Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/34001/2014
IA/34003/2014
IA/34005/2014
IA/34013/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 December 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

(1) AC
(2) AB
(3) GB
(4) JB
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Dawkin, counsel
For the Respondent: Ms Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Jamaica. The third appellant is also British having been granted citizenship in October 2014 (after the respondent's decisions were made but prior to the appeal hearing in the First-tier Tribunal).

2. Given that two of the appellants are minors and given also my references to the health of the first appellant, the appellants are entitled to anonymity in these proceedings and I make a direction accordingly.

3. The appellants had applied for leave to remain in the UK on human rights grounds. At that time the third appellant was not British. The respondent refused their applications under Appendix FM and paragraph 276ADE(1) of the Immigration Rules and decided to remove the appellants under s10 of the Immigration and Asylum Act 1999. The decisions had been reconsidered and maintained on 13 August 2014.

4. The appellants appealed against those decisions and their appeal was heard in the First-tier Tribunal by First-tier Tribunal Judge Geraint Jones QC ("the FTTJ"). He refused the appeals of the first, second and third appellants on human rights grounds and made no decision on the appeal of the third appellant, finding that her appeal was "otiose" due to her British citizenship.

5. All four appellants sought permissions to appeal and this was granted by Upper Tribunal Judge Taylor on 8 July 2015. Her reasons for so granting were as follows:-

> "1. The grounds argue that the judge erred in law in failing to recognise the authority of Zambrano (C-34/09) and Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 48.
>
> 2. It is also argued that he misdirected himself as to the findings of fact at issue, failing to recognise the relationship between the first and second appellants when it had not been challenged, failing to take into account material medical evidence, and misdirecting himself in relation to his assessment of the best interests of the children.
>
> 3. Finally it is said that he showed bias in his attitude.
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> 4. The determination contains loose and somewhat intemperate language in relation not only to the judge's view of the conduct of the appellants but also his opinion of the caselaw cited.
>
> 5. All grounds may be argued."

6. Thus the appeal came before me.

7. In their grounds of appeal, the appellants rely on the guidance in **Zambrano** to the effect that refusal to grant a right of residence to the first and second appellants was contrary to Article 20 TFEU because the decision deprived the British third appellant of the enjoyment of her rights as an EU citizen. The FTTJ had erred in law in failing to recognise the binding authority of **Zambrano** and **Sanade**. Further, the FTTJ had misdirected himself as to the facts at issue in that he had failed to recognise the genuine and subsisting relationship of the first and second appellants which had not been challenged by the respondent: the FTTJ had made contrary findings despite there being no challenge on this issue by

the respondent at the hearing. It had not therefore been open to the FTTJ to make an alternative finding without inviting the parties to address this issue first.

8. In addition, according to the appellants, the FTTJ had failed to take into account two letters dated the day before the hearing, handed to the FTTJ and the respondent prior to the start of the hearing. The FTTJ failed to refer to these in the decision, despite having allowed them to be adduced in evidence. Both letters related to the vulnerability of the first appellant and were thus relevant to the analysis of the best interests of the children in her care.

9. The grounds also refer to the FTTJ's findings with regard to the best interests of the third appellant as being perverse, particularly that it was in her best interests to "relocate to the warmer climes" of Jamaica within the bosom of her family. It was submitted by Ms Dawkin, for the appellants, that the FTTJ had failed to make any mention of the best interests of the fourth appellant. He had also erred in giving weight to the poor immigration history of the parents in the assessment of the children's best interests and in finding that the children were unlawfully in the UK when they were both born here. The decision to remove the third and fourth appellants had been made on the basis of their being family members of persons who had overstayed and were not British at the date of decision. The FTTJ also failed in his duty to make a decision in the third appellant's appeal against the decision to remove her.

10. In her oral submissions, Ms Dawkin reiterated that this was a classic **Zambrano** situation: the removal of the parents undoubtedly had the effect of requiring the third appellant to leave the EU. She submitted that the FTTJ should have taken into account the respondent's policy of not removing British children in such circumstances. There had been no suggestion that the third appellant could be cared for by anybody else in order to remain in the UK. This was, she submitted, exactly what the FTTJ had envisaged but he nonetheless found the removal reasonable. It was unequivocal that, according to EU law, domestic law and the respondent's policy, it was unreasonable to expect the child to leave. Furthermore, she submitted, the failure of the FTTJ to take into account the first appellant's medical condition, which would impact on the best interests of the children, was an error of law, given that the first appellant currently received support in the UK.

11. On behalf of the respondent, Ms Everett relied on the Rule 24 reply to the effect that the FTTJ had directed himself appropriately. It was noted that the appeal was being pursued on Article 7 grounds and although the FTTJ had made comments about the case law cited, he had appropriately directed himself at paragraph 68 in relation to s117A-D of the 2002 Act. It had been appropriate to consider whether or not it would be reasonable to expect the child to relocate to Jamaica with his [sic] parents. At paragraph

58, the FTTJ found that no evidence had been adduced as to why it might be unreasonable to expect the child to depart from the UK; on the evidence (or rather the lack of it), the burden being on the appellants, it was open to the FTTJ to conclude that it would be reasonable for the child to relocate with the family.

12. In her oral submissions, Ms Everett said that she was not resiling from the R24 reply but that she had taken on board the criticisms of the FTTJ's decision. She agreed that the respondent had accepted, prior to the hearing, the relationship of the first and second appellant was genuine and subsisting; she accepted it was unarguable that there had been anything to contradict the respondent's position as regards the nature of the relationship. She agreed that the third appellant was British at the date of hearing. She did not consider the FTTJ had been right to describe the decision as otiose; rather, she submitted that the third appellant's acquisition of British nationality post-decision rendered the decision invalid. As regards the FTTJ's reasons for concluding that the third appellant could reasonably leave the UK, these flowed from the fact the third appellant would leave the UK in the bosom of her family. Ms Everett confirmed that the respondent's IDI in force at the date of decision advised that, in most cases, it would not be reasonable to remove a British child. She noted however that there were some circumstances in which this guidance would not apply. Ms Everett made no positive assertion in concluding her oral submissions but said she would leave it to me to decide whether there was a material error of law in the FTTJ's decision.

Discussion

13. The only issue before the FTTJ was whether the removal of the appellants would place the UK in breach of Article 8. All the appellants, at the date of decision, were Jamaican citizens and it was inappropriate therefore for the FTTJ to decide that the appeal by the third appellant was otiose. Notwithstanding her having been granted British citizenship prior to the date of hearing, the decision to remove her had given rise to a right of appeal and the third appellant was entitled to a decision on her appeal, albeit the removal decision was no longer enforceable.

14. Ms Dawkin submits that the application of **Zambrano** and related case law is at the crux of this case. I agree.

15. I have a number of concerns about the FTTJ's decision. First, the FTTJ ignored the respondent's concession that the relationship between the parent appellants was genuine and subsisting, referring to a lack of evidence on the issue. No evidence was required given that this claim had been accepted by the respondent. Although the FTTJ was not bound to accept the nature of the relationship, his departure from the agreed position of the parties required explanation. In the absence of such an explanation, the reasonable inference is that the FTTJ had misunderstood or failed to take the concession into account. Furthermore, and

significantly, the FTTJ failed to follow the guidance in **Sanade** as to the application of **Zambrano,** instead criticising aspects of that guidance. That guidance has direct application to the facts of this case, particularly given that the parties had agreed that the parent appellants were in a genuine and subsisting relationship and, implicitly, that they were the primary carers of the third appellant. The FTTJ's failure to follow the guidance in **Sanade** is a material error of law and his decision must be set aside in its entirety.

16. In **Sanade**, the Upper Tribunal stated at point 5 in the headnote:

> "Case C-34/09 Ruiz Zambrano now 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 the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

17. The Upper Tribunal in **Sanade** also made clear at point 6 of the headnote that:

> "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."

18. The first and second appellants are the third appellant's parents and only carers. The removal of the first and second appellants would force the third appellant to leave the EU to be with her parents. Her circumstances fall within the situation described in **Sanade**. This is also the respondent's position as set out in her guidance. The IDI "Family Migration: Appendix FM Section 1.0B: Family Life (as a Partner or Parent) and Private Life: 10-year Roots" (November 2014) states at 11.23 under the rubric "would it be unreasonable to expect a British citizen child to leave the UK?":

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British citizen child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgement in Zambrano."

19. The Guidance then goes on:

> "Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that

> there is satisfactory evidence of a genuine and subsisting parental relationship."

20. The Guidance identifies the exception to that approach:

> "It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify the separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> > Criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> >
> > A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.
>
> In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation."

21. The third appellant has no other carer in the UK. Her only carers are her parents, the first and second appellants. Thus the exception in the IDI does not apply here. I find therefore that the appellants' situation is covered squarely by the guidance in **Sanade**: the third appellant is a British citizen whose primary carers are her parents. If her parents, the first and second appellants, are removed from the UK, the third appellant, who is aged 11, would be forced to depart the UK with her parents. This would deprive her of the right to reside in the UK, the country of her nationality.

22. I also take into account the guidance in s117B(6) of the Nationality, Immigration and Asylum Act 2002 which provides that "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." A "qualifying child" means, for these purposes, a child under the age of 18 who is a British citizen (see s.117D(1)). The third appellant is, therefore, a "qualifying child". It is accepted that the first and second appellants have a "genuine and subsisting parental relationship" with the third appellant.

23. Section 117B(6) states that: "The public interest does not require the person's removal" where that genuine and subsisting parental relationship exists and "it would not be reasonable to expect the child to leave the United Kingdom".

24. Applying the respondent's guidance and **Sanade**, it would not be reasonable to expect the third appellant to leave the UK. In such circumstances, the public interest does not require the removal of the first

and second appellants. The fourth appellant's removal, as was pointed out by Ms Dawkin, hinges on that of the first and second appellants, his parents, on whom he is dependent.

25. Whilst both parties' representatives submitted that the appropriate course was for me to remit the appeals to the First-tier Tribunal, given that the respondent accepts the first and second appellants are in a genuine and subsisting relationship and, implicitly, that they are the primary carers of the third appellant (who is British), I consider it appropriate to remake the decision on that basis. Accordingly, I find that the removal of the appellants would give rise to a disproportionate interference with the appellants' right to a family and private life in the UK.

Decision

26. The making of the decision of the First-tier Tribunal did involve errors of law, as set out above.

27. I set aside the decision.

28. I re-make the decision in the appeals by allowing them on human rights grounds.

Signed ***A M Black***

Date: 30 December 2015

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Awards

No fees having been paid, there can be no fee awards.

Signed ***A M Black***

Date: 30 December 2015

Deputy Upper Tribunal Judge A M Black