



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18530/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
by way of a telephone hearing.
on 24 October 2017

Decision & Reasons promulgated
on 27 October 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

OMA
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Sood, instructed by 1st Call Immigration Services, on the telephone.

For the Respondent: Mr Mills – Senior Home Office Presenting Officer present before the Tribunal.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge PJM Hollingworth promulgated on 21 July 2017 in which the Judge dismissed the appellant's appeal on all grounds.

2. The matter was listed for an Initial hearing before the Upper Tribunal sitting at the Employment Tribunal in Birmingham on 24 October 2017. Notices were sent out on 15 September 2017. On 18 October 2017, the applicant's representatives contacted the Upper Tribunal referring to two appeals in which they stated they represented their client and whose cases had been handled previously by Mrs Usha Sood, Counsel. Enquiries revealed that one of the cases was listed for hearing before the First-tier Tribunal in Nottingham whereas those with the above reference number were listed in Birmingham. The representatives indicated that it had only just come to their attention, due to the absence of a caseworker following his mother's death, that the two cases had been listed on the same day into different court rooms.
3. It is not just a listing into two different court rooms but to different cities within the Midlands and to completely different Tribunals which appears to have escaped the attention of those instructed, until this communication was sent.
4. It is not known when Mrs Sood received her brief in respect of the two hearings that would clearly have indicated to both the author of the documents and Mrs Sood the nature of the logistical problems that would be faced.
5. The request by the representatives for the Upper Tribunal to consider moving one of the appeal locations to allow the cases to be heard in the same centre is, frankly, ridiculous. Not only are hearings not listed for the convenience of advocates but whoever made that request appears to fail to understand the reality of the request they are making. Mrs Sood is based in Nottingham and a case in the Upper Tribunal cannot be transferred to the First-tier Tribunal for that tribunal to hear both cases. It was not made out it is appropriate to send an Upper Tribunal judge to Nottingham for the convenience of a representative in the circumstances of this case.
6. The request was refused by a Duty Judge on 20 October 2018 on the basis the conflict of dates would have been known and that no re-adequate reason had been given for why alternative immigration counsel could not be instructed bearing in mind there is immigration bar in both Nottingham and Birmingham. The Duty Judge advised the representative that if Mrs Sood arrived promptly at Birmingham the Upper Tribunal had no objection to hearing the case first at 10.00am, or earlier if the respondent was also present, to try and assist as far as reasonably practicable.
7. It appears that what may then have happened is that the appellant's representatives telephoned the Upper Tribunal Administration to ascertain whether the case could be moved to be heard later in the day. It appears, without consulting the judge responsible for the list on the day, that an indication was given that this could be arranged.
8. The business of the Upper Tribunal in relation to the other cases listed for hearing on 24 October 2017 was concluded by mid-morning. As it was not known when Mrs Sood would be able to attend it was canvassed with Mr Mills, who was present in court, whether he would have any objection to the Tribunal exploring the possibility of whether the hearing could proceed by way of a telephone hearing with Mrs Sood making submissions from Nottingham on the telephone. Mr Mills did not object as a result of which the Upper Tribunal

contacted Mrs Sood's clerk asking him to canvass the matter with Mrs Sood who, at that time, was on her feet before the First-tier Tribunal. Details were provided for contact with the clerk assisting the Upper Tribunal. Mrs Sood agreed as a result of which appropriate arrangements were made for telephone communication to be established at 12:30 PM.

9. A good telephone line existed allowing for clear simultaneous communication. At the outset of the hearing Mrs Sood was asked whether she had any objection to proceeding and making submissions relating to the making and of an error of law in this way, to which she had no objection. The hearing therefore proceeded with submissions being made in relation to the making of an error of law in relation to which no communication problems were experienced.
10. At the conclusion of the hearing the decision was reserved

