Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/22541/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 15 May 2018

Decision and Reasons Promulgated
On: 11 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M Y
(ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Maqsood, counsel, instructed by Reza Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant. The claimant is a national of Pakistan, born on 10 January 1981.

2. Unless and until a tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The secretary of state appeals against the decision of First-tier Tribunal Judge Higgins promulgated on 21 February 2018 allowing her appeal under Article 8 of the Human Rights Convention.

The factual background to the appeal

4. The claimant entered the UK when she was 24. She had entry clearance as a student until 10 February 2013. She then made an in time application for leave to remain as a student. As evidence that she met the English language requirements and was competent to the CEFR Level B2, she relied on the certificate which recorded that she had taken the TOEIC test. It recorded that she sat the speaking and writing elements on 23 January 2013, with listening and reading elements on 8 February 2014. Her application was successful and she was granted leave to remain as a student until 25 June 2015.

5. She claimed to have met her future husband in May 2013. He is British. They married according to Islamic tradition in July 2014 and lived together afterwards.

6. Prior to leave as a student expiring on 25 June 2015 they were married in a registry office on 17 June 2015. She then applied for leave to remain as his partner which was refused on 3 August 2015. She appealed. That appeal had still to be determined when she made a further application to remain as his partner on 15 January 2016.

7. At that point her husband had two jobs and his aggregate gross earnings were claimed to be £21,584.69. The respondent treated the application she made in January 2016 as a variation of the application she had made six months previously.

8. At the time of her application the claimant was pregnant. Her first child was born on 30 April 2016. Her second child was born in 2017. The children are British.

9. The secretary of state considered whether the claimant met the requirement as a partner under Appendix FM. The secretary of state was satisfied that she did not. She concluded that the TOIEC certificate was obtained fraudulently. The claimant fell for refusal under the suitability requirements of Appendix FM and could therefore not meet the requirements of a grant of leave to remain either under the five year parent route or the ten year parent route.

10. Even if the suitability requirements had been met she would not have satisfied the eligibility requirements under the five year parent route for the two reasons set out at paragraph [10].

11. Nor did she meet the requirements for a grant of leave to remain under paragraph 276ADE(1).

12. The secretary of state considered leave to remain outside the Rules, noting that she had given birth to a British child since she made her application. Her husband is British and would be able to care for her child in the event that he chose to remain in the UK or he could travel to Pakistan with her. The interference with her family life was outweighed by the severity of the deception she used.

13. Judge Higgins considered the evidence produced at the appeal. There are some very lengthy paragraphs in his written decision - see example paragraph [38] - making it difficult to follow and assess.

14. He noted that the claimant gave evidence in English. The quality of her English deteriorated when put under any sort of pressure and was poor [22]. He has set out his reasons for such findings in some detail from paragraph [28] onwards. He was satisfied to the requisite standard and beyond that the claimant was fully aware that the TOIEC

certificate on which she relied in support of the application made on 9 February 2013 had been fraudulently obtained [34].

15. He rejected the contention that her deception in 2013 was incapable of justifying the secretary of state's reliance on paragraph S-LTR.1.6. The secretary of state's decision to rely on paragraph S-LTR.1.6 in the claimant's case was not "perverse"as submitted [38]. She was a party to fraudulent activities which had the potential to undermine public confidence in the system of immigration control. The secretary of state was entitled to choose to rely on that paragraph in the circumstances. She still had to determine whether the claimant's conduct was sufficiently serious, in context, that to allow her to remain in the UK was undesirable. He found that it was open to the secretary of state to make such a judgment.

16. He accordingly found that the secretary of state's decision was in accordance with the Rules. [39].

17. With regard to the human rights appeal, he referred to decision Sanade and Others (British children - Zambrano - Derici (India) [2012] UKUT 48. He found at [41] that the claimant's misconduct in 2013 was not sufficiently serious to displace the 'principle' in Sanade, namely that it was not open to the respondent to require a British child or accompanying British parent such as her father to relocate to a country outside the European Union and to submit that it would be reasonable for them to do so as a means of avoiding interference with their family life. Her enforced departure would interfere with the family life she enjoys in the UK.

18. He considered whether the decision requiring her to leave the UK is proportionate to the legitimate end sought to be achieved [42].

19. With regard to s.117B of the 2002 Act, he referred to MA (Pakistan) [2016], noting that consideration of whether it is reasonable to expect a child to leave the UK is not restricted to an assessment of their best interests. The Tribunal is required to have regard to the appellant's history, conduct and other relevant public interest considerations.

