



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/27913/2014

THE IMMIGRATION ACTS

Heard at: Field House
on 4 July 2016

Decision and Reasons Promulgated
on 29 July 2016

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHOHEL AHMED
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr M Bhuiyan, Haque and Hausmann Solicitors

DETERMINATION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.
2. The claimant is a national of Bangladesh, born on 8 October 1985. He appealed against the decision of the secretary of state dated 17 June 2014 refusing his application to vary his leave to remain in the UK and to remove him by way of directions.

3. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 6 October 2015, allowing the claimant's appeal under the Immigration Rules.
4. The claimant came to the UK on 25 November 2009 with leave to enter as a Tier 4 (General) Student valid until 28 October 2012. He was subsequently granted an extension of stay as a student until 13 April 2014. On 11 April 2014, he applied for leave to remain as a partner. It was accepted that he has a genuine and subsisting relationship with his partner who is British.
5. The secretary of state considered the application under Appendix FM and paragraph 276ADE of the rules. As regards the partner route under Appendix FM, there were no insurmountable obstacles to the relationship continuing in Bangladesh. Nor were the requirements under paragraph 276ADE met. There were no exceptional circumstances.
6. Prior to the hearing before the First-tier Tribunal, additional grounds of appeal were lodged without objection. This followed the birth of the claimant's child in the UK 10 December 2014. She is a British citizen.
7. The evidence before the Tribunal was that the claimant's sponsor was born in Bangladesh and came to the UK at the age of four with her family. He has not worked in Bangladesh. He has four brothers and his mother lives there.
8. In the UK he has his wife and child. Both she and the child were born in the UK and are British citizens. She will not go to Bangladesh because she finished her education in the UK. In Bangladesh the culture and weather is different [10].
9. The claimant did not think of his immigration status when he 'saw' his wife here. He "liked and loved her" and wanted to marry her. If his application is refused, the judge stated that she will go back with him if she can go with his children [10]
10. During cross examination the claimant stated that his wife was born in Bangladesh. All her family are in the UK. The claimant would be able to work in Bangladesh if returned there and it would be easier for him to obtain a good job with his qualifications gained in the UK. They cannot return to Bangladesh as a family because although his wife was born there, she has been in the UK all her life and her family is in the UK [12].
11. He was not aware that marrying in the UK would not automatically lead to his having a right to live here [13]. He had not discussed the fact that his student visa was ending. They did not discuss what they would do if the application failed. If his wife and child go to Bangladesh, he will go with them and will not go on his own. If his wife and baby want to go, they will go back together. He cannot live

without them. If they remain in the UK, he will remain. His wife sponsored his application. Had she not done so he would have returned to Bangladesh. [13]

12. The Judge set out a number of authorities in respect of Article 8 from [28 to 33], including Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC).
13. The Judge noted that the circumstances had changed since the refusal, as the claimant's child was born. That child is a British citizen, as his his mother. The suitability and eligibility requirements under the rules are met but the secretary of state did not accept that EX.1 applies under the partner route [34].
14. She considered the appeal on the basis of the circumstances applying at the date of hearing [35].
15. She found that looking at the claimant and his partner only, taking the oral evidence at its highest, the claimant had not shown that there would be very significant difficulties faced by him or the sponsor in continuing family life outside the UK, which could not be overcome or would entail very serious hardship for the claimant or sponsor. They can both speak Bengali. His family is in Bangladesh. The sponsor came to the UK from Bangladesh. The claimant has qualifications and would expect to obtain well paid employment to support his family on return. Any difficulties with change of climate, length of absence, presence of the sponsor's family in the UK and adaptation to the surroundings and changes may cause some concern but do not reach the threshold of significant difficulties. [36]
16. Under the "child route" she found that there is a genuine and subsisting parental relationship with a qualifying child. The claimant's child is in the UK and is a British citizen. The issue for determination was whether it would be reasonable to expect the child to leave the UK. [37]
17. When applying Zambrano, and Sanade, she found that it is not reasonable to expect the child to leave the UK and thereby lose the substance of the rights conferred by virtue of his status as a British citizen and citizen of the European Union. [38]. She found that it "followed" that EX.1 applies to the claimant's application in the changed circumstances. She accordingly allowed the appeal under the Immigration Rules.
18. She did not however go on to consider in the alternative an Article 8 claim outside the rules.
19. On 10 May 2016, Upper Tribunal Judge Rintoul granted the secretary of state permission to appeal. It was arguable that the Judge erred at [37-38] in her findings with respect to EX.1 under the child route, in her finding as to whether it would be

reasonable to expect the child to leave the UK. Given that the child's mother would remain in the UK as she is not a British citizen, it cannot be argued that Zambrano is relevant; nor can Sanade be regarded as relevant as this was based on a concession.

