Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28704/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th November 2017	**On 8th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR TAHIR SIDDIQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Richardson, Counsel, instructed by Elegant Solicitors
For the Respondent: Mr T Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Onoufriou promulgated on 20th January 2017, in which he dismissed the Appellant's appeal against the decision of the Respondent dated 26th June 2014 to refuse his application for leave to remain in the United Kingdom on the grounds that to remove him would not place the United Kingdom in breach of its obligations under the European Convention on Human Rights.

2. At the appeal hearing before the Upper Tribunal, the Appellant has been represented by Mr Richardson of Counsel and the Respondent has been represented by Mr Melvin, the Senior Home Office Presenting Officer. Permission to appeal had been granted by Upper Tribunal Judge Craig on 20th September 2017, who found that it was arguable that the First-tier Tribunal Judge's finding that it would not be unreasonable to expect the Appellant's child, who is a British citizen, to leave the UK was inadequately reasoned.

3. In considering this appeal I have considered all of the evidence and the submissions before making any findings. I have fully taken account of the grounds in support of permission to appeal, the grant of permission, the Rule 24 reply from the Secretary of State, the further submissions made in writing on Section 117B by Mr Richardson, together with the oral submissions made by both legal representatives today.

4. The Grounds of Appeal state that the Appellant and his wife have a British citizen child who was born on 27th August 2016. It was argued that the judge failed to take account properly of the **Zambrano** issue. It was argued that the judge, although he referred to the cases of **AQ (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 250** and the case of **Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 0048** and the case of **Izuazu (Article 8 – new rules) [2013] UKUT 0045**, did not make a final ruling given the cases of **CS** and **Marin**, which were pending before the European Court of Justice. It was argued that the judge misunderstood the ratios of **CS** and **AQ (Nigeria)** and the submissions made in respect of those cases and that this was not a case involving deportation involving serious criminality.

5. It was argued in the grounds of appeal that the judge's statement at paragraph 22 that 'ignoring **Zambrano** for the moment' is a matter which is said to be utterly irrational and that he cannot when considering removing the child disregard important principles of law and that the judge has failed to deal properly with **Zambrano**. It was argued that the judge erred in finding that there were no exceptional circumstances in the case, as it involved a British citizen child, such as to mean that Article 8 was clearly engaged.

6. Within Mr Richardson's written submissions he goes further and seeks to argue that if an Appellant enjoys a parental relationship with a British child, he in fact cannot be removed from the UK and relies upon the case of **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120**. He refers to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, which states 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 UK.*"

7. He argues that a qualifying child under Section 117D includes a British citizen or a child who has lived in the UK for a continuous period of seven years or more, and it was submitted that it the public interest did not require the Appellant's removal as he is the father of a qualifying child and that it would not reasonable for the child to relocate, because the child is a British citizen. He relied on the concession of the Secretary of State previously made in the case of **Sanade**, that it was not possible to require a British citizen or EU child to relocate outside the European Union. Mr Melvin, however, informs me that such concession has in fact since been withdrawn by the Secretary of State.

8. It was argued by the Appellant that the case must be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the Union with that parent or primary carer and that the Secretary of State's own policy under the Immigration Directorate Instruction "Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes" from August 2015, was considered by the court in the case of **SF and others** and that the policy states that:

> "*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***."

9. The policy it goes on to state:

> *"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 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."*

10. However, as was conceded by Mr Richardson, in this case the policy of the Secretary of State was not actually referred to the Immigration Judge in this case by either side

and clearly it was not strictly therefore an argument before the First-tier Tribunal Judge that the policy in itself meant that it would not be reasonable to expect this British citizen child to leave the EU with his parents.

11. The judge at paragraph 22 noted that the Appellant did have a genuine and subsisting parental relationship with a child who is a British citizen in the UK under the age of 18 and likewise found that the Appellant is in a genuine and subsisting relationship with a partner in the UK who is a British citizen. However, the First Tier Tribunal judge went on to find that in respect of his marital relationship he did not consider that there were insurmountable obstacles to family life continuing with his wife in Pakistan, as they are both familiar with the culture and they have family there and he noted that the Appellant's wife was originally born and raised in Pakistan.

12. The judge went on to state:

> "*Ignoring **Zambrano** for the moment I do not consider that it would not be reasonable to expect the child to leave the UK. The child is not yet 6 months old and there are no health issues that have been raised so there would be no difficulty in the child being raised in Pakistan as, in effect, it currently knows no other culture*."

13. The judge then went on in paragraph 23 to find that:

> "*In **Zambrano** the facts of the case were that the Appellant was the primary carer of an EU citizen and therefore if that individual was required to leave the EU necessitating the EU citizen to leave with them, thereby depriving the EU citizen of their rights as an EU citizen then that requirement by the member state is prohibited as determined in **CS**. However, I note that the care of the child is shared between the Appellant and his wife. If the Appellant is removed from the United Kingdom his wife does not have to follow him and consequently nor does his child. The child will still have a primary carer in the form of his mother. I therefore distinguish the facts of the case before me with those in **Zambrano** and **CS**.*"

14. The judge then went on to consider the matter under Article 8 outside of the Immigration Rules and found that there were no exceptional circumstances and that the Appellant and his wife were aware of the precarious immigration status. He noted that the family would be split if the Appellant was returned and his wife and child remained here, but he found that this was a regrettable result of the need to maintain effective immigration control, which he did not consider would be a disproportionate application in the case. The judge found that there was nothing preventing the Appellant from applying for entry clearance to return as the spouse of a person present and settled here.

