Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14093/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 15th June 2016	**On 13 July 2016**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

EGALLE KANDE ARACHCHILLAGE NADEEKA EGALLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Solomon of Counsel instructed by Jein Solicitors
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Immigration Judge Saffer made following a hearing at Bradford on 28th October 2015.

Background

2. The appellant is a citizen of Sri Lanka born on 9th November 1982.

3. Her husband, Dr Channa Ranatunga, entered the UK as a student on 10th October 2004 with leave which was subsequently extended until 31st January 2010. The couple married in 2007 and on 21st September 2007 she also entered the UK as a student with leave until January 2009. Having completed her MSc at Coventry University she switched to a Tier 1 (Post-Study Work) Migrant visa which expired on 16th February 2011. Her husband, having completed his degree also switched to a Tier 1 visa valid until 27th January 2012. He was subsequently granted a further visa until 25th January 2015 during which time he completed his PhD at the University of Hull. Having completed his ten years' lawful residence in the UK he was granted indefinite leave to remain on 10th January 2015.

4. Their child [KR] was born on [ ] 2015 and is a British citizen.

5. The appellant applied for a spouse visa on 15th January 2015 but was refused on 25th February 2015 on the grounds that the income threshold was not met. At that time she was working in two jobs on a part-time basis, as was her husband, but she did not provide the specified evidence in relation to the employment. The Secretary of State was not satisfied that she met the income threshold of £18,600, she had not lived in the UK for twenty years and it would not be unduly harsh for the family to relocate to Sir Lanka. It was this decision which was the subject of the appeal before Judge Saffer.

6. Judge Saffer recorded that the child's British nationality was not a trump card. He was not in the education system in the UK and was being denied the opportunity of being brought up in his parents' homeland where they were both citizens. The appellant had failed to provide the specified evidence relating to the period prior to the application and could not establish even at the date of the hearing that they fulfilled the income threshold required by the Rules. Her limited private life had always been precarious given her temporary status and the family were a burden on the public purse given the fact that she uses the NHS.

7. He concluded as follows:

> "It is in [KR]'s best interest (given his tender age) to be together with his parents where they can lawfully live. If his parents choose to live in different countries it is reasonable to expect him to go with his mother. He can come back whenever he wishes and his father can visit him whenever he wants. Alternatively he can stay with Mr Ranatunga while the appellant makes an application for entry clearance if Mr Ranatunga chooses to stay here. He is not therefore being denied his rights as an EEA citizen.

If they all choose to go to Sri Lanka his parents can both work there. There is no evidence that in Sri Lanka he would be neglected or abused, or that he would have unmet needs that could not be catered for, and there are no stable arrangements for his physical care that can be put in place. He can in due course go to school in Sri Lanka which is where his parents were educated. The quality of education may not be as high as here but it was good enough for his parents to be able to come here. He can access health services there."

8. On that basis he dismissed the appeal.

The grounds of appeal

9. The grounds argue that the judge failed to adequately consider and apply Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which provides that the public interest does not require the person's removal where the person has a genuine and subsisting relationship with a qualifying child (the appellant is the mother of a British citizen child) and it would not be reasonable to expect the child to leave the UK.

10. The judge erroneously finds that it would be reasonable to expect the child to go with his mother. However the Presenting Officer failed to discharge her duty to draw the relevant Home Office policy to the Tribunal's attention; the appellant had a basic public law right to have her case considered under the policy. Immigration Directorate Instruction Family Migration: Appendix FM, Section 1.0(b) Family Life (as a Partner or Parent) and Private Life: 10-Year Routes provides as follows so far as is material:

"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.

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.

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."

11. Although the judge considered Sanade & Others (British children – Zambrano – Dereci) [2011] UKUT 48 (IAC) he failed to adequately apply it. In Sanade it was held inter alia that:

> "Ruiz Zambrano, Bailii: [2011] EUECH 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 EU, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

12. The judge therefore erroneously found that the child could stay with her husband whilst the appellant made an entry clearance application but this was not reasonably open to him given the evidence of her husband that if the appellant had to go to Sri Lanka the child would have to go with her.

13. Finally, the judge erroneously applied the test of insurmountable obstacles whereas the reasonableness of relocation remains the test under Article 8 outside the Rules.

14. Permission to appeal was granted by Judge Nicholson on 25th April 2016 for the reasons stated in the grounds. The judge said that it was arguable that Judge Saffer ought to have allowed the appeal in line with the comments in Treebhawon & Others (Section 117B(6)) [2015] UKUT 674.

15. On 13th May 2016 the respondent served a reply arguing that the judge had in fact looked at the reasonableness of the British citizen child leaving the UK and implicitly concluded that it would not be unreasonable for him to go to Sri Lanka. He had also considered a number of scenarios including that the child could remain in the UK with his father. Accordingly, the findings were open to the judge, not irrational and the grounds amount to a disagreement with the decision.

Submissions

16. Mr Solomon relied on his grounds.

17. He accepted that, according to the determination, Counsel before the First-tier Judge had conceded that the appellant could not meet the requirements of the Immigration Rules, although he said that in fact Counsel had been wrong to do so since arguably the appeal ought to have been allowed under paragraph EX.1.

