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Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27100/2014

THE IMMIGRATION ACTS

At Field House
on 28th August 2015

Decision and Reasons Promulgated
On 8th October 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

Mr M.N.U
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. K. Nasher of J. Stifford, Solicitors.

For the Respondent: Mr. P. Nath, Home Office Presenting Officer.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I make the order because there is a child involved.

DECISION AND REASONS

Introduction

1. Although it is the respondent who is appealing for convenience I will continue to refer to the parties as they were in the First-tier Tribunal
2. The appellant is a national of Bangladesh, born in 1994. He came to the United Kingdom as a student in December 2012. He had leave until May 2014. In March 2014 he entered into an arranged marriage with Miss S. B. She was born in 1984. She is originally from Bangladesh; has lived in the United Kingdom for 15 years; and has British nationality.
3. On 17 April 2014 he made application for leave to remain as her partner. That application was refused on 13 June 2014. The respondent accepted that he and his wife were in a genuine relationship. His wife worked part time and could not meet the financial requirements under appendix FM. Reference was made to section EX1 which provides exceptions to certain of the eligibility requirements. The issue was whether there were insurmountable obstacles to family life with his wife continuing outside the United Kingdom (EX.1. (b)) His wife spoke Bengali and was aware of the culture in Bangladesh. The conclusion was that insurmountable obstacles did not exist. Regard was also had to paragraph 276 ADE. The appellant had only been in the United Kingdom a short time and so did not meet the rule unless he could demonstrate a lack of ties to his home country. The respondent concluded he retained ties.

The First tier Tribunal

4. His appeal was heard by First-tier Judge Miles on 24 February 2015. In a decision promulgated on 9 March 2015 the appeal was allowed under appendix FM on the basis that EX1(a) applied. The appellant's wife had given birth to their daughter on 5 November 2014. She was entitled to British nationality. The judge concluded that it would not be reasonable to expect his child or indeed his wife to leave the United Kingdom.
5. The judge based this conclusion on the decision of the Upper Tribunal in Sanade and others (British children - Zambrano-Dereci) [2012] UKUT 00048. At paragraph 20 of the decision the judge stated:

“In my judgement the decision of Sanade makes it very clear, and irrespective of the practical considerations in the particular circumstances of any case, that expecting a British citizen spouse or child to leave this country in order to live in a third country which was not in the European Union is, as a matter of law, unreasonable and on that basis therefore that decision determines that question under paragraph EX1 of appendix FM. It follows therefore that I find that it would not be reasonable to expect the appellant's daughter to leave

the United Kingdom and accordingly therefore his application satisfies the requirements of paragraph EX1 (a) of appendix FM and his appeal therefore succeeds on that basis.”

6. The judge went on to say that it was not necessary therefore to consider paragraph EX1 (b) in relation to his wife or rule 276 ADE. The judge did find the appellant's evidence that his family had disowned him because of his marriage was untrue and did not accept his claimed lack of ties with his home country.

The Upper Tribunal.

7. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable the judge did not properly apply Sanade and others (British children - Zambrano-Dereci) [2012] UKUT 00048 and consequently the judge materially erred in law in the consideration of appendix FM.
8. Mr. Nath, Home Office Presenting Officer, relied upon the grounds on which leave was granted. These said that the facts in the present case differed significantly from that in Sanade and others (British children - Zambrano-Dereci) [2012] UKUT 00048. It was pointed out that the appellant's wife and child were not being required to leave either the United Kingdom or the European Union. It is for his wife to choose whether she returns to Bangladesh with the appellant.
9. Whether the decision interferes with family life will depend on whether it is reasonable to expect the spouse or child to join the appellant. There can be cases, as here, where both parties to the marriage are from the same country and familiar with the way of life. There will be other cases where it would be practically impossible to enjoy family life in another country.
10. Mr. Nath emphasised that the respondent was not requiring the appellant's wife and child to leave. Mr. Nasher provided me with a copy of the decision of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 which held as a starting point is in the best interests of children to be with both parents and to have stability and continuity. It was pointed out that seven years spent in the United Kingdom from the age of four will be more significant than the first years of life when children are focused on their parents. He emphasised that the appellant's daughter was entitled, a British nationality and that this was referred to by the judge at paragraph 16 of the decision.
11. Both representatives agreed that there was no dispute about the background facts and that if I found a material error of law there was no reason why I could not proceed to determine the appeal without further evidence.

