IAC-AH-SC-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12861/2014

THE IMMIGRATION ACTS

Heard at Manchester UT	**Decision & Reasons Promulgated**
On 17th March 2015	**On 9th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS ZARA ARSHAD
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Smith, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 28th February 1987. The Appellant had applied on 24th December 2013 for leave to remain in the United Kingdom as the spouse of Muhammad Awan. That application was refused by the Secretary of State on 25th February 2014. The Appellant appealed and the appeal came before Immigration Judge Ransley sitting in Manchester on 12th August 2014. In a determination promulgated on 20th August 2014 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.

2. On 3rd September 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 6th October 2014 First-tier Tribunal Judge Cox noted that the judge's findings were unchallenged as to what he called the devious conduct of the Appellant and Sponsor husband *vis à vis* the UK immigration regime and the unsurprising conclusion that Judge Ransley took a robust view on the proportionality issue. Nevertheless Judge Cox acknowledged that the Appellant and her husband had a British citizen child and raised an important and arguable issue by reference to Section 117B(6) of Part 5A of the 2002 Act brought into force by the Immigration Act of 2014 along with the authority of *Sanade*.

3. On 16th October 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. That response noted that whilst the Appellant may be in a genuine and subsisting parental relationship with a qualifying child where it would not be reasonable to expect that child to have to leave the UK but that is not a determining factor and that there are many other factors under Section 117B which are also relevant when considering the public interest in particular financial independence. The response contended that the fact that the Appellant has a British citizen child did not mean that the public interest was overridden.

4. On that basis the matter came first before me on 16th December 2014 for the specific purpose of determining whether or not there had been a material error of law. At that hearing a letter had been lodged by the Appellant's previously instructed solicitors indicating that it was not their intention to attend the hearing. The Appellant appeared considerably distressed by this and indicated she had no idea why they were not present. In such circumstances I granted an adjournment to enable the solicitors to advise why they were not in attendance, and for the Appellant to obtain representation.

5. It is on that basis that the appeal now comes back before me. It is disappointing to note that the Appellant's previously instructed solicitors Khirri of West Bromwich have completely ignored the court's direction to provide an explanation for their previous failure to attend. The Appellant now appears by her instructed Counsel Miss Smith, Miss Smith attending pursuant to the provisions of direct access to the bar.

Submissions/Discussions

6. Miss Smith submits that there is a material error of law in the decision of the First-tier Tribunal Judge in her analysis of Section 117B(6) of the Immigration Rules and the judge's failure to follow the authority of *Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)*. She points out that this is not a deportation case and the Secretary of State accepts that the conditions therein are satisfied. This is a case where the judge has failed to address the appropriate issues and that there is consequently a material error of law that I should set aside the decision and remake it in favour of the Appellant.

7. In response Mr Harrison indicates that it is not as simple as that because of the fact that paragraphs 117B(6)(a) and (b) are joined by the word "and". Miss Smith

responds that *Sanade* is a complete response to that submission. Mr Harrison points out that it is not the position of the Secretary of State that they are requiring the child to leave the country merely the Appellant and that the First-tier Tribunal Judge noted that the Appellant and her husband were involved in a factual account which the judge found untruthful. He points out that the child's father who is in the UK is a British citizen and that this is not a *Chikwamba* situation where if the mother was required to leave she would automatically get back in bearing in mind the financial position of the parties. He does no more than make these submissions and leaves it to the court to determine the issues further.

The Law

8. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

9. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

The Relevant Statute and Case Law

10. It would be helpful within this determination to set out the relevant statutory authority and case guidance upon which the submissions are made. Section 117B(6) to the Immigration Rules states:

> (6) 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 United Kingdom.

11. *Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 0048 (IAC)* is authoritative guidance extending the principles set out in *Zambrano*. *Zambrano* makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, 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. Where in the context of Article 8 one parent of a British citizen child is also a British citizen 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. 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.

Findings

12. The submissions put forward by Miss Smith are persuasive. The judge at first instance has at paragraph 51 and 52 failed to take into account provisions in *Sanade* and the law as it now stands applying both that authority and Section 117B. I am not persuaded by the submissions made by Mr Harrison although I acknowledge that this is not a *Chikwamba* situation. There is consequently an error of law in the decision of the First-tier Tribunal Judge. I set aside the decision.

The Remaking of the Decision

13. I again heard further submissions from both legal representatives. I am satisfied that the Appellant must succeed in her appeal despite the concerns expressed by the First-tier Tribunal Judge as to her account. Paragraph 95 of *Sanade* is good law. It states that where a 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 submit that it would be reasonable for them to do so. Consequently in this case it is not reasonable nor is it in any way expected that the Appellant's child should leave the UK. However we are dealing with a child who is 1 year old. It is not reasonable in such circumstances to separate the Appellant from her child. I acknowledge that there is a father who is a British citizen but I do not consider it reasonable or appropriate to separate the child from his mother. On that basis following the principles in *Sanade* the Appellant's appeal must succeed.

14. It is further appropriate to briefly address the issue under paragraph 117B(6). That paragraph would appear to apply in this instant case and it postdates *Sanade*. This Appellant has a genuine and subsisting parental relationship with a qualifying child so the question consequently arises due to the use of the word "and" linking (a) to (b) as to whether it would be reasonable to expect the child to leave the United Kingdom in these circumstances. For all the above reasons particularly bearing in mind the protection given to the child by EU law as confirmed in *Sanade*, the age of the child and thereby the relationship of the child to her mother it would not in all the

circumstances of this matter be reasonable to expect her to leave. This is a matter to which I have to give due consideration when applying 117B when taking into account the public interest considerations. In such circumstances the Appellant's appeal is allowed under the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is remade allowing the Appellant's appeal under the Immigration Rules.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed Date **17th March 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date **17th March 2015**

Deputy Upper Tribunal Judge D N Harris