18. He submitted that it was incumbent on the Presenting Officer to draw the attention of the Immigration Judge to the relevant Rules and policy and in not doing so the Presenting Officer had failed in his duty before the judge. The appellant clearly fell within the ambit of the policy, having an impeccable immigration history. She had been lawfully in the UK throughout the entire period and in fact, when she discovered that she was unable to switch from having a Tier 1 (Post-Study) Work visa to becoming a point-based system dependant in line with her husband's Tier 1 visa, she left the UK before her leave expired in February 2011 and made an application from Sri Lanka ,which was granted for the same duration as her husband's.

19. Mr Solomon argued that the judge's conclusion that the appellant could relocate to Sri Lanka was contrary to established case law. In MA & SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380, at paragraph 68 the Tribunal wrote as follows:

> "In Izuazu the Secretary of State made the following concession (recorded in Appendix A to the determination):
>
> > 'The Secretary of State continues to accept that where the primary carer of a British citizen is denied a Zambrano right of residence on the basis that his or her removal or deportation would not force the British citizen to leave the EU, it will not logically be possible when considering any Article 8 claim made by such a person to determine their claim on the basis that the family (including the British citizen) can relocate together to a place outside the EU. However, the Secretary of State does not accept that it follows that there will be no circumstances in which a decision taken in respect of the primary carer of a British citizen can require that British citizen to leave the UK. The Secretary of State does not consider that the UK Border Agency letter sent to the Tribunal in Sanade suggested that she did accept that it is *never* reasonable to expect a British citizen party to genuine family life in the UK to relocate permanently abroad but apologises for any lack of clarity in the correspondence which may have caused the Tribunal to reach this conclusion'."

20. The evidence in this case was that the child would have to go with his mother because at the time of the hearing he was 4 months old and still being breastfed.

21. Mr Diwnycz relied formally on his Rule 24 reply but accepted that the appellant had made out her case.

Conclusions on whether the judge erred in law

22. Under paragraph EX.1 of Appendix FM to the Immigration Rules, if the appellant has a genuine and subsisting parental relationship with a child who, is, inter alia, a British citizen and it would not be reasonable to expect him to leave the UK, the appellant is entitled to succeed within the Immigration Rules.

23. The Immigration Act 2014 set out at paragraph 117B the public interest considerations applicable in all cases relating to Article 8 and in particular, at paragraph 117B(6) states:

> "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 UK."

24. The judge did not refer to Section 117B(6) and, in citing the test of insurmountable obstacles at paragraph 16 of his determination, appears to have erroneously not applied his mind to the correct test of reasonableness of relocation.

25. Moreover, his attention was clearly not drawn, as it should have been, to the relevant IDIs to be applied in cases where refusing the application would require a primary carer to return to a country outside the EU.

26. In Mandalia v SSHD [2015] UKSC 59 the Supreme Court stated:

> "19. It follows, however, that the Court of Appeal was handicapped by the lack of any analysis of the effect of the process instruction on the lawfulness of the agency's decision by either of the specialist tribunals below. It was unfortunate not only that the judge's grant of permission to appeal to the Court of Appeal was couched in ambiguous terms but also that other judges of the Upper Tribunal misconstrued it and so declined to address that part of Mr Mandalia's appeal which was based on the process instruction. But it was still more unfortunate that no reference had been made to the process instruction before the First-tier Tribunal. Mr Mandalia could not be expected to have been aware of it. But, irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office Presenting Officer clearly failed to discharge his duty to draw it to the tribunal's attention as policy of the agency which was at least arguably relevant to Mr Mandalia's appeal: see AA Afghanistan v SSHD [2007] EWCA Civ at paragraph 13."

27. Moreover in R (Lumba) v SSHD [2011] UKSC 12 Lord Dyson said:

> "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."

28. Accordingly, the judge erred in law and his decision is set aside.

Findings and Conclusions

29. Neither party made any further submissions. Mr Diwnycz in particular did not argue either that the IDIs did not apply nor that there were any adverse factors in this case which militated in favour of the appellant being refused.

30. In Treebhawon & Others (Section 117B(6)) [2015] UKUT 674 the President of the Tribunal said as follows:

> "20. In section 117B(6), Parliament has prescribed three conditions, namely:
>
> (a) the person concerned is not liable to deportation;
>
> (b) Such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and
>
> (c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.
>
> Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none."

The Tribunal went on to hold that Sections 1 to 3 of Section 117B do not apply and that it would further appear that the little weight provisions of Sections 117B(4) and (5) are similarly of no application.

31. It was rightly not argued that there are any countervailing factors in this case. The appellant has a perfect immigration history, having complied with the terms of her visa at all times.

32. The effect of the decision to refuse this application would be to force the British citizen child to leave the EU, since he is entirely dependent upon his primary carer, his mother.

33. The case must be assessed on the basis of whether it would be unreasonable to expect the appellant's British citizen child to leave the EU with her. Her case falls squarely within the IDIs cited above. If it would not be reasonable to expect him to go to Sri

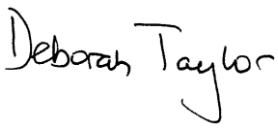
Lanka, then the appeal falls to be allowed in line with Section 117B(6) of the 2002 Act. Those provisions are mirrored in paragraph EX.1.

34. The appeal therefore succeeds both within and without the Immigration Rules.

Decision

35. The original judge erred in law. His decision is set aside and re-made as follows. The appellant's appeal is allowed.

No anonymity direction is made.



Signed Date: 13 July 2016
Upper Tribunal Judge Taylor