20. Mr Duffy relied on the secretary of state's grounds seeking permission. The Zambrano principle cannot apply as there is no issue of removing the sponsor. She is the primary carer of the newly born child.
21. He relied on MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC) and in particular paragraph 41, where the Upper Tribunal referred to a judgment of Hickinbottom J in Jamil Saneh v Secretary of State for Work and Pensions and the Commissioner for HM's Revenue and Customs [2013] EWHC 2093 (Admin), summarising the learning from various authorities set out at [40] of MA and SM, with which the Tribunal agreed and which it adopted. In particular, the rights of an EU child will not be infringed if he is not compelled to leave. Even where a non EU ascendant relative is compelled to leave EU territory, the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU and who can and will in fact care for the child.
22. Mr Duffy submitted that it is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.
23. Nothing less than such compulsion would engage Articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where an EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent if for example he were removed or prevented from working, although such actions and removal may result in an interference with some other right, such as the right to respect for family life under Article 8 of the European Convention of Human Rights.
24. Mr Duffy also referred to [56] of MA and SM, where the Tribunal observed in respect of SM that the mere fact that the sponsor cannot be economically active as he would wish, because of his care responsibilities to the children is not sufficient to support a conclusion that the children would be denied the genuine enjoyment of the EU citizenship rights, nor would this be the case if the sponsor were required to stop working altogether. The right of residence is the right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living. Zambrano was accordingly not relevant.
25. Moreover, the appeal could not succeed under the 2006 Regulations because the child would be entitled to remain with the mother, herself a British citizen. The question therefore is whether or not it would be reasonable to expect the child to leave the UK.

26. Although s.55 of the 2009 Borders Act was applicable and had been relied on, the Judge erred in finding in line with Zambrano and Sanade that it would not be reasonable to expect the child to leave the UK and lose the substance of the rights conferred by virtue of the child's status here as a British citizen and of the European Union.
27. On behalf of the claimant, Mr Bhuiyan adopted his skeleton argument. He submitted that the Judge gave a detailed analysis of recent case law. She found in line with the case law quoted, "including" Zambrano and Sanade which showed that her decision was not based wholly on those decisions but "only a part of it, albeit a very little part of it."
28. He accepted that the Judge could have made her findings "... clearer accordingly, in paragraphs 37-38, perhaps by rephrasing her construction of sentences; even if that is to be considered an error, surely it cannot be considered material enough to trigger a set aside of the decision in order to overturn the original findings."
29. As an "alternative submission" he submitted that the matter be remitted to the First-tier Tribunal in the event that an error of law is found. There should be a fresh hearing to determine the issues, given that the claimant has been the primary carer of the child since birth due to the mother's ill health and full time work.

Assessment

30. I find that the First-tier Tribunal Judge made an error on a point of law. She found that it is not reasonable to expect the child to leave the UK.
31. However, the child's mother could not be compelled to leave the UK as she too is a British citizen. Accordingly, there is a relative available who has the right of residence in the EU and who can and would in practice care for the child.
32. Although the Judge also had regard to s.55 of the 2009 Act, she expressly included Zambrano and Sanade when concluding that it is not reasonable to expect the child to leave the UK. The decision in Zambrano was not relevant to the decision that had to be made.
33. The Tribunal is required, in considering EX.1, to consider whether or not it would be reasonable to expect a child to leave the UK. The Judge did not have regard to the Tribunal's decision in MA and SM, supra, or Sanneh which summarised the relevant principles to arise from Zambrano.
34. In the circumstances I find that the decision of the First-tier Tribunal involved the making of a material error on a point of law. I accordingly set it aside.

35. Both parties submitted that this was an appropriate case to be remitted to the First-tier Tribunal.
36. I have had regard to the Senior President's Practice Statement in this respect. In giving effect to that approach, I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made is likely to be fairly extensive. I have also had regard to the overriding objective and conclude that it would in the circumstances be just and fair to remit the case.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside. The appeal is remitted to Taylor House for a fresh decision by another Judge.

No anonymity direction is made.

Deputy Upper Tribunal Judge Mailer

Signed

Date 28 July 2016