Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10130/2016

THE IMMIGRATION ACTS

Heard at: Liverpool	**Decision & Reasons Promulgated**
On: 17th August 2017	**On: 21st August 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AAT
(anonymity order made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Hussain, Lei Dat & Baig Solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a male national of Nigeria born in 1972.

Anonymity Order

2. This appeal turns on the presence in the United Kingdom of the Appellant's minor son. I am concerned that identifying the Appellant could lead to the identity of the child being revealed in the public domain. Having had regard to Rule 14 of the Tribunal Procedure

(Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Decision of the First-tier Tribunal

3. The Appellant came to the United Kingdom in 2006 with leave to enter as a student. In June 2009 he made an in-time application to extend his leave. This was refused by the Respondent on the 15th July 2009. There was no further contact between the Appellant and the Respondent until on the 25th June 2015 the Appellant made an application for leave to remain on human rights grounds. The Appellant had married a naturalised British citizen, a Dr A, and now he wished to remain here with her. The Respondent initially refused and certified the claim with reference to s94(1) of the Nationality, Immigration and Asylum Act 2002, but the certification was subsequently withdrawn after the Appellant's representatives launched judicial review proceedings. In a letter dated 23rd March 2016 the decision to refuse was maintained. Although it was expressly accepted that the Appellant met the suitability [10] and eligibility requirements [16] set out in Appendix FM it was not accepted that there would be insurmountable obstacles to family life continuing outside of the UK and the matter fell to be refused with reference to paragraph EX.1. Leave was further refused on private life grounds. The Respondent did not consider there to be good reason to grant leave under Article 8 and so leave was refused.

4. By the date that the appeal came before the First-tier Tribunal the Appellant's family life case had developed in that he and his wife had celebrated the birth of their first child. The little boy was born in January 2017 and is a British citizen.

5. The determination of the appeal by the First-tier Tribunal was promulgated on the 4th April 2017. The Tribunal agreed with the Respondent's assessment that there were no insurmountable obstacles to Dr A moving to Nigeria (her country of origin) or in the family life being re-established there. There is no challenge to that conclusion. Next, the Tribunal turned to assess the significance of the fact that the Appellant now has a British child. At paragraph 8 (viii) the Tribunal properly directs itself to consider whether it would be reasonable to expect this child to leave the UK. The determination

then cites numerous cases relating to children and Article 8 before concluding that it would indeed be reasonable. Finding that the public interest in removing persons without leave to remain outweighs the Appellant's right to a family life with his family in the UK, the Tribunal then dismisses the appeal.

Error of Law

6. The grounds can be shortly stated. At paragraph 8 (xxvi) the determination says the following:

> "In AN & Ors v Minister for Justice and Equality [2013] IEHC 480 (a non binding decision of the High Court of Ireland) the Judge noted that the suggestion in Sanade "that it is not possible to require a British Citizen to relocate outside of the European Union" followed on from a submission made by the Respondent at that time. If that was a concession before the Tribunal in Sanade, it is certainly a concession that has long since been withdrawn".

7. Mr Hussain submits this paragraph to encapsulate the error in approach by the Tribunal in this case. In its assessment of proportionality the Tribunal was bound by terms of statute, namely section 117B(6) of the Nationality, Immigration and Asylum Act 2002:

> (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.

8. By virtue of s117D of the same Act, a British child is a "qualifying" child in the context of s117B(6)(a). It is accepted that the Appellant's child is British.

9. The only remaining question was therefore whether it is reasonable to expect that child to leave the UK. As the determination points out, there is a considerable body of caselaw on this matter, and in particular on the effect of that provision on children who are not British but are nevertheless "qualifying" by virtue of their seven-years long residence. In such cases, the Tribunal is required to weigh the public interest into its consideration of whether the child might reasonably be expected to leave the country with the parent who is facing expulsion. That is in effect the approach that the Tribunal

has taken in this case. Mr Hussain points out, however, that this child was not one of those children. He is British, and as such different considerations apply. In particular, the ratio of the concession made in Sanade. Mr Hussain took issue with the Tribunal's conclusion that this was "certainly a concession that has long since been withdrawn".

10. He was right to do so. There was nothing before the Tribunal to indicate that the concession in Sanade – to the effect that it will not be "reasonable" to expect a British child to leave with a parent facing expulsion – has "long since been withdrawn". On the contrary, a statement to very similar effect remains the Respondent's published policy to this day. At section 11.2.3 of the Immigration Directorate Instruction 'Family Migration: *Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*' (August 2015), under the heading "Would it be unreasonable to expect a British Citizen child to leave the UK?" the following answers are given to caseworkers:

> "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 child 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".

(emphasis added)

11. It should be noted that the terms "parent" and "primary carer" are distinguished, and separated by an "or". The clear import of that policy statement is that where *a* parent of a British child is being required to leave the EU, the case *must always be assessed* on the basis that it would be unreasonable to expect the British Citizen child to leave the EU with that parent.

12. Mr Harrison queried whether that policy statement had been brought to the Tribunal's attention. If it was not, that is an unfortunate omission: UB (Sri Lanka) [2017] EWCA Civ 85. I am nevertheless satisfied that it is a matter of which the Tribunal might reasonably be expected to be aware, given that it is guidance that

has been expressly adopted and endorsed on a number of occasions by the Court of Appeal (see for instance MA (Pakistan) [2016] EWCA Civ 705) and Upper Tribunal (PD and Others [2016] UKUT 108 (IAC)). This section in particular has recently received some attention from the Vice President in SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120(IAC). It follows that I accept Mr Hussain's submission that the Tribunal erred in its approach to the significance of the child's British nationality. The 'concession' in Sanade, an expression of the law as it has developed since Zambrano has not been withdrawn at all; it continues to be reflected in the Respondent's own published guidance.

13. What is the significance of that guidance? This case involves the family life of a husband, wife and a very young child. As the Respondent acknowledges it would be plainly be contrary to the best interests of the child – and absent any criminality disproportionate - to separate that family unit. Realistically, there are therefore only two options: expect mother and child to go to Nigeria with the Appellant, or allow him to remain in accordance with the principles in s117B(6). Applying the terms of the policy, which I take to represent the Respondent's case on where the balance should be struck, I find that it would not be reasonable to expect this child to leave this country. There is accordingly no public interest in the Appellant's removal and his appeal must be allowed.

Decisions

14. For the reasons I have given I am satisfied that the decision of the First-tier Tribunal involved material errors in approach. It is set aside.

15. The decision is remade as follows: "the appeal is allowed".

16. There is an order for anonymity.

Upper Tribunal Judge Bruce
18th August 2017