Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00110/2014

THE IMMIGRATION ACTS

Heard at Manchester Crown Square	**Decision & Reasons**
On 6 January 2016	**Promulgated**
	On 11 April 2016

Before

Upper Tribunal Judge Plimmer

Between

C
ANONYMITY ORDER MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr Levine, Counsel
Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Introduction

1. The origins of this appeal are traceable to a decision made on behalf of the SSHD dated 8 January 2014, to deport the appellant, a national of Malaysia from the United Kingdom ('UK'). The appellant has a wife with

discretionary leave to remain in the UK and two children, the elder of whom is a British citizen.

2. I have anonymised the appellant because this decision refers to matters relevant to his children.

Appeal proceedings

3. On 24 July 2014, the appellant's appeal against the SSHD's decision was dismissed by the First-tier Tribunal ('FTT'). The appellant has appealed against this decision on two grounds: (1) in concluding that it would be reasonable to expect the appellant's elder child, a British citizen to relocate to Malaysia the FTT has failed to correctly apply the principles set out in Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC); (2) in finding that the appellant's wife could care for the children in the absence of the appellant the FTT failed to consider her emotional and financial ability to do so in the absence of the appellant.

4. Permission to appeal was granted on the basis that it is arguable that the FTT failed to apply the guidance in Sanade.

Hearing

5. At the beginning of the hearing I outlined my preliminary views. I indicated that ground 1 set out a clear error of law and the materiality of that error turned upon whether ground 2 was made out. In these circumstances Mr Levine was content to confine his submissions to ground 2 and relied upon the grounds of appeal drafted on behalf of the Appellant.

6. Mr McVeety submitted that the FTT was entitled to find that the children's mother has been and will be able to care for the children in the UK, and as such ground 2 has not been made out.

7. After hearing submissions from both parties I announced my decision that the FTT did not make a material error of law requiring the decision to be set aside.

Error of law discussion

8. I accept that the FTT erred in law in concluding that it would be reasonable to expect the appellant's British citizen child to leave the UK to reside in Malaysia. Sanade (supra) makes it clear that where the child is a British citizen and therefore an EEA citizen, it is not possible to require them to relocate outside the EEA or to submit that it would be reasonable to do so [95]. It follows that the FTT was wrong in law to find that it would not be unreasonable for the elder child to relocate [26].

9. This is not a material error of law requiring the decision to be set aside. The relevant version of paragraph 399(a) of the Immigration Rules in force

at the date of decision only benefits the appellant as a result of his relationship with his British citizen child where two requirements are met: *"(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."*

10. It is clear that in order for the appellant to benefit from paragraph 399(a) two mandatory requirements must be met: (a) and (b). The FTT considered (b) at [27] in case it was wrong regarding its conclusion regarding (a) (see first sentence of [27]). The FTT made it clear that it did not consider that (a) or (b) could be met [27]. It follows that if the FTT was correct to conclude that (b) could not be met, the appellant could not meet a mandatory requirement of 399, and any error of law regarding the other mandatory requirement at (a) matters not. I now turn to the manner in which the FTT approached (b).

11. As the grounds of appeal concede, the FTT was entitled to conclude that the father played no significant role in the household for the reasons outlined at [27 and 28]. The grounds of appeal however submit that the FTT failed to address whether or not the mother would be able to emotionally or financially care for the children in the appellant's absence. The issue for the FTT was whether or not the mother "*is able to care for the child[ren] in the UK*". The FTT gave clear and detailed reasons for finding that she is able to do so. The FTT was clearly of the view that the children's mother would be able to emotionally care for the children in the appellant's absence. A careful reading of [27 and 28] makes it clear that the FTT regarded the appellant's role in the family to be minimal. The FTT regarded the mother as having demonstrated that she is able and willing to care for her children in the appellant's absence.

12. The submission that this mother would not be able to financially support the children is difficult to follow. She has been accommodated by family members for a number of years. Whatever the position regarding the intended length of their financial support there was no evidence that she and the children could not continue to reside with the family members. The children are of school age and their mother is entitled to work. It is difficult to see why she could not financially support her children through employment. Given the appellant's gambling addiction and lack of significant support to the family it is unlikely that he has been a source of stable financial support to them. In any event the requisite level of financial support would be available from the state for the children, one of whom is a British citizen.

13. It follows that ground 2 is not made out and in the premises the error of law identified in ground 1 is not material.

Decision

14. The decision of the FTT does not contain a material error of law and is not set aside.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 11 January 2016