Error of law.

12. I find that paragraph 20 of the decision indicates a material misdirection by the judge in relation to the law. It follows from what the judge said that paragraph EX1 of appendix FM would apply to all cases were a third country national was in a genuine relationship either of partnership with a British national or as the parent of a British child. This is not a correct statement of the law. The judge has taken more out of Sanade and others (British children - Zambrano-Dereci) [2012] UKUT 00048 than the case decided. The Supreme Court in ZH (Tanzania) -v- SSHD [2011] UKSC 4, particularly the judgement of Lord Kerr, highlighted the significance of British nationality. However, it was not necessarily determinative as First-tier Judge Miles suggested.
13. First-tier Judge Miles refers to the 5th head note of Sanade and others (British children - Zambrano-Dereci) [2012] UKUT 00048 and the decision in C-34/09 Ruiz Zambrano. However, paragraph 6 which is relevant was not quoted :

“6. Where in the context of Article 8 one parent (“the remaining parent”) of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principal, CC-256/11 Murant Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of the parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.”
14. In the present appeal neither the appellant’s wife nor child can be removed against their will. His wife can care for their child should she decide to stay in the United Kingdom. Consequently there is no breach of her rights as a European citizen.

Remaking the decision

15. Having found a material error of law and there being no factual dispute I re-make the decision and dismiss MNU’s appeal.
16. He has not been here long enough to meet the requirements of paragraph 276 ADE. First-tier Judge Miles found as a fact that he retained ties with his home country. I would retain this factual finding.
17. He does not meet the requirements of appendix FM. It has been accepted that his wife's income does not meet the financial requirements. I do not find he is assisted by EX1 either as a partner or a parent. I do not find insurmountable obstacles to family life continuing outside the United Kingdom. This is a choice, his wife will have to make. She could reasonably go with him to Bangladesh where she spent her formative years. Their daughter is an infant who will have no awareness of her surroundings and her focus will be upon her

parents. In the circumstance I find this is a situation where there is the practical option of the entire family going to Bangladesh.

18. In the case of Sanade and others (British children - Zambrano-Dereci) [2012] UKUT 00048 there were three appellants, each of whom was married to a British citizen and had minor children who were British citizens. The appeals were concerned was the automatic deportation provisions in relation to article 8. At paragraph 56 onwards the court referred to the jurisprudence in relation to whether immigration action constituted an interference with the right to respect for family life and whether it was reasonable to expect the spouse or child to follow the claimant. It referred to a wide spectrum of situations and ties with the country of destination.
19. Paragraph 59 onwards refers to the interests of children affected. Reference is made to Lady Hale's judgement in ZH (Tanzania) -v- SSHD [2011] UKSC 4 where at paragraph 25 to 33 her Ladyship referred to the best interests of the child being a primary consideration. Paragraph 29 refers to the level of integration in the place of residence. At paragraph 30 it was pointed out that nationality is not a trump card but is of particular importance in assessing the best interests of any child.
20. In the case of Mr Sanade the various interests were referred to; the fact he had been granted indefinite leave to remain; and was not perceived as posing a future risk. In the circumstances his deportation was not considered to be proportionate. However, the appeals of the other two defendants were dismissed. The decision illustrates the fact sensitive nature of the evaluation rather than the blanket cover First-tier Judge Miles applied.
21. In summary, in the present case the appellant does not meet appendix FM and is not assisted by EX1. I have considered the situation outside of the rules. I have borne in mind his child's best interests and that this question does not form part of the proportionality assessment. It is generally in a child's best interest to be with both parents. It is accepted the relationship with his wife and child is genuine. I am influenced by the relative short-term the appellant has been in this country; the fact he married when his immigration status was precarious, with his leave about to expire. I am also influenced by the fact that his child is only an infant. The appellant does have family members in Bangladesh and his claim estrangement was not accepted. Looking at all of the circumstances and bearing in mind the considerations in section 117 of the Nationality, Immigration and Asylum Act 2002 it is my conclusion that the respondent's decision is proportionate.

Decision

22. First-tier Judge Miles materially erred in law and the decision is set aside.
23. I remake the decision dismissing the appeal of MNU

Upper Tribunal Judge Farrelly

Anonymity.

The First-tier Tribunal did not make an order for anonymity. I now make an Order for anonymity because there is a child involved.

Deputy Upper Tribunal Judge Farrelly