Background

11. The appellant, a national of Nigeria, born on 7 July 1970, appealed against the respondent's decision to refuse to issue a Derivative Residence Card to him (the 'EEA decision') and the respondents rejection of his application made on human rights grounds on the basis of a claimed exception set out in the UK Borders Act 2007 to the appellant's deportation from the United Kingdom.
12. The appellant pleaded guilty to 9 offences committed by giving false identities in order to remain in the United Kingdom, to which he was not entitled, and which he used to obtain work. The offences occurred from May 1995 until 2013 according to the sentencing remarks of His Honour Judge Graham sitting in the Crown Court at Basildon on 2 January 2013. The appellant was convicted on his guilty plea and sentenced to concurrent prison sentences totalling 18 months imprisonment in all. The respondent sought to deport the appellant from the United Kingdom as a result of his criminal conduct.
13. On 20 April 2015, the appellant applied for a Derivative Residence Card on the basis that he is a third country national upon whom a British Citizen is dependent in the United Kingdom on the basis of the Court of Justice of the European Union (ECJ) judgement in the case of *Ruiz Zambrano*. The application was refused on 28 August 2015 on the basis that taking account of the appellant's personal conduct, with specific reference to what is described as an extensive criminal record and level of offending said to be a clear indicator of a propensity to reoffend, the appellant's continued presence in the United Kingdom was not conducive to the public good; as a result of which the application for a derivative residence card was refused by reference to regulation 21A(3)(a) of the Regulations.
14. The above reference numbers relate to the appeals issued by the appellant challenging the two decisions.
15. Having considered the evidence submitted in both oral and documentary form the Judge noted the appellant's wife had been issued a residence permit although at that time did not work but was looking for work.
16. Whilst the decision does not contain a specific paragraph heading 'findings' which may have assisted, the findings of the Judge can be gleaned when

considering the decision as a whole. Relevant findings can be summarised in the following terms:

- a. That the best interests of the children are to remain with both their parents and to remain in the United Kingdom. It will be highly detrimental for the children to go to live in Nigeria. It is clear it is in J's best interests to remain with his parents and with his siblings [40].
- b. The relationship between the appellant and his children was accepted by the respondent [44].
- c. The Judge accepted all the medical evidence submitted in relation to J [45]. That medical evidence supports the conclusion it is in J's best interests to remain in the United Kingdom in order to avoid any deterioration in his medical condition [46].
- d. Certificates of convictions have been provided in relation to the appellant [47 - 49].
- e. At [51] the Judge writes:

51. I find that the appellant has engaged in the entirely cynical use of unauthorised entry together with false documentation in order to lead his life in the United Kingdom for a substantial period of time without any permission to do so. I find the conduct of the appellant in this respect, further illustrated by his criminal convictions, to illustrate the complete undermining of the principle of the maintenance of effective immigration controls. I find the criminal conduct of the appellant as reflected in his period of imprisonment of four years, coupled with a confiscation order in the sum of £130,000, to reflect the gravity of his offending in relation to tax credits. The amount of money involved demonstrates serious implications for the public purse.

- f. It would be unduly harsh for the appellant's children to live in Nigeria which is not a course of action their mother wishes to pursue. There was disagreement between the appellant and his wife in this respect [52].
- g. There is an "extremely significant" level of public interest in the deportation of the appellant based on the level of criminality in conjunction with his immigration history. The best interests of the children are a primary consideration. The question at issue is whether there are very compelling circumstances over and above undue harshness for the children if the appellant were to be removed [53].
- h. The relationship between the appellant and his wife was formed at a time the appellant was not in the United Kingdom lawfully [54].
- i. The Judge did not find it had been established that there are very compelling circumstances over and above those set out in paragraph 399 [54].

- j. Medical services available to the child J are such that the appellant's presence is not required in the United Kingdom to share responsibility with his wife for the day-to-day care of J [55].
- k. The appellant has provided joint care with his wife for the children within the United Kingdom [56].
- l. The respondent has granted the appellant's wife a residence card which the Judge found confirmed the children would not be removed as dependants. The Judge notes the appellant's advocate submission that is the appellant has full parental responsibility over the children but will not be able to exercise it if he is removed [57].
- m. The appellant's offending is serious and that whilst he has not reoffended the Judge sets out the nature of the gravity of his offending and its consequences. The appellant has committed such serious offences that the consequences are such that the level of the public interest requiring his removal is justified [58].
- n. The actions of the appellant in relation to the use of a false passport document fully vindicates the description of the appellant's behaviour as cynical and undermining the effectiveness of UK immigration control [60].
- o. The Judges considered the effect of the disruption of the family unit upon the children [61].
- p. The appellant has failed to establish that very compelling circumstances exist over and above the exceptions to deportation [62].
- q. The level of public interest outweighs the splitting up of the family. The requirements of the Immigration Rules have not been satisfied. It has not been demonstrated that compelling circumstances exist which would enable the Judge to consider whether there would be a breach of Article 8 outside the Rules [63].
- r. In relation to the appeal against the refusal of a residence card, the appeal is also dismissed for the reasons set out in the respondent's refusal [64].

17. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part which is in the following terms:

- 3. The grounds for this application are not clear or precise as to the alleged error (s) of law. The grounds indicate a lack of findings on material matters relating to the EEA appeal. They also indicate a failure to consider material evidence in relation to the human rights appeal. Notwithstanding the lack of clarity in the grounds I am satisfied that they and the content of the judge's decision do raise arguable errors of law capable of affecting the outcome.

Grounds and submissions

18. The grounds on which the appellant sought permission to appeal, dated 3 August 2017 and drafted by Mrs Sood, appear to raise the following issues:
- a. The wife's evidence was that if the appellant were to be removed neither she/the children would go with the appellant, and as the appellant's evidence had already been heard, this could not be properly pursued. Judicial management failed to adjourn or allow additional evidence on this critical legal issue of whether the children could be removed, given that each has joint parental responsibility. Section 13 of the Children Act 1989 prohibits any child leaving the jurisdiction with one parent, without the consent of the other parent with parental responsibility, or without a court order [4].
 - b. The respondent's public policy considerations in relation to deportation cannot be held to dispose of the legal issues raised in the appellant's skeleton argument which sites Sanade, CA and UK and submitted that Ruiz Zambrano derived rights of residence under EU law not automatically lost if a crime is committed, but the First-tier Tribunal Judge does not deal with the conflicting arguments between the parties as to this [5].
 - c. The reality and the principle of these children needing both parents was emphasised, the First-tier Tribunal Judge accepts that the youngest child J has a rare incurable condition and all accepted that the appellant is in a genuine subsisting parental relationship with his children. The importance of keeping families together was reiterated in the skeleton argument, the First-tier Tribunal accepted the expert report of the education specialist and the consequences of disruption of education and acknowledges the Testamentary and Spiritual Guardianship agreement, but asserts the First-tier Tribunal does not explicitly deal with the effects on the family if the father were no longer there [6 - 10].
 - d. Deportation cannot be proportionate. The fact of creating a fatherless one parent household dependant upon benefits is compelling to prevent deportation. There will be a disproportionate interference with relationships. There has been a fundamental failure to consider the effect of disruption on the family unit upon the children and the Judge has without any extensive best interest analysis as to the consequence of the split decided that the past offending and public detriment from the crime outweighs any public interest in the family staying together [11].

19. The reference in the pleaded grounds to the decision of the Court of Appeal in R (on the application of OO) (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 338 appears to have no arguable merit, it being a challenge to a judicial review decision in relation to which a separate test is applied on public law grounds to a review and not on an appeal basis, and relating specifically to the impact of temporary removal pursuant to section 94B of the 2002 Act pending the pursuit and determination of an appeal. Findings made by the Court in relation to that aspect do not appear to assist in establishing arguable legal error material to the decision in this case.
20. It was submitted the Judge failed to carry out a proper proportionality assessment focusing in particular on J when there were a number of other children.

