) [2012] UKUT 00048 (IAC) in the context of Article 8. At paragraph 56 it is found that the Appellant assists his wife in the care of the children but "he is most certainly not their primary carer": afterall, she managed to look after the elder three on her own without any assistance from him at all prior to his arrival in March 2013[9]. It is found that his removal would not result in the children being required to leave the UK because they are not dependent upon him for exercise of their residence rights. In the alternative it would not be unreasonable for the whole family to relocate to Trinidad & Tobago[10]. The Tribunal concludes that it would be open to the Appellant to apply for entry clearance under Appendix FM: his wife being in receipt of DLA he would be exempt from the minimum income requirements. Having considered all of these factors the Tribunal concludes that the decision is not disproportionate and the appeal is dismissed.

[7] Paragraph 31
[8] Paragraph 33
[9] Paragraph 56
[10] Paragraph 58

The Grounds of Appeal and Response

8. The written grounds of appeal rely on the authority of Chikwamba (FC) (Appellant) v SSHD [2008] UKHL 40 and Hayat [2011] UKUT 00444 (IAC) and submit that it was "clearly wrong in law" for the First-tier Tribunal to have dismissed the appeal on the ground that the Appellant could apply for entry clearance. It is further submitted that the Tribunal has failed to take the best interests of the British children into account and reliance is placed on ZH (Tanzania) (FC) v SSHD [2011] UKSC 4. It is submitted that the Tribunal has erred in finding it to be a reasonable option that these British children go to live in Trinidad.

9. Permission to appeal was refused by the First-tier Tribunal but was granted upon renewed application by Upper Tribunal Judge Storey, who granted permission on the Sanade point, specifically noting that the First-tier Tribunal had appeared to reach a conclusion contrary to the position taken by the Respondent, and endorsed by the Tribunal, in that case.

10. The Respondent's Rule 24 response is dated the 9th January 2015. In summary it is submitted that the decision was open to the First-tier Tribunal on the evidence before it.

11. At the hearing before me Mr Timson conceded that he was unable to rely simply on the Chikwamba point raised in his grounds. It may well be the case that the Appellant did not have to meet the financial requirements but there had not been the evidence before the First-tier Tribunal to enable it to make a finding that all of the remaining requirements were met: for instance he could not say with confidence that the "specified evidence" had been produced. He agreed that the Tribunal had expressly found, in respect of EX.1, that the requirements of the Rule were not met. He instead adopted the point made by Judge Storey in respect of Sanade. Much of the reasoning in the determination was taken up with finding that the family could reasonably relocate to Trinidad. Mr Timson relied on Judge Storey's grant of permission to submit that this finding went behind the Respondent's concession in that case. With permission he further varied his grounds to submit that that the determination had failed to address particular evidence which went to the issue of how much care the Appellant gave to his children. This was particularly important in the context of his wife's illness and the disabilities of their son.

12. At the Error of Law hearing the Respondent was represented by Mr Harrison, Senior Presenting Officer. He accepted that the Tribunal did appear to place a great deal of emphasis on its conclusion that this family of five British children could go and live in Trinidad. He clarified that it was not the Respondent's case that they should. It had simply been the Respondent's case that the interference that would be caused by the Appellant's removal would be proportionate. Mr Harrison conceded that there was evidence, in particular medical evidence,

that had not received attention in the Tribunal's findings, but submitted that it was a matter for me whether I thought that was a material error.

Error of Law

13. This was a detailed and careful determination. Although I have found it to contain errors I have considerable sympathy with the First-tier Tribunal: it would appear that neither party were at all clear about the nature of decision under appeal, the relevant law nor even what the grounds of appeal were. To that extent the Tribunal was not assisted.

14. Three points have been raised in this appeal, with varying degrees of emphasis placed on each.

Chikwamba

15. It is agreed that the Appellant has not made a formal application for leave to remain under Appendix FM. It is further agreed that he was nevertheless entitled to rely on its provisions because he raised Article 8 on appeal: GEN 1.9(a)(iii)[11]. What is less clear is how far that gets the Appellant in this appeal. Paragraph 33 (cited above) would appear to contain a mistake in that the Appellant had neither leave to remain as a visitor nor any other form of leave for less than six months. He did however have temporary admission so that error would be entirely immaterial since the Tribunal was quite correct to identify that the Appellant could not 'switch' without satisfying the requirements of EX.1: E-LTRP.2.2(a). Since the Tribunal plainly concluded that he could not I found it difficult to see how the Appellant can simply point to Chikwamba to say that the appeal should have been allowed on the facts as found. Before me Mr Timson conceded that in order to rely on Chikwamba he had first to show that the Tribunal's approach to EX.1 involved the making of an error of law.

