



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01211/2013

THE IMMIGRATION ACTS

Heard at Stoke
on 13th February 2014

Determination Promulgated
on 19th February 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SI YUN ZHENG
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Royston instructed by TRP Solicitors.

For the Respondent: Mr McVeety – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Colyer and Ms S E Singer, hereinafter referred to as 'the Panel', who dismissed the appeal on all grounds.
2. Permission was sought on the basis the Panel had made a material misdirection in law.

Error of law finding

3. The Appellant, a citizen of the Peoples Republic of China, was born on the 5th July 1986. She is the subject of an automatic deportation order dated 28th May 2013 as a result of a conviction for involvement in the production of counterfeit DVD's for which she was sentenced to 14 month imprisonment.
4. Deportation was resisted on the basis she satisfied one of the exceptions provided in UK Borders Act, namely that her removal will result in a breach of Article 8 ECHR.
5. The Panel noted that the appellant has a child, J, who was born in 2010. The child is a British citizen as evidenced by the British passport produced to the Panel [87]. Nationality was not disputed by the Respondent.
6. The Secretary of State's position in the decision to deport letter is that it was not considered unreasonable for the child, then aged 3, to leave the UK and so adapt to life in China and that in any event there was another family member in the UK, his father, who has ILR who can care for him. It is said J can maintain contact with his mother indirectly. This view was endorsed by the Panel who in paragraph 105 also found:
 105. In considering the welfare and best interests of this young child we find that it would be in the best interests of the child to live with and be brought up by his parents. As it is in the best interests of the child to live with and be brought up by his parents, then the child's removal with his parents does not involve any separation of family life. We find that the child is still young and there has not been such a period of substantial residence such that the child may have significant roots put down, personal identity developed, friendships formed and links made with the community outside the family unit. We find the appellant has not established that her child's private life has been significantly forged and therefore we do not place major weight as during the child's early years, he has been primarily focused on self and the caring parent. We find that there is not a period of long residence sufficient for this child to have formed ties outside the family. is likely to have greater impact on his or her wellbeing. We find that this young child may readily adapt to life in a new country with the support of his mother.
7. The above may be correct as an application of the relevant test for a foreign national child, but the Panel were assessing a British national child who is also a European Citizen. There is no mention of cases such as Sanade [2011] UKUT 48 in which it was found that "where a child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it

would be reasonable for them to do so" [95]. UK nationality and European citizenship from part of the child's private life yet there is no indication this important element was properly considered by the Panel.

8. I find the above to be a material error supporting the assertion the issues in the appeal have not been adequately considered and that adequate reasons have not been given for the conclusions reached. Accordingly the determination is set aside.

The remaking of the decision

Discussion

9. In relation to the nationality issue, in R (on the application of Mansoor) v Secretary of State for the Home Department [2011] EWHC 832 (Admin) Mr Justice Blake said that a national enjoyed the international human right as well as the domestic human right to live and remain in their own country (para 42).
10. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that "Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child".
11. In Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC) the Tribunal held that Case C-34/09 Ruiz Zambrano, BAILII: [\[2011\] EUECJ C-34/09](#) "now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so".
12. If the above is correct then in practice nearly all case law in this jurisdiction regarding the reasonableness of return by one spouse to join another is now swept away although I do not find such an absolute statement is legally correct. In European law there is constant reference to the doctrine of proportionality which must be relevant to any decision involving this issue. In relation to domestic case law, in AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88 it was held that there was no error where significant weight had been accorded to the Claimant child's British nationality because nationality was not a trump card. It was necessary to take account of the whole circumstances which included the availability to the child of family life with parents in one of their countries of origin, and the extent to which the Claimant's immigration history involved dishonesty.
13. In relation to the appellant's son, he faces a situation in which if he is forced to leave the EU, this may breach his rights under Community Treaties/EEA law

such as to make the decision unlawful. If the child's mother is his primary carer the right to a family life with her will be lost if she is deported. It has not been shown on the facts to be warranted as being in the child's best interests or proportionate.

14. Whilst in Sanade it was acknowledged that where there is a persistent and/or serious offender separation of a family may be warranted this has not been proved to be so on the facts of this case.
15. A further relevant finding, which is not challenged, is that relating to the strength of the relationship between the appellant and the father of her child. In paragraph 78 the Panel find that there may have been a close relationship in the past but that they have significant doubts that it is as close as the appellant has suggested. They find as a result the child will be taken to China with his mother indicating it is accepted by the Panel that his father does not represent an option for his care as a person who can meet the needs of the child in the UK. This contradicts the endorsement of the submissions that there is such a person in paragraph 90.
16. Although it is said the child can return to China and live there, there is no comparison between his rights as a British and European citizen and the benefits flowing there from and those available to him in China.
17. The right of the European citizen child to remain within the borders of the EU and enjoy the rights flowing from such a status is enshrined within the treaties of the European Union. The concept of a European citizen may not be one some politicians care to acknowledge but it exists and is relevant to this case. It has not been shown that the decision maker when considering the best interests considered this element with the required degree of care and neither did the Panel. A decision that forces the child to have to leave the EU can be said to breach the child's rights under Community Treaties/EEA law. I find this to be the case on the evidence in relation to the appellant's son.
18. As the child has a legal right to remain as an EEA national his mother has as his primary carer. It has not been established on the evidence that there is another in the UK capable of meeting the child's needs. It has not been shown on the evidence that the conduct of the mother is such that removal is proportionate if this means the child having to lose the benefit of his rights derived from his national identity. Whilst not a trump card in either the national or European context I find this an important element that is material to the proportionality of the decision. The best interests of the child are of importance although not determinative. As the child cannot be removed this is a family splitting case. There is insufficient evidence to enable a finding to be made that the severance of the family life enjoyed between the child and his mother is justified in this case; therefore the only other option is for the child to leave with his mother

which it has not been shown it is reasonable to expect him to do in all the circumstances.

19. I find the exceptions to the UK Borders Act therefore made out and that at this time the appeal must be allowed.

Decision

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as no application for anonymity was made and it not established on the facts that such an order is warranted.

Signed.....
Upper Tribunal Judge Hanson

Dated the 13th February 2014