20. Judge Higgins stated at [43] that the secretary of state conceded in Sanade that it is not open to her to submit that it is reasonable to expect that his children should relocate outside the European Union. Accordingly, the child's best interests in remaining with their mother in the UK are not outweighed by the public interest in maintaining effective immigration controls. He accordingly allowed her appeal under Article 8.

21. On 7 March 2018, First-tier Tribunal Judge Chohan granted the secretary of state permission to appeal. It had been contended that the Judge gave greater weight to family life than should have been the case and that he failed to consider the possibility of the claimant making an entry clearance claim.

22. Judge Chohan found that there was an arguable error of law that no consideration was given to the possibility of the claimant making an application for entry clearance.

Submissions

23. Mr Tufan noted that the Judge allowed the appeal on the basis of the decision in Sanade, supra. He referred to the Court of Appeal decision in SSHD v VM (Jamaica) [2017] EWCA Civ 255 at [41] and [43].

24. The Court of Appeal noted at [52-53] that the Upper Tribunal misunderstood the effect of EU law principle identified in Zambrano and Dereci. It seems to have been misled by an ill advised concession made by the secretary of state in Sanade and accepted by the Upper Tribunal in that case as correct, that where a person enjoys family life as an engaged parent with a child who is a British citizen, then in terms of Article 8, it is not possible to argue that a third country national's removal may be proportionate on the footing that a family unit could move together to a country outside the EU: Sanade at [93-95].

25. In the subsequent appeal of SSHD v AQ (Nigeria) [2015] EWCA Civ 250, counsel on behalf of the secretary of state had specific instructions and urged the Court to analyse the position afresh, free from the straitjacket of the concession made in Sanade. Lord Justice Sales considered that it was right to do so since the concession skews the position and obscures the proper analysis [53].

26. Mr Tufan referred to MA (Pakistan) and relied on the grounds seeking permission. He contended that the Tribunal has given greater weight to family life than should have been in the finding on the possibility of there being a temporary breach in the relationship with the claimant and her children, whilst the claimant exercised the normal channels and made an entry clearance application. Any interference with the claimant's family life in the UK would be proportionate in the interests of effective immigration control, having regard to the claimant's deceitful conduct as well as the fact that her status in the UK was precarious.

27. On behalf of the claimant, Mr Maqsood, who also represented the claimant before the First-tier Tribunal, submitted that the secretary of state had raised two grounds in seeking permission. He referred to the grant of permission at paragraph 3, that no consideration had been given to the best interests of the children if they were to remain with their father in the UK in the absence of the claimant, from which it followed that no consideration had been given to the possibility of her making an application for entry clearance.

28. Mr Maqsood submitted that the reliance by Judge Higgins on the decision of Sanade [41] did not constitute a material error in the circumstances. The Judge was seeking to apply the secretary of state's own policy in making his assessment. The best interests of the child constitute a primary consideration. The Judge's attention was drawn to the policy relevant at the material time.

29. The policy to which he referred the Judge is contained in the Immigration Directorate Instructions: Family Migration: Appendix FM, August 2015 at paragraph 11.2.3. which deals with the question of whether it would be unreasonable to expect a British child to leave the UK.

30. The policy provides that

– save in cases involving criminality, the decision maker must not make a decision in relation to the parent of a British child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of the child.

– The decision maker must consult the criminality guidance in ECHR cases (internal) when assessing cases involving criminality.

– The decision to refuse the application would require a parent to return to a country outside the EU so the case must always be assessed on the basis that it would be unreasonable to expect a British child to leave the EU with their parents.

– It may be appropriate to refuse to grant leave where the conduct of the parent gives rise to considerations of such weight as to justify separation where the child could otherwise stay with another parent in the UK.

31. The circumstances envisaged could cover, amongst others:

    i. Criminality falling below the threshold set out in paragraph 398 of the Immigration Rules;

    ii. A very poor immigration history such as where the person has repeatedly and deliberately breached immigration Rules;

32. In considering whether the refusal may be appropriate, the decision maker must consider the impact on the child of any separation.

33. Mr Maqsood submitted that the policy had been applied properly. He referred to paragraphs [41-42] where the Judge stated that the principle does not apply if there has been significant criminality. He found that serious as the claimant's misconduct in 2013 was, it was not sufficiently serious to displace the principle in Sanade. It did not meet the relevant threshold referred to in the policy.

34. The Judge found that Article 8 is engaged. He had regard to the ages of her children and considered whether entry clearance was a proportional end in this case [42].