15. He went on to find:

> "*I have noted Section 117Bf(6) of the 2002 Act, but I do not consider it would not be reasonable to expect his child to leave the United Kingdom with him for the reasons I have already given. Likewise, I have already pointed out that his wife and child do not have to follow him to Pakistan*."

16. In respect of the judge's findings regarding EX.1, Mr Richardson quite properly concedes that EX.1 could not be met in any event as the Appellant did not have sole responsibility for his child under paragraph E-LTRP.2.3 of the Immigration Rules and in effect therefore the judge was simply considering the appeal outside of the Immigration Rules. But in respect of whether or not it is reasonable to expect the child to leave the UK it is clear from paragraph 22, in my judgment, although at the start of that paragraph the judge accepts that the Appellant does have a parental relationship with a child who is a British citizen in the UK and under the age of 18 when considering or not whether it is reasonable to expect the child to leave the UK he has then, as he stated, ignored the **Zambrano** issue and simply found that "*the child is not yet 6 months old and there are no health issues that have been raised so there would be no difficulty in the child being raised in Pakistan as apparently it currently knows no other culture*".

17. Those are the reasons given by the judge as to why he says it would be reasonable to expect the child to leave the UK. He seems to fail to take into account in that regard of the fact that the child is a British citizen and that the mother also is a British citizen, so when considering Section 117B(6) in terms of whether it would be reasonable to expect the child to leave the UK and in fact the judge relies upon the reasons already given. In that regard he fails to take account entirely of the fact that this was a British citizen child. The fact that the child was a British citizen has to be taken into account when considering reasonableness and one cannot simply ignore in that regard when making the initial findings, the **Zambrano** issue.

18. The judge at paragraph 22 goes on to note that the care of the child was shared between the Appellant and his wife and that if the Appellant is removed from the United Kingdom his wife does not have to follow him and consequently nor does his child. The child will still have a primary carer in the form of his mother.

19. However, in the case of **Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others C-133/15** it was held that it is important to determine which parent was the primary carer of the child and whether in fact there was a relationship of dependency between the child and that parent. As part of that assessment the authorities should take into account the right to respect for family life as per Article 7 of the Charter of Fundamental Rights, to be read in conjunction with the obligation to take into consideration the best interests of the child. That the other parent, a Union citizen, was actually able and willing to take responsibility for the child was a relevant factor, but was not a sufficient ground for a conclusion that there was not as between the third country national parent such a relationship of dependency that the child would indeed be compelled to leave the EU, if the third country national were refused the right of residence. Such an assessment must take into account the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to both parents and the risks which separation from the third country parent might entail for the child's equilibrium.".

20. In this case the question as to what the actual effects on the child will be is in terms of any separation and whether in fact obviously that the child would in fact be forced to leave the EU if the Appellant were removed has not been considered by the judge. The judge simply seems to find that the fact that the Appellant is married to a British citizen wife who would stay with the child in itself means that the Appellant does not have to leave.

21. The judge's reasoning in that regard has not properly considered all of the circumstances and simply seems to make an assumption that the fact that there is a British citizen mother simply means the child does not have to leave the EU. I find it is actually clear following the recent developments in the **Zambrano** principle that that is not an adequate consideration of that issue, and as to whether or not the British Citizen child would in fact be effectively forced to leave the EU.

22. Nor has the judge really considered the issue as to whether or not it is reasonable for the family to be split in order for the Appellant to return to make an application for entry clearance. The judge simply said that the family will be split if the Appellant were returned and his wife and child remained but "*this regrettable result of the need to maintain effective immigration control in respect of which I do not consider would be a disproportionate application in this case*". No adequate reason has been given in that regard as to why the public interest would mean that when an Appellant does have a wife and British citizen child that following the **Zambrano** principle the child should be split from one parent in order for that application to be made. Adequate reasons have not been given in that regard.

23. I do find that the decision of First-tier Tribunal Judge Onoufriou does contain material errors of law and I set aside that decision. I remit the case back to the First-tier Tribunal to be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge Onoufriou. However, the judge's findings regarding the ETS scores had not been dishonestly obtained and the judge's findings that the Appellant was genuine and his test results were invalid because ETS Global UK were unable to authenticate them and the judge's findings that the appellant did meet the suitability requirements of Appendix FM and he met the eligibility requirements of paragraph E-LTRP.1.2 to 1.12 and 2.1 should be preserved, as those findings were not challenged before me. The findings that the Appellant had not utilised a proxy and therefore not utilised deception in obtaining his ETS scores has not been challenged by the Secretary of State before the Upper Tribunal and are maintained.

24. I also preserve, as agreed by Mr Melvin on behalf of the Secretary of State, the findings of the First-tier Tribunal Judge that the Appellant has a subsisting parental relationship with a child who is a British citizen in the UK and who is under the age of 18 and that likewise he is a genuine and subsisting relationship with a partner who lives in the UK and a British citizen. Subject to those findings being preserved I do not preserve any other findings of fact and the extent and nature of the relationship with the British citizen child and the effect on the child still need to be determined when considering the Article 8 issue and the question of reasonableness by the First-tier Tribunal.

Notice of Decision

The decision of First-tier Tribunal Judge Onoufriou does contain material errors of law and I set aside that decision, subject to the preserved findings of fact stated within paragraphs 23 and 24 above.

The case is remitted back to the first-tier tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Onoufriou.

No anonymity direction is made, no such order having been sought before me and the circumstances of the case not meriting anonymity.

Signed Date 14th November 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty