Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number HU/09913/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3rd December 2018	**On 07th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

D L
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kanangara (Counsel, instructed by Lisa's Law, Solicitors)
For the Respondent: Ms A Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant's application to remain in the UK on the basis of his family life was refused and his appeal dismissed for the reasons given in the decision of First-tier Tribunal Judge Mill promulgated on the 28th of June 2018. The Judge found that the Appellant's removal would not require the children to leave the UK and that there was a decision for the Appellant and his wife to make about their future.

2. The grounds of application argue that the Judge erred in respect of the assessment of the best interests of the children and the assessment of reasonableness as the Judge had not identified on what basis the public interest outweighed the best interests of the children. It was further argued that the Judge then erred with respect to the considerations in section 117B(6) with reference to Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC).

3. Permission to appeal was granted on the 4th of October 2018. It was observed in the grant that it was arguable that the Judge had not fully appreciated the significance of the British nationality of the children and the effect of Zambrano. The submissions are set out in the Record of Proceedings. Both representatives maintained their respective positions that had been set out before.

4. The legal position has changed since the decision was promulgated with the decision in KO (Nigeria) [2018] UKSC 53. Although the appeal in KO was a deportation appeal there were removal appeals heard at the same time of which NS (Sri Lanka) is perhaps the most relevant. From paragraph 19 of the judgment it was observed that reasonableness in the context of assessing the reasonableness has to be assessed "in the real world in which the children find themselves." In paragraph 44 Lord Carnworth confirmed the correctness of the withdrawal of the concession that had been made in Sanade (British children – Zambrano – Dereci) [2012] UKUT 28 (IAC), that meant that it can be reasonable to expect a British citizen child to leave the UK. Those 2 paragraphs have to be read in conjunction with each other.

5. From Dereci and Jeunesse [2014] ECHR 1036 the decision as to where the family lives is made in the real world and circumstances that the family find themselves in. If the removal of the Appellant does not require the child or children to leave the UK because there is a parent or carer with whom they can remain then the child is not required to leave. A comparison with the finding in Jeunesse shows that the family may then be faced with a difficult decision but the state is not obliged to accept a fait accompli simply because family life has been created in a host state when an Appellant's presence is either illegal or precarious.

6. To the extent that the Judge relied on the Appellant's immigration history and conduct that was not relevant. In that regard paragraphs 38 and 39 are erroneous but they are not material and can effectively be excised from the decision without affecting the decision that was made or the reasoning applied.

7. The fact was that the Appellant did not have leave to remain and independently of the children had no basis on which to remain in the UK. How that had come about was not relevant to the decision to be made but that basic fact was part of the real world in which the decision had to be made. The children's best interests were assessed independently by the Judge in paragraphs 30 and 31 of the decision and there is nothing erroneous in the assessment made. there was no evidence to show that the children had any particular needs or requirements that elevated their best interests beyond those that would usually arise, i.e. to be with both parents in a stable and caring environment.

8. In other words there was nothing about the children's best interests that would outweigh the public interest in the enforcement of immigration control. The Judge fully and properly assessed the situation in paragraph 40 and the findings made clearly arose from the facts of the case. As the Judge observed in paragraph 41 the decision did not require the children to leave the UK leaving the Appellant and his spouse with a choice which is a reflection of the practical effect of the decisions in Dereci and Jeunesse.

9. Given how the position has changed and with the confirmation that it can be reasonable to expect a child to leave the UK but where the child is not required to do so I am satisfied that the decision made by Judge Mills was open to him on the basis of the facts as found. That there is slightly different route by which the result is reached does not assist the Appellant, any error is not material as the end result remains the same.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.)

Fee Award

In dismissing this appeal I make no fee award.

Signed: 

Deputy Judge of the Upper Tribunal (IAC)

Dated: 17th December 2018