Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03706/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 August 2017	**On 7 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MACHIMKWU CHIMAOBIM AJOKU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, Counsel instructed by Vincent Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who entered the United Kingdom a visitor, and then applied for leave to remain as the partner of a British national, appeals against the decision of the First-tier Tribunal (Judge L Murray sitting at Newport on 2 October 2016) dismissing his appeal on human rights grounds against the decision of the Secretary of State to refuse to grant him leave to remain either as the partner of a British national or as the parent of a British national child. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity proceedings in the Upper Tribunal.

The Reasons for the Initial Refusal of Permission to Appeal

2. The initial grounds of appeal to the Upper Tribunal were settled by a member of the solicitor's firm who represented the appellant at the hearing before Judge Murray. On 4 May 2017 Designed Judge Manuell refused permission to appeal for the following reasons:

> The excessively lengthy grounds are misconceived and fail to identify any arguable material error of law. Headed "Skeleton Argument", at best they seek to re-argue an appeal which the Judge had dismissed with full and clear reasons. The Judge considered the best interests of the child in the course of her Article 8 ECHR evaluation, where the relevant current authorities were correctly applied.

The Reasons for the Eventual Grant of Permission to Appeal

3. The appellant instructed a new firm of solicitors who in turn instructed Counsel, Ms Akinbolu, to settle new grounds of appeal.

4. On 11 July 2017 Upper Tribunal Judge Canavan granted permission to appeal for the following reasons:

> It is at least arguable that, despite the Judge's lengthy recitation of the case law, and in particular what was said in **MA (Pakistan**) about the respondent's policy guidance, the Judge failed to take into account the respondent's guidance in relation to British citizen children and where a fair balance should be struck. Considering the Judge's findings at [36], it is possible that the failure might be found to be immaterial. However, the point is sufficiently arguable to be considered in more detail at a hearing.

The Hearing in the Upper Tribunal

5. At the hearing before me to determine whether an error of law was made out, Ms Akinbolu developed the case pleaded in the new grounds of appeal. The respondent's published guidance made it clear that in all cases in which the interests of a British child are affected, it must be approached on the basis that it would be unreasonable to expect the British citizen child to leave the European Union. The Judge referred to **Sanade [2012] UKUT 48**, but appeared to conclude that the decision represented an erroneous or outdated statement of law, since it was based upon a concession that had subsequently been withdrawn. This conclusion was legally incorrect. The concession was incorporated in the published policy, and the Tribunal in **Sanade** gave judgment to the effect that the concession reflected the correct legal principle.

6. In **SF & Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC),** the Tribunal had again confirmed this statement of law. Apparently, Judge Murray was unaware of the respondent's policy or of its relevance. Had she been aware of the policy, it is arguable that she would

have arrived at a different conclusion.

7. Having found that there was a genuine and subsisting relationship with a British child, and that it was in the child's best interest to remain, absent cogent evidence of criminality or an exceptionally poor immigration history, the application of section 117B(6) of the 2002 Act reduced the weight to be given to the public interest in the removal of the appellant to such an extent as to render removal disproportionate.

8. On behalf of the Secretary of State, Ms Isherwood adhered to the Rule 24 response settled by a colleague opposing the appeal. She sought to distinguish **SF** on the facts, and she submitted that the policy guidance relied on by Ms Akinbolu did not apply in this case, as neither the respondent in the decision letter nor the Judge in her reasoning had suggested that it was reasonable to expect the British citizen child to leave the United Kingdom with the appellant. She submitted that the policy was not engaged where the parents of the child in question had a reasonable choice as to where family life should be carried on.

Discussion

9. As noted by the Tribunal in **SF** at paragraph [7], the IDIs on family migration - Appendix FM, section 1.0(b), headed "Family life as a partner or parent and private life, 10 year routes", and dated August 2015, contain at paragraph 11.2.3 guidance on the following question: "*Would it be unreasonable to expect a British citizen child to leave the UK?"* The relevant parts of the guidance are as follows:

> 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 to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in **Zambrano** …
>
> 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.
>
> 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 separation, if a 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 threshold set out in paragraph 398 of the Immigration Rules;

- a very poor immigration history, such as whether a 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 (my emphasis). If the decision-maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the office of the children's champion on the implications for the welfare of the child, in order to inform the decision.

10. Ms Akinbolu invites the Tribunal to adopt a broad interpretation of this policy with the consequence that, absent misconduct by the parent of the gravity envisaged in the exception (criminality or *"a very poor immigration history"*), the Secretary of State should be taken as conceding, with reference to Section 117B(6) of the 2002 Act, that the public interest does not require the parent's removal where that parent has a genuine and subsisting parental relationship with the British national child.

11. However, I do not consider that this broad interpretation of the policy is correct. The prohibition stipulated in the policy is against assessing a case on the basis that it would be reasonable to expect a British citizen child to leave the UK *with the parent or primary carer who is facing removal.* There is no express prohibition against assessing the case on the basis that it would be reasonable to expect a British citizen child to leave the UK *with both parents*. In such a scenario, there would be no separation, no break-up of the family unit, and so the need to justify separation would not arise.

12. It is important to distinguish between expectation and choice. It is implicit from the Judge's findings at paragraph [33] that in her view the child's mother had the reasonable choice of relocating to Nigeria with the child and his father, and at paragraph [36] she made an express finding to this effect (see below). This is not the same as finding that mother and child were *expected* to leave the UK in order to join the appellant in Nigeria.

13. The narrow construction of the policy advocated by Ms Isherwood is consistent with Appendix FM, under which a person in the appellant's position cannot take the benefit of EX.1(a) because he shares parental responsibility for his British national child, rather than having sole responsibility for the child.

14. The decision of the Tribunal in **SF** is also consistent with a narrow construction of the policy. The appellants in **SF** were a mother and her two young children. Each of them had entered the United Kingdom unlawfully in 2012. Prior to that, they had lived in Albania. The first appellant's husband had come to the UK much earlier. He had obtained ILR and subsequently by false representations, a grant of British citizenship. He was currently serving a sentence of seven and a half years' imprisonment for offences connected with people-trafficking. After the appellant arrived in the UK, the first appellant gave birth to a further child. The youngest child was born when the child's father had indefinite leave to remain, and as a result, this youngest child was a British citizen.

On 29 April 2015, the appellants were served with notices refusing their asylum claims and deciding that they should be removed from the UK as illegal entrants.

15. The First-tier Tribunal dismissed the appeals on all grounds raised. The issue that was pursued before the Upper Tribunal was an argument that because of the nationality of the youngest child, it would be unreasonable to expect that child to leave the UK; and that this had an impact on the merits of the decision that the appellants should be removed.

16. Mr Wilding drew the attention of the Upper Tribunal to the policy. He accepted that this was not a case in which the conduct of the mother of the other three children was such as to give rise as to considerations of such weight as to justify separation. The Tribunal also observed that it did not appear that consideration had been given to the possibility of the British citizen child staying with another parent or alternative primary carer in the EU. The Tribunal held, at paragraph [9], that it appeared inevitable that if the guidance to which Mr Wilding had drawn their attention had been applied to the present family, at any time after it was published, the conclusion would have been that the appellant should have been granted a period of leave to remain in order to enable the British citizen child to remain in the UK with them.

17. As submitted by Ms Isherwood, the facts of **SF** were significantly different from the facts of the present case. The effect of the decision under appeal in **SF** was to compel a British citizen child to leave the EU. This was because his father was in prison, and his other parent and primary carer was facing removal. So, the case plainly fell within the scope of the policy. There was no question of choice. The parents did not have the choice of voluntarily relocating to Albania to continue family life there with their children, as one of them was in prison. Thus it was unreasonable to expect the British citizen child to leave the EU with his mother, in circumstances where the conduct of the mother did not give rise to considerations of such weight as to justify separation from the father; and in any event the child could not otherwise stay with his father in the UK or elsewhere in the EU.

18. Conversely, as rehearsed earlier in this decision, it was never in contemplation in this case that the British citizen child should leave the UK with the appellant, and so the reasonableness of expecting the child to do so did not arise as a material consideration in the proportionality assessment. By the same token, the policy was not engaged.

19. Accordingly, there was no error of law in the Judge's approach. She engaged with the appellant's case as it was presented to her. No reliance was placed on the policy by the appellant. So there was no error by the Judge in not taking into account the policy when assessing proportionality. At the beginning of paragraph [34], the Judge correctly stated the law as follows: "*It is not the position under UK or EU law that it is unreasonable per se for a British citizen child to relocate outside the EU*".

20. Ms Akinbolu submits that the concession made in **Sanade** has re-surfaced in the policy. I reject this submission as the policy does not address the question of when it is reasonable for a British citizen child to relocate abroad as part of a family unit.

21. The appellant's child was aged 23 months at the date of the hearing. After extensive consideration of the relevant jurisprudence, including **ZH (Tanzania) -v- SSHD [2011] UKSC 4** and **JW (China) -v- SSHD [2013] EWCA Civ 1526**, the Judge reached the sustainable conclusion that while it might be in the child's best interest to remain in the UK to enjoy the benefits of UK citizenship, "*it is only marginally so".* Accordingly, this was a case in which the need to maintain immigration control might well tip the balance against the appellant, following **MA (Pakistan) and Others -v- SSHD [2016] EWCA Civ 705** and **EV (Philippines)**. The Judge cited extensive passages from both these authorities at paragraphs [28] and [29] of her decision.

22. At paragraph [36], the Judge said as follows:

> I find that there are powerful or cogent reasons why leave should not be granted in this case. The appellant does not meet the immigration rules by a significant margin. He was only in the UK as a visitor and overstayed. His son was conceived during a period when his stay was temporary and he had no legal basis to apply as a partner inside the UK. I find that there are strong countervailing factors in this case. The appellant's son is very young and adaptable with no health issues, and I conclude that it would not be unreasonable for him to live in Nigeria. It follows also, from my conclusions, that the requirements of section 117B(6) are not met. I have therefore conducted a wider public interest assessment.

23. At paragraph [38], the Judge observed that the appellant was not financially independent. At paragraph [39], the Judge said that the appellant had arrived in the UK as a visitor in March 2015 and it was not clear when leave expired, but because he had been here precariously, she had to give little weight to his private life. His relationship with his qualifying partner had been established whilst he had been here in a temporary capacity in the knowledge that he could not expect to remain unless he satisfied the immigration rules. She did not consider it was unreasonable for his partner to live in Nigeria "*should she choose to join the appellant there.*"

24. The Judge was wrong in paragraph [36] to characterise the appellant as becoming an overstayer. The appellant had Section 3C leave as he applied for leave to remain during the currency of his visit visa. The Judge's error is not, however, material. For the Judge returned to the issue of proportionality at paragraph [39], and she proceeded on the correct premise that the appellant's status in the UK had at all times been precarious, not unlawful.

25. In conclusion, in a decision which ran to 17 closely-typed pages, the Judge gave comprehensive and sustainable reasons for dismissing the appeal, and no error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 2 September 2017

Judge Monson

Deputy Upper Tribunal Judge