Error of law

21. Reference was made by Mr Mills to the background of this appeal which is very relevant to assessing the merits of the challenge. There were initially two decisions and two appeals. One of the children, born in United Kingdom, was aged 10 and so eligible to apply for British citizenship and made that application which was granted. As a result, the child could not be removed from the territory of the European Union which gave rise to a claim for a derivative right of residence following the decision of the European courts in Zambrano.
22. On 15th September both applications (of the appellant and his wife) were refused citing criminal offences committed by the appellant and his wife who herself received a sentence of six months imprisonment. It is not disputed that an application can be refused on the basis of the applicant's criminality.
23. At an earlier CMR hearing Mr Mills brought to the attention of the First-tier Tribunal the decision of the Court of Justice of the European Union in CS (Morocco). On 7 April 2017, the Upper Tribunal delivered its error of law determination in Secretary of State for the Home Department v. CS. In so doing, it is the first case to consider the application in domestic law of the judgment of the CJEU Grand Chamber on its earlier reference in Case C-304/14 Secretary of State for the Home Department v. CS [2017] 2 WLR 180 (linked to Case C-165/14 Rendon Marin v. Administracion del Estado [2017] 2 WLR 117. Both cases raised the question whether it is permissible to derogate from citizenship rights under Article 20 of the Treaty on the Functioning of the European Union, as interpreted in Case C-34/09 Zambrano, in situations where a third country national parent of an EU citizen child engages in criminal conduct.
24. The Court accepted the position of the United Kingdom Government that it is possible, in principle, to derogate from such rights. The test to be applied in such circumstances is whether the measure in question is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or public security. This is a question for determination by the national court. The national court must carry out a specific assessment of all the current and relevant circumstances of the case, in the light

of the principle of proportionality, of the child's best interests and of fundamental rights. That assessment must take account in particular of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation.

25. The Tribunal considered the application in domestic law of those tests. It was argued by the respondent, CS, that the domestic regime of automatic deportation was incompatible with EU law in such cases. The Tribunal rejected that argument. It also rejected the argument that the Secretary of State could rely solely on the existence of past criminal conduct in order to demonstrate a genuine, present and sufficiently serious threat. In so doing, it gave important guidance on the continuing application of the principle in Case 30/77 R v. Bouchereau [1978] 1 QB 732. The Upper Tribunal found that the original First-tier Tribunal determination was flawed by a series of errors of law. It set it aside.
26. It was accepted by Mr Mills that the decision as originally drawn was unlawful as a result of which the hearing was adjourned to allow the respondent to issue a supplementary decision; which was that before the First-tier Tribunal dated January 2017 and which dealt with the CS (Morocco) points.
27. The Secretary of State as part of the further assessment conceded the wife's claim as a result of which she was granted a derivative residence card as per the decision in Zambrano. This meant that both the appellant's wife and the children were able to remain in the United Kingdom with no danger to the children of having to leave the territory of the United Kingdom and no danger of the children losing all their primary carers.
28. It was submitted following the grant of a residence card to the children's mother that any application by the above-named appellant to remain on the basis of the derived residence card would fail, as the children would not as a result of the decision challenged by the above appellant, be required to leave the territory of the European Union.
29. The appellant arguably fails to establish this line of argument is wrong in law.
30. Mr Mills also placed reliance upon the decision of the Court of Appeal in the case of Secretary of State for the Home Department and VM (Jamaica) [2017] EWCA Civ 255. This is the case in which the Secretary of State formally withdrew an earlier concession made in Sanade which the Court of Appeal agreed was an approach that should not be followed. Specific reference is made by Mr Mills to [60] of that decision in which the Court of Appeal state:

60. On this reasoning, VM has no claim to remain in the UK as a result of the citizenship rights in EU law of his wife and children. If he is deported to Jamaica, KB and the children (with KB deciding for them) will face a difficult choice whether to relocate there with him or remain in the UK without him. But the fact that they will be confronted with that choice, and might in practice feel compelled to go with him, does not engage EU rights in a way which creates a right under EU law for VM to remain in the UK. As this Court held in FZ (China) v Secretary of State the Home Department [2015] EWCA Civ 550, following Dereci and the decision in O, S and L (at Paras [42] - [44] of the Advocate Generals Opinion and

para [56] of the judgement), “the critical question is whether there is an entire dependency of the relevant children on the person who was refused a residence permit or who is being deported” (see para [14] – [19]). In the present case there is no “entire dependency” of AB, KSM and KDM on VM, in the requisite sense, because they could remain in the UK with their mother, KB, who as a British citizen herself has a right to be here.

