Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number HU/14526/2017

THE IMMIGRATION ACTS

Heard at Field House
On 27th November 2018

Decision and Reasons Promulgated
On 2nd January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

ALI [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Salam (Solicitor, S A Salam)
For the Respondent: Mr Diwnycz (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant applied for LTR to remain in the UK on the basis of his private and family life with his wife and British Citizen child. Following the refusal of the application the Appellant's appeal was heard by First-tier Tribunal Judge Pickup who dismissed the appeal in a decision promulgated on the 14th of March 2018. The Judge found that there were no insurmountable obstacles to family life continuing in Pakistan and that removal would not contravene section 117B(6) in line with the decision under paragraph EX.1 of Appendix FM.

2. Permission to appeal to the Upper Tribunal was granted by the Upper Tribunal on the 2nd of October 2014. Deputy Upper Tribunal Judge Doyle observed that it was arguable that the Judge had not adequately considered section 117B(6) of the 2002 Act and had not applied the test of reasonableness.

3. The submissions from the representatives are set out in the Record of Proceedings. In summary both maintained their stated positions Mr Salam submitting that it was not reasonable to expect a British Citizen child to leave the UK. In the course of submissions Mr Diwnicz referred to a Scottish case promulgated after KO (Nigeria) [2018] UKSC and provided a reference to that case. At the end of the hearing Mr Salam was given the opportunity to provide further written submissions. Those were received on the 11th of December 2018 at Field House and forwarded to me in Birmingham. I have considered those in addition to the previous written and oral submissions that had been made.

4. Mr Salam's observation that neither KO nor the Scottish case concerned British Citizen children and so were not directly relevant has some merit in the sense that neither case saw the underlying principles applies to circumstances such as these. However there are 2 parts of the decision in KO that are relevant to the decision that was made in this appeal. Paragraph 44 of KO repeats the earlier withdrawal of a concession that had been made in Sanade (British children-Zambrano-Dereci) [2012] UKUT 48 and subsequently withdrawn that meant that British Citizen children can be expected to relocate outside the UK and confirms that in applying the concession in the appeal under consideration the First-tier Tribunal had erred.

5. The second aspect of KO that is relevant is in paragraph 19 where Lord Carnworth observed that "There is nothing in the section to suggest that "reasonableness" is to be considered otherwise in the real world in which the children find themselves." That takes me back to Sanade, from headnote 6 Blake J had observed within the Judgment "*Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. 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."* Although given in the context of a deportation case the discussion is not limited to those cases but is of general application.

6. That observation in Sanade is supported by that in KO, that the position has to be assessed in the reality of the position that the child finds themself in. The removal of the Appellant in this case does not require the child to leave the UK as the child is not dependent on the Appellant for their ability to remain in the UK. By clear implication the Judge found that the Appellant's presence was not required for the child's best interests or that the best interests were not such that the public interest in the enforcement of immigration control was outweighed.

7. Judge Pickup approached the decision in this appeal in 2 stages, the first was assessing whether the child would have to leave the UK if the Appellant and found that the child would not have to. That was an assessment of the facts as they stood at the date of the hearing at which the Judge assessed the evidence. It was also a reflection of the basic fact that the Appellant did not have an independent right under the Immigration Rules or statutes to remain in the UK. Secondly the Judge considered whether it would be reasonable to expect the child to leave. In this part of the decision the Judge's findings placed the choice on the Appellant and his spouse and found that family could reasonably be enjoyed in Pakistan.

8. A comparison can be made with the case of Jeunesse [2014] ECHR 1036. In that case the ECtHR found that in the absence of exceptional circumstances it would be proportionate and reasonable to expect the Appellant's family who were Dutch nationals to leave the Netherlands if they wished to continue family life together. The Appellant succeeded as the court identified exceptional features including the attempts over many years by the Appellant to regularise her position with no attempt to enforce removal *and* the Appellant had at one time herself been a Dutch national but that had been lost through a change in the substantive law (not through her personal conduct).

9. Some of the observations of the Judge in the course of his reasoning have been overtaken by the reasoning in KO but that has not affected the overall nature of the decision which now has to be read in the light of the law as it has been clarified. Following the observations in KO and the need to assess the circumstances as they really are and the legal effect of the situation that the Appellant and his wife had created by entering into a relationship in the circumstances that the Judge described the decision was open to the Judge for the reasons given. The Judge gave significant weight to the best interests of the child as he was obliged to do but the reality of the situation is that the Appellant and his wife have a choice. One of them will have to live outside the country of their nationality. Appendix FM has been upheld as being compliant with article 8 and there is a discretion where there may be circumstances not addressed by the rules. In finding that there were no circumstances justifying a grant outside the rules the Judge was entitled to make that finding.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:
Deputy Judge of the Upper Tribunal (IAC)

Dated: 15th December 2018