EX.1, Proportionality and Sanade

16. The Respondent's 'concession' referred to by Judge Storey is set out at paragraphs 93-95 of Sanade:

> "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?

[11] The reference to GEN 1.1 in the determination is a typographical error.

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 EU**".

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."

17. The Respondent has not in this case sought to resile from the 'Sanade concession'; indeed it still appears as a statement of policy in the Respondent's current guidance document "Appendix FM 1.0 *Family Life (as a Partner or Parent) and Private Life*: 10-Year Routes (April 2015)":

> '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.
>
> 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.
>
> 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 separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.'

18. Before me Mr Harrison confirms that it is not the Respondent's case that the children, nor indeed the Appellant's wife, should leave the UK; nor is it submitted that it would be reasonable for them to do so.

19. What appears to have happened in this determination is that the 'Zambrano' principle, applied under the Immigration (EEA) Regulations 2006, has been conflated with whether, taken in the round, it is proportionate to interfere with the Article 8 family life of these children. If this were an appeal under the

Regulations the question would be whether the parent facing removal can qualify for a *right* of residence on the basis that he is the sole carer for the children. He would have to show himself the sole or primary carer in order to establish that the child needed him there in order to exercise his or her own citizenship rights. No doubt this was what Mr Timson had in mind when he made the concession recorded at paragraph 56 of the determination: "in his oral submissions at the hearing Mr Timson, the Appellant's counsel, conceded that if I were to find that the Appellant is not the primary carer for the children then that would be an end to this argument". With respect to Mr Timson and the First-tier Tribunal, that was not in fact the end of the argument, which was also put under Article 8. Sanade and the Respondent's own Immigration Directorates' Instructions[12] establish that when contemplating a family split under Article 8 it will not generally be 'reasonable' to expect British children, or indeed British spouses, to leave the EEA. If the Appellant cannot meet the requirements of the Rules it may still be entirely proportionate to proceed with removal, but not, generally, on the grounds that his family can go with him. This determination's analysis of whether it would be "reasonable" for these children to go with the Appellant, under both EX.1 and freestanding Article 8, does not reflect that concession. The real focus of enquiry under Article 8 should have been whether it was disproportionate to interfere with the family life as it existed in the UK. That leads me to the last issue raised in this appeal.

The Family and Private Life of the Appellant and his Family

20. I have set out above the conclusions of the Tribunal that the Appellant was not the primary carer for his children. That may have been a finding that was open to the Tribunal on the evidence before it but that was not the only question that the Tribunal had to decide. The question was one of proportionality. In order to evaluate that the Tribunal had to *inter alia* assess the impact of the Appellant's removal on his family.

21. Before me Mr Harrison conceded that the Appellant's bundle contained a good deal of independent evidence which indicated that the Appellant played a significant role in the lives of his children, and that none of this had been expressly addressed in the findings. That evidence included letters from the school confirming that he brings the children to and from school and a letter from the family's Liason Nurse at the North Manchester General Hospital confirming that he has brought the children and his wife to appointments, is present during home visits and to her knowledge takes the children to school. In a letter dated 17th September 2013 Katie Rowson, Specialist Paediatric Nurse wrote:

> "[CR] has attended essential hospital appointments with his son [J], and is clearly playing a very active and supportive role in his care.

[12] The extract set out above is dated April 2015 but is in identical terms to that in force at the date of the First-tier Tribunal determination.

> It is crucial that family life is maintained and the support and care continues. If this family are separated in any way this could have significant effects on the emotional well being of all members of the family including Jacob"

Nurse Rowson reiterates this view in a more recent letter, dated 18th March 2014, wherein she describes the Appellant's role in this family as "crucial".

