Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18973/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 November 2015	**On 6 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

WILLIAM OFORI APPIAH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bahja of Counsel
For the Respondent: Mr Bramble a Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent refused the Appellant's application for leave to enter as the spouse of a United Kingdom citizen on 4 April 2014, that application having been made on 9 July 2013.

2. This was due to him being a "persistent offender". His offences included theft of mail, obtain property by deception, using a vehicle while uninsured, failing to surrender to custody, theft by an employee, possession of an offensive weapon, theft from a dwelling, theft from a person, and making off without payment. The offences were committed between 2003 and 2006. He had, in addition, used false identities and overstayed his visa remaining here unlawfully for 5 years from 2002 to 2007.

3. His appeal against that decision, based on the passage of time and the fact of having a young family settled here, was dismissed by First-tier Tribunal Judge Howard ("the Judge") following a hearing on 26 March 2015. This is an appeal against that decision.

The grounds of the application

(1) Failure to conclude that his child (Megan born on 14 January 2010) was a "qualifying child".

4. It was argued in the grounds that as her passport was issued in April 2010 she was at the date of birth a British citizen. The Judge rejected that argument. Permission to appeal on that ground was refused as there was nothing "before the Judge to show that at the time of her birth her mother" Mrs Ofori-Appiah "had indefinite leave to remain in the United Kingdom".

(2) Failure to consider Sanade and others (British children – Zambrano – Dereci) India [2012] UKUT 48 (IAC) and Campbell (Exclusion; Zambrano) Jamaica [2013] UKUT 147 (IAC).

5. It was argued in the grounds that;

> "The test in Zambrano is whether the EU citizen would be forced to leave the Union. The appellant's wife made it clear that she and the children were considering leaving the UK in order to be with the appellant. This was not a choice she would have to make herself, but she felt she had no other option but to leave the UK."

6. Mr Bahja submitted that if Megan was not a "qualifying child" Zambrano and Senade did not apply.

(3) Failure to consider the best interests of the children in a proper context.

7. It was argued in the grounds that;

> "Even if there were no Qualifying children, the Judge had a duty to consider their best interest under section 55 of the 2009 Act."

The grant of permission

8. First-tier Tribunal Judge Grimmett granted permission to appeal (3 August 2015), only on the ground that;

> "... Sanade and Zambrano which it appears were raised in the Appellant's skeleton argument … have not been considered by the Judge."

Respondent's position

9. The Respondent asserted in her rule 24 reply (12 August 2015) in essence that it is difficult to see how Sanade/Zambrano would assist the Appellant given his offending and the circumstances of his children.

10. Mr Bramble submitted that Campbell does not assist the Appellant as in that case the children were born prior to the Appellant leaving the United Kingdom and his removal [31 of Campbell] did not;

> "... prevent them from continuing to exercise in the United Kingdom substantive enjoyments of their rights as Union citizens."

Discussion

Ground 1 - "qualifying child"

11. Permission was not granted to enable this to be argued. Even if it had been, or the Judge erred and the child was a "qualifying child", the application would have been dismissed for the all the reasons that follow regarding ground 2.

Ground 2 – Sanade/Zambrano

12. Zambrano v Office national de l'emploi (Case C-34/09) CJEU (Grand Chamber), 8 March 2011 states that a child's European citizenship is a source of rights for the child and his/her parents/carers, irrespective of any crossing of borders and exercise of Treaty rights such as those relating to freedom of movement.

13. Dereci and others v Bundesministerium für Inneres (Case C-256/11) CJEU (Grand Chamber), 15 November 2011, states that the Citizens Directive was not applicable to third country nationals who applied for the right of residence in order to join their Union citizen family members who had never exercised their right to free movement and who had always resided in the Member State of which they were nationals.

14. Campbell (exclusion; Zambrano) [2013] UKUT 00147 (IAC) guides me to the view that Zambrano principles apply in both in-country and out-of-country cases where the Member State must ensure that any "refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union".

15. Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC) guides me to the view, among other things that the fact the children are British was a strong pointer to the fact that their future lies in the United

Kingdom. Zambrano makes it clear that where the child or remaining spouse is a British citizen and therefore a citizen of the European Union, 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. The critical question is whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union. Where the claimant's conduct is persistent and/or serious the interference with family life may be justified even it involves the separation of the claimant from his family who reasonably wish to continue living in the United Kingdom (c.f. Lee v Secretary of State for the Home Department [2011] EWCA Civ 348).

16. This application fails on the following grounds.

17. Firstly, the children are not exercising freedom of movement. They have never lived elsewhere than the United Kingdom. The 3 month period when the older child saw in Ghana with the Appellant was temporary and only due to a particular set of circumstances her mother found herself in.

18. Secondly, neither the children nor their mother are being denied the genuine enjoyment of the substance of the rights conferred by virtue of their status as a citizen of the Union. The family life that was determined as being the most appropriate when the adults chose to have a family was always subject to being limited by geography and immigration control.

19. Thirdly, Mrs Ofori-Appiah and the children are not being forced to leave the United Kingdom. The children are plainly not considering anything given their tender years. Considering leaving the United Kingdom falls far short of being forced to leave the United Kingdom.

20. Fourthly, the Appellant is a persistent offender as shown by his list of previous convictions, and his lack of remorse is evidenced by the lies he told the Respondent and the Judge when he denied having been arrested let alone convicted for the various offences. His dishonesty appears to be a core part of his character. In this regard I note the following evidence.

21. The Appellant's Solicitor wrote (3 October 2013) with the notice of appeal;

> "3. The appellant is shocked to find his previous offences taken into consideration whereas he has thoroughly explained to the ECO that he has not committed any of these offences.
>
> 4. The appellant spouse is surprised that the ECO is judging him on his previous offences, which he never committed.
>
> 5. … the ECO cannot separate family under article 8."

22. In the handwritten note attached to the notice of appeal the Appellant said he was "never arrested" for the theft of mail, obtaining property be deception,

theft by employee, or theft from a dwelling, and he was not charged with making off without payment. He filed a statement (19/08/14) also denied having committed any of the identified offences. Mrs Ofori-Appiah filed a similar statement (19/08/14).

23. Mr Bahja submitted that the Appellant had been in Ghana and had made a mistake regarding his convictions. The scale of the convictions was not such that the public interest would prevail. The Judge looked at it from the wrong direction. The fact that the children are British makes a difference.

24. Despite these entirely false protestations, and Mr Bahja's submission, the Police Certificate that was issued for entry clearance purposes (24 July 2013) identifies that the Appellant had been sentenced on 2 different dates at the Central Hertfordshire Magistrates Court for 5 separate offences. In addition he had been cautioned on 3 different dates by the police for 4 offences. Of those 9 separate matters, 6 involved dishonesty. I further note that the Appellant used 8 different names and 5 different dates of birth.

25. In my judgement, despite Mr Bahja's submissions, this Appellant is in a far weaker position than the Appellant in Campbell (who lost his appeal) for the following reasons.

26. Firstly in Campbell the Appellant entered into his family life with his children whilst that Appellant was in the United Kingdom. This Appellant chose to have children whilst he was outside the United Kingdom and created a family where the family life that was going to be enjoyed was defined by the parameters of distance and being subject to immigration control.

27. Secondly the Appellant in Campbell pleaded guilty to only 1 offence and did not seek to resile from that conviction or use multiple aliases and dates of birth. This Appellant committed 9 separate offences and had been either cautioned or convicted on 5 separate dates and yet sought to mislead the Respondent and the Judge by denying having committed them or even having been arrested which he plainly was, and he used 8 different names and 5 different dates of birth. This Appellant was therefore rightly described by the Respondent in the refusal letter as "a persistent offender who shows a particular disregard for the law". The dishonesty that formed the core of his offending persists to this day as he sought to mislead the Respondent and the Judge regarding his offending behaviour.

28. For all these reasons, in my judgement there was therefore no material error of law in the manner in which the Judge dealt with the "Sanade/Zambrano" issue.

Ground 3 - best interests of the children

29. Permission was not granted to enable this to be argued. The application was based entirely on a misunderstanding of the applicability of the principles derived from Zambrano to the facts of this case.

Decision:

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.

Signed:

Deputy Upper Tribunal Judge Saffer
4 November 2015