31. The appellant cannot sustain an argument that he can satisfy the “entire dependency test” as his wife and the children’s mother have shared care and she has been granted leave to remain to continue to provide care.
32. In VM (Jamaica), it was accepted that the parents of the relevant children also had joint custody. As in that case this is a case in which the remaining parent who shared custody with the children’s father will take over sole care and custody of the children.
33. I find no arguable error material to the decision to dismiss the appeal under the EEA Regulations made out in relation to this matter.
34. In relation to the dismissal of the appeal against the application for leave to remain on human rights grounds; no arguable legal error is made out. A reading of the grounds indicates disagreement with the conclusions of the Judge. The assertion the Judge failed to properly undertake a balancing exercise has no arguable merit. The Judge clearly considered the competing interests and balanced the same against each other, before concluding that the public interest that exists in this case warranted the appellant’s deportation from the United Kingdom even if that resulted in the separation of the appellant from the family unit.
35. The assertion the Judge focused solely upon J and not the other children has no arguable merit. Clearly the Judge was aware of the composition of the family unit and refers to the same. A lot of the evidence focused upon J and his needs which is why there is specific reference to them in the decision under challenge.
36. The assertion the Judge failed to take into account the impact of separation upon the family has no arguable merit. A Judge is not required to set out findings in relation to each and every aspect of the case and it is clear from reading the determination that the Judge considered all the evidence made available as part of the assessment of the merits of the appeal.
37. This is not a decision made on the grounds of public revulsion in relation to the EEA aspect.
38. Mrs Sood relied upon the Childrens Act 1989 - The main principles and provisions embodied in this legislation are that:
 - the welfare of children must be the paramount consideration when the courts are making decisions about them;
 - the concept of parental responsibility has replaced that of parental rights;
 - children have the ability to be parties, separate from their parents, in legal proceedings;
 - local authorities are charged with duties to identify children in need and to safeguard and promote their welfare;

- certain duties and powers are conferred upon local authorities to provide services for children and families;
 - a checklist of factors must be considered by the courts before reaching decisions;
 - orders under this Act should not be made unless it can be shown that this is better for the child than not making an order;
 - delay in deciding questions concerning children is likely to prejudice their welfare.
39. Section 1 states that when a court determines any question with respect to –
(a) the upbringing of a child; or (b) the administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the court’s paramount consideration.
40. Section 1(4) states if a court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or the court is considering whether to make, vary or discharge [F2a special guardianship order or] an order under Part IV certain procedural stapes must be taken.
41. The appellant argues that a child cannot be removed from the United Kingdom without the consent of both parents which is factually correct. Even if there is a dispute between the parents as to whether the children will accompany the appellant to Nigeria or not the appellant cannot unilaterally withdraw the children and take them with him. The thrust of the appeal against the refusal of the derived residence card is the argument that the children should be permitted to stay in the territory of the European Union. It sounds disingenuous when arguing against the refusal of the residence card to claim that the children must stay in the United Kingdom and any attempt to remove them is unlawful yet to claim in relation to other aspects of the appeal that there is a likelihood that the children may be removed. The evidence clearly shows that children are going to remain in the United Kingdom and there are no orders in force granting permission to either parent to remove them from the jurisdiction.
42. The appellant retains his shared parental responsibility and it has not been made out he needs to be physically in the UK to exercise the same.
43. In relation to the Childrens Act, Mrs Sood was asked during the course of her submissions for her authority supporting the proposition that the Childrens Act 1989 should have been taken into account by the Judge as part of the decision-making process. The above text relating to this act shows that the act has a very specific purpose of codifying previous law in the public and private children sphere and to provide the mechanism by which disputes relating to children should be resolved. The matter before the Judge was not an application to resolve an issue about the children. There were no arguable issues arising regarding the children’s standing or status or their welfare and no applications had been had been made pursuant to the Childrens Act.
44. The welfare principles, making the best interests of the child paramount, reflects the principles considered by the Judge when assessing the best interests of the children. No arguable error is made out in relation to the same.

45. Mere disagreement with the outcome or desire for a more favourable result does not establish arguable legal error. On the basis of the information made available to the Judge it is not being shown the outcome of the proportionality balancing exercise is in any way arguably perverse, irrational, or contrary to the evidence.

Decision

46. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

47. 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 such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the identity of the children.

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 26 October 2017