22. The bundle also contained a letter from Jill Delaney, HIV Specialist Nurse, dated 10th March 2014. Nurse Delaney has been involved in the care of the Appellant's wife since 2005, when she first met the Appellant as he attended appointments with her. Nurse Delaney records her own impression of how much care the Appellant provides for his wife and their children, and notes the significance of the fact that it is difficult for those who are living with HIV to find life partners who are accepting of it, where they themselves do not have the condition. Having had an opportunity to observe the change in the family when the Appellant had returned to Trinidad previously, Nurse Delaney writes:

> "From a psychological perspective [A's wife] is much more stable emotionally when [C] is around; he is a very stabilizing influence. The episodes of previously experienced depression are much less and one of the stresses she suffers from is the worry of [C] being deported and her being left with 5 children, three of whom will be under 6 years…I would be extremely concerned for [her] mental health should [C] not be allowed to stay in the UK, she does have other family but they are not particularly supportive. When she and [C] have been apart [her] mood becomes very low and in turn she finds it very difficult to cope with everyday stresses and struggles to take her medication every day. It is vital that she takes this medication every day at the same time to keep the HIV under control, if she doesn't the virus can damage the immune system leaving her susceptible to opportunistic infections.
>
> In summary without [C]'s support [his wife] would be dependent on supportive services and would struggle to care for her children."

23. This last point, also made by Nurse Rowson, is further supported by Dr KMB Ajdukiewicz, the Consultant Physician in charge of Amanda's care, in his letter of 2nd April 2014.

24. I note that the Tribunal has recognised that the Appellant is a "loving and caring father" and that he provides support to his wife[13]. I cannot see however, that this particular evidence, offered by health care professionals, was addressed anywhere in the findings. It was plainly pertinent to the matter of the welfare of the children and to whether it was proportionate to refuse the

[13] Paragraph 16

Appellant entry. I cannot be satisfied that the decision would have been the same had this evidence been considered. Its omission was therefore a material error of law.

The Re-Made Decision

25. At the hearing before me on the 3rd July 2015 the parties were in agreement that the case history set out above is correct. The Appellant was not in the UK as a visitor, he was here on temporary admission. In those circumstances, Mr McVeety submitted, he was entitled to rely on the provisions of EX.1:

> 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 continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

26. Although the Appellant's solicitors have gone to the trouble of providing evidence that his wife is entitled to DLA and so is exempt from the minimum earnings requirement, the parties are in agreement that if EX.1 applies she does not even have to show this: E-LTRP.3.1. It being accepted that the children are all British citizens resident in the UK the matter in issue under EX.1(a) (ii) is: is it reasonable to expect the Appellant's British children to leave the UK?

27. For the reasons set out above it might be thought from the IDI, Sanade and indeed the Respondent's concession in this case (see paragraph 18 above), that

this was the end of the matter. For the avoidance of doubt I find, on all of the evidence before me, that it would not be reasonable to expect any of these children to leave the UK. The reasons for that finding are that these children are all British and have lived all of their lives in the UK. The older children are at school and are settled here. I find any disruption to that arrangement would be contrary to their best interests. This is particularly so of the eldest child, J (now 14 years old) who suffers from epilepsy with generalised developmental delay. He has special educational needs[14] for which he receives specialist support, for instance 21 hours per week of individual work with a teaching assistant. What is true of his siblings is particularly so for J. It would be very much contrary to his best interests to expect him to leave the UK, and leave behind the relationships he has built up with fellow students, his teachers and specialist staff who work with him on an intensive one-to-one basis. I have also given some weight to the circumstances of their mother. As their main carer her behaviour, demeanour and state of health is likely to have an immediate and profound impact on her children. The consistent evidence I have, in numerous letters from health care professionals as well as from the witness herself, is that she would find disruption to her present regime of medication and psychological support very difficult to deal with. Anti-retrovirals, and indeed counselling, may be available in Trinidad & Tobago but any disruption in medication/treatment would be to her detriment, both physical and mental, and by extension to her that of her children.

Decisions

28. The decision of the First-tier Tribunal is set aside.

29. I re-make the decision by allowing the appeal under the Immigration Rules.

30. In view of the young ages of the children, and the health issues relating to the Appellant's wife, I make a direction for anonymity in the following terms:

"Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings".

Deputy Upper Tribunal Judge Bruce
3rd July 2015

[14] A statement of special educational needs was prepared by Oldham Council on the 21st June 2012