35. He had regard at paragraph [43] to s.117B of the 2002 Act. In particular, s.117B (6) provides that the public interest does not require the removal of a person who has a genuine and subsisting parental relationship with a qualifying child who it would not be reasonable to expect to leave the UK. This applied to the claimant's children. With regard to the claimant's previous conduct, he referred to Sanade in this context. Mr Maqsood submitted that the relevant principle is still in place in the policy.

36. He contended that the suggestion that entry clearance is sought was "impossible". He referred to paragraph S-LTR of Appendix FM.

37. S-LTR.1.6 is a mandatory ground of appeal. There is no discretion available. The secretary of state relies on the non-conduciveness provision.

38. He submitted that in this case there is however one instance of past deception applicable to this provision. This is 'inadequate' as the provision requires a higher threshold for its applicability.

39. Its application constitutes a flagrant denial of the right to private and family life. The effect of applying LTR.1.6 is that all such individuals must be refused to remain under

Appendix FM family life as a partner under the five or ten year route. There would be no discretion having regard to R-LTRP.1.1 of Appendix FM.

40. In addition, all applications by such persons for leave to remain under Appendix FM family life as a parent under the five or ten year parent category must be refused. There is no discretion either because of the application of R-LTRPT.1.1.

41. He referred to paragraph S-EC.1.5 of Appendix FM relating to entry clearance applications. This provides that the applicant will be refused entry clearance on the grounds of suitability if any of the paragraphs in EC.1.2 to 1.9 apply. The effect would be that partners and parents of British citizens would be indefinitely barred from remaining in the UK as well as seeking to re-enter the UK. Nor is the bar to such entry clearance applications limited in time.

42. He also referred to paragraph 320(11) of the Rules which apply to Appendix FM entry clearance for leave to enter applications. This only provides a discretionary ground of refusal if the applicant has contrived in a significant way to frustrate the intentions of the Rules by, for instance, using deception and there are other aggravating circumstances. This provides a 'kind of threshold' for engaging discretionary general grounds of refusal where there is a history of deception in previous applications.

43. He submitted that it is thus "perverse" to suggest that the use of deception in the past on its own, will result in the refusal on mandatory grounds under the suitability requirements in Appendix FM (S-EC.1.5 or S-LRT.1.6).

44. There will almost always be an element of criminality involved where the conduciveness grounds are used.

45. In reply, Mr Tufan accepted that the Judge was entitled to consider that the claimant's enforced departure from the UK would result in the interference with family life in the UK. Given the ages of the children and having regard to the current Home Office policy published on 22 February 2018, set out at page 76, 'the policy would not bite' in such a situation. The unacceptable choice would be for the whole family to return to Pakistan or that the children should remain with their father in the UK.

Assessment

46. Judge Higgins found that the claimant was guilty of deception on the basis set out above. He nonetheless concluded under Article 8 that it would not be reasonable for the children to leave the UK with the claimant.

47. When granting permission to appeal, Judge Chohan noted that such finding was open to Judge Higgins.

48. Permission to appeal however was granted on the basis that no consideration had been given to the best interests of the children if they were to remain with their father in the UK in the absence of their mother. It followed that no consideration had been given to the possibility of the claimant making an entry clearance application.

49. Whilst it is correct that Judge Higgins referred to the decision in Sanade which is no longer good law, he also had regard to the applicable policy to which I have set out in some detail.

50. Mr Maqsood represented the claimant at her appeal before the First-tier Tribunal. He informed me that he referred the Judge to the applicable policy.

51. I have considered the entry clearance requirements under Appendix FM as applicable to a partner or as a parent. The suitability requirements which must be met for entry clearance, would effectively bar the claimant from re-entering the UK.

52. The policy to which I have referred envisages that it may nonetheless be appropriate to refuse to grant leave where the conduct of the parent gives rise to considerations of such weight as to justify separation. This includes a person's very poor immigration history, such as where a person has repeatedly and deliberately breached the immigration Rules.

53. Judge Higgins had proper regard to the decision in MA (Pakistan), that the consideration of whether it is reasonable to expect the children to leave the UK is not restricted to an assessment of their best interests. Regard must also be had to the claimant's history and conduct.

54. He found that the claimant has a genuine and subsisting relationship with her husband as well as a genuine and subsisting parental relationship with her children. The finding that it was in the children's best interests to remain with their mother in the UK [43] is a decision which is informed by the relevant policy.

55. Judge Higgins has given a detailed decision. He has given sustainable reasons for his findings based on the evidence produced.

Notice of Decision

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

Anonymity direction continued.

Signed Date 8 June 2018

Deputy Upper Tribunal Judge C R Mailer