Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00997/2012

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 24 June 2013	**On 25 July 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S M A
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Ward instructed by Hoole & Co., Solicitors
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (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. The appellant is a citizen of the United States of America who was born on 23 February 1984. On 10 September 2010 the appellant was convicted at the Bristol Crown Court of possession of a class B controlled drug namely cannabis/cannabis resin; possession with intent to supply a class B controlled drug namely cannabis and possession of a prohibited weapon. On 11 February 2011, he was sentenced to a total

of fifteen months' imprisonment for those offences. As a consequence, the appellant was a "foreign criminal" falling within the UK Borders Act 2007. On 25 October 2012, the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied and on 3 May 2012 made a deportation order against the appellant.

3. The appellant appealed to the First-tier Tribunal and in a determination promulgated on 4 January 2013 the First-tier Tribunal (Judge Davidge and Mr M G Taylor CBE, DL) dismissed the appellant's appeal. The Tribunal found that the appellant's deportation was not prohibited by the Immigration Rules (in particular para 397 of the Rules) and further that the appellant's removal would not breach Art 8 of the ECHR.

4. On 22 January 2013, the First-tier Tribunal (Judge Bailey) granted the appellant permission to appeal to the Upper Tribunal. Thus, the appeal came before me.

The Submissions

5. Ms Ward who represented the appellant (but had not done so before the First-tier Tribunal) relied upon the grounds of appeal and a skeleton argument submitted on the day of the hearing. Ms Ward submitted that the point was a short one. The appellant's case before the First-tier Tribunal was that his deportation would interfere with his private and family life with his wife and their two small children, as well as his wife's younger brother who lived with them. All the appellant's family are British citizens. Ms Ward submitted that the First-tier Tribunal was wrong in law to find that it was reasonable to expect the appellant's wife and their children to relocate to the USA with him. Ms Ward submitted that was contrary to the approach recognised by the Upper Tribunal in Sanade and Others (British Children – Zambrano – Dereci) [2012] UKUT 0048 (IAC) at [65(c)] and [95]. Ms Ward submitted that the Upper Tribunal recognised that as EU citizens the appellant's spouse and children could not be required to relocate outside the European Union and it was not open to the Secretary of State to argue that it was reasonable for them to do so. Contrary to that, the First-tier Tribunal found that it was reasonable to expect the appellant's wife and children to travel with him to the USA (see para 43 of the determination). The First-tier Tribunal, therefore, Ms Ward submitted, had wrongly assessed the "best interests" of the appellant's children on the basis that they would be accompanying him to the USA rather than on the basis that there would be an inevitable split between him and his family and had then failed to assess whether that was in the best interests of his children and whether the seriousness of his offending was of such weight to justify that separation.

6. Mr Hibbs did not seek to argue that Ms Ward's submission was in principle wrong. Instead, he submitted that the issue was irrelevant because the new Immigration Rules had, in effect, in para 399 codified Sanade and consequently there was nothing left to be decided under Art 8 since the appellant could not succeed under para 399. Mr Hibbs referred me to, and relied upon, the Administrative Court decision in R (Nagre) v SSHD [2013] EWHC 720 (Admin), especially at [30] and the decision of the Inner House of the Court of Session in MS v SSHD [2013] CSIH 52, especially at [26].

7. In response, Ms Ward accepted that the Immigration Rules would determine the vast majority of cases but that there will be residual cases not covered by the Immigration Rules. Ms Ward submitted this was one such case. Certainly, she pointed out, the First-tier Tribunal thought it was such a case as it devoted 38 paragraphs of its determination to Art 8 and only three to the Rules. Ms Ward submitted that the Rules did not adequately consider the position of the appellant's wife as a single mother in the UK bringing up their children and also did not deal with the impact upon the children of not seeing their father for many years.

Discussion

1. Sanade

8. Ms Ward's principal submission based upon Sanade is undoubtedly correct. Indeed, it was accepted to be so by Mr Hibbs. In Sanade the Chamber President (Blake J) said at [95]:

> "... 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 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 so on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."

9. At [106] when considering the facts of Mr Sanade's appeal, noting that his wife and children were British citizens, Blake J identified the relevant question to be addressed under Art 8 as:

> "Whether Mr Sanade's conduct is so serious as to make it proportionate to the legitimate aim in his case to require him to leave his wife and young children for an indefinite period unless and until the deportation order can be revoked".

10. In this appeal, the First-tier Tribunal found at para 43 that there was:

> "Nothing in the evidence before us which shows that [the appellant's wife] cannot reasonably be expected to relocate with her husband and children to America."

11. That finding was not one open to the Tribunal to make in the light of Sanade and the EU jurisprudence upon which it is based. As a result, the First-tier Tribunal considered the best interest of the appellant's children and that of his wife's 9 year old brother who lived with them on the basis that, at least the appellant's wife and their children, would accompany him to the USA.

12. It appears that the Tribunal was led into this approach by the appellant's then Counsel. At para 6 of its determination, the First-tier Tribunal noted that the grounds of appeal to the Tribunal:

> "are that the Appellant has a family life with his wife and children here, and the decision will sever the family relationships, with the mother and children staying here."

13. That, of course, would be an approach consistent with Sanade. However, the First-tier Tribunal went on to note that:

> "At the hearing the matter was pursued on a different basis, namely that the most significant disruption would be caused by the wife and children going to America, so that the Article 8 rights of the Appellant's wife's brothers would suffer severe interference."

14. That said, however, the skeleton argument of Counsel for the appellant at the hearing clearly puts the case on the basis that the appellant's wife and children cannot reasonably be expected to accompany him and that it is not in the best interests of the children for the appellant to be separated from his children and that that is a disproportionate interference with his (and their) family life. It may be that the change in emphasis at the hearing inadvertently took the First-tier Tribunal down a road that it should not have travelled in the light of Sanade. In any event, as I have indicated, Mr Hibbs accepts that the First-tier Tribunal erred in failing to follow the approach in Sanade. His submissions focused on whether that error was material.

2. Art 8 and the Rules

15. Mr Hibbs submitted that the First-tier Tribunal could not have reached any other conclusion under Art 8 since the outcome was effectively determined by the Immigration Rules, namely para 399.

16. The consistent and cumulative case law of the Upper Tribunal recognises that since the new Immigration Rules came into force on 9 July 2012 dealing, on their face, with Art 8 issues, that the Tribunal should adopt a two-stage approach. First, it should determine whether an appellant can succeed under the relevant Rules dealing with private life, family life or in respect of deportation. If the appellant succeeds, there is no need to consider Art 8 on the basis of the approach in the Strasbourg cases. But, secondly, if an appellant cannot succeed under the Rules the Tribunal should consider the application of Art 8 'outside the Rules'. That position is clearly set out in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393; Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 0060 (IAC) and Izuazu (Article 8 – new rules) [2013] UKUT 0045 (IAC).

17. In R (Nagre), Sales J approved the Upper Tribunal's approach. However at [30], Sales J added a caveat as follows:

> "The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the new Rules and finding that the claim for leave to remain under them fails, the relevant official or Tribunal Judge considers that it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it will be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

18. That approach was proved and applied by the Inner House of the Court of Session in MS. At [26] Lord Drummond Young stated that:

> "We agree entirely with that qualification. It seemed to us that the new Rules are likely to deal adequately with the great majority of cases where the Article 8 right to private or family life is put in issue. In that event, there is no need to go on to consider Article 8 separately, using the type of analysis set out in R (Razgar) v Home Secretary ..."

19. Subsequent to Nagre, the Upper Tribunal in Green (Article 8 – new rules) [2013] UKUT 00354 (IAC), acknowledging Sales J's caveat in [30] of his judgment, noted that in Nagre: "the difference between the Rules and the Strasbourg principles was marginal ...". By contrast, in Green the Upper Tribunal examined the appellant's claim under Article 8 in a deportation case where the appellant had committed the offence as a juvenile. It's rationale for doing so was that this issue was not a matter specifically dealt with in the Rules.

20. I begin with the relevant Immigration Rules which came into effect on 9 July 2012. Paragraph 398, so far as relevant, provides as follows:

> "398. Where a person claims that their deportation would be contrary to the UK's obligation under Article 8 of the Human Rights Convention, and ...
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months; ...
>
> The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

21. For these purposes, paragraph 399(a) and (b) are the relevant provision dealing respectively with the appellant's relationship with his children and his partner. Paragraph 399 provides as follows:

> "399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would not be reasonable to expect the child to leave the UK; and
>
> (b) there is no other family member who is able to care for the child in the UK; or
>
> (b) the person 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

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK."

22. It is Mr Hibbs' submission that the error by the First-tier Tribunal was not material because, in effect, there was nothing left to decide under Art 8 once the First-tier Tribunal found that the Immigration Rules did not apply.

23. The First-tier Tribunal dealt with the appellant's claim to met the requirements of the new Rules in paras 20-23 of its determination. I do not set out those paragraphs in full. Suffice it to say, the only issue considered by the First-tier Tribunal was the application of para 399(a) to the relationship between the appellant and his wife's younger brother. At para 21 the First-tier Tribunal concluded that there was a "genuine subsisting parental relationship" between the appellant and his wife's brother. Given that finding, somewhat curiously the First-tier Tribunal went on to find in para 22 that the "relationship falls short of a quality and character to be described as parental". Leaving aside that contradiction, the First-tier Tribunal stated that, in any event, it had not been established that there was "no other family member who is able to care" for the appellant's wife's younger brother in the UK. The Tribunal does not appear, however, to have considered at all the application of para 399(a) to the appellant and his own children or of para 399(b) in respect of the appellant and his wife.

24. Even if the appellant could not establish that he met the requirements of the Rules – and there is an incomplete assessment of that issue by the First-tier Tribunal - that alone would not, in my judgment, have excused the Tribunal from considering Art 8 'outside the Rules'.

25. This is not a case which fell within the caveat recognised in Nagre and MS. That point is most acute and pressing when considering the Art 8 claim based upon the family life between the appellant and his own children. Whilst Mr Hibbs is right to some extent that Sanade is incorporated within para 399, the implications of it are not. Paragraph 399(a) requires where there is a "genuine and subsisting parental relationship" with a child: (1) that the child is a British citizen; (2) that it would not be reasonable to expect the child to leave the UK; and (3) that there is no other family member who is able to care for the child in the UK. Requirement (b) reflects the Sanade issue to the extent that Sanade resolves issue (b) in favour of the British citizen child. However, under Art 8 that is only one of the relevant issues to be considered in determining whether an individual's deportation would be proportionate. It requires the decision maker, as the Upper Tribunal made clear in Sanade at [95], to approach the issue of proportionality on the basis that there will be a necessary (long-term) separation between an appellant and his child or children. In other words, that they will remain in the UK whilst he has been deported. Under Art 8, it is then necessary for the Tribunal, *inter alia*, to determine whether that separation is in the "best interests" of the children and to take those best interests into account as a "primary consideration" in determining proportionality and whether the

seriousness of the appellant's offending outweighs any countervailing factors including the children's best interests. Paragraph 399 does not encapsulate the full measure of that balancing exercise. It does not expressly require a consideration of the children's "best interests" as a factor, let alone a primary consideration, in determining whether an appellant's deportation is in the public interest. Paragraph 399 only contemplates one situation in which, where the British citizen child cannot reasonably be expected to leave the UK, the public interest will be outweighed and that is where "no other family member ... is able to care for the child in the UK". Paragraph 399(a) does not allow for an assessment of a child's "best interests" where, for example, it has two parents, one of whom is to be deported whilst the other will remain in the UK as is his or her entitlement. That, of course, is the situation in this appeal.

26. The importance of a child's best interests in determining whether an individual's removal or deportation is a breach of Art 8 is part of the established jurisprudence of the Strasbourg court (see the Grand Chamber decisions in Üner v The Netherlands (Application No. 46410/99) [2007] INLR 273 at [58]; and Maslov v Austria (Application No. 1638/03) [2009] INLR 47 at [68] citing Üner). Equally, the importance of a "child's best interests" in the context of immigration decision making is enshrined in s.55 of the Borders, Citizenship and Immigration Act 2009 and is an integral part of assessing proportionality under Art 8 of the ECHR as recognised by the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4.

27. For these reasons, I do not accept Mr Hibbs' submission that in this appeal the Tribunal was not required to consider Art 8 outside the Rules because it fell within the caveat recognised in Nagre and MS. In my judgment, this was a case where there was a difference between the content of the Rules and the proper approach to Art 8 set out in the Strasbourg case law and the UK's domestic law.

28. Consequently, the First-tier Tribunal's failure properly to consider the appellant's claim that his deportation would breach Art 8 in accordance with the principles recognised in Sanade was material to their decision to dismiss his appeal. That decision cannot stand and is set aside.

Decision and Disposal

29. If that was my decision, Ms Ward invited me to remit the appeal to the First-tier Tribunal to consider the application of Art 8. Mr Hibbs indicated that he was neutral as to whether the appeal should be remitted or retained in the Upper Tribunal.

30. Bearing in mind paragraph 7.2 of the Senior President's *Practice Statements*, and having regard to the extent and nature of the fact-finding (including the evidence to be relied upon), I am satisfied that this is an appropriate case to be remitted to the First-tier Tribunal for a rehearing of the appellant's appeal in respect of Art 8. It was common ground between the parties that none of the Tribunal findings could be preserved save those in para 54 of its determination.

31. The appeal is remitted to the First-tier Tribunal for a fresh hearing before a differently constituted panel.

Signed

A Grubb
Judge of the Upper Tribunal