



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/16570/2013

THE IMMIGRATION ACTS

Heard at Manchester  
On 13<sup>th</sup> December, 2013  
and 7<sup>th</sup> February, 2014

Determination Promulgated  
On 27<sup>th</sup> February, 2013

Before

Upper Tribunal Judge Chalkley

Between

MRS JOANNA LAMBACO FARNWORTH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: (On 13<sup>th</sup> December, 2013) Mr Said, a Solicitor's Clerk  
(On 7<sup>th</sup> February, 2014) Ms Faryl, of Counsel, instructed by Leigh Bailey  
Solicitors

For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

## DETERMINATION AND REASONS

1. The appellant is a citizen of the Philippines, who was born on 25<sup>th</sup> June, 1982, and who on 9<sup>th</sup> March, 2013 applied to the respondent for her leave to be varied.

### Immigration History

2. The appellant entered the United Kingdom on 22<sup>nd</sup> October, 2012, on a family visit visa valid from 10<sup>th</sup> October, 2012, to 10<sup>th</sup> April, 2013. She had a previous family visit visa valid from 25<sup>th</sup> April, 2012 to 25<sup>th</sup> October, 2012 and had previously entered the United Kingdom on 27<sup>th</sup> April, 2012. She had been in the United Kingdom on earlier occasions. She entered the United Kingdom on 8<sup>th</sup> March, 2011 on a visit visa valid for 12<sup>th</sup> January, 2011 to 12<sup>th</sup> July, 2011 and earlier on another visit visa valid from 3<sup>rd</sup> August, 2009 to 3<sup>rd</sup> August, 2010.
3. On 14<sup>th</sup> May, 2013, the respondent refused to vary leave to remain and gave directions for her removal. The respondent accepted that the appellant enjoyed a genuine family life with her husband and with their child who was born to the appellant in the United Kingdom on 4<sup>th</sup> January, 2013. The application was refused by the respondent with reference to Appendix FM of Statement of Changes in Immigration Rules, HC 395, as amended, because the appellant had entered the United Kingdom on a visit visa and did not have sole parental responsibility over her 9 month old baby. The respondent relied on paragraphs E-LTRPT2.2, 2.3 and 3.1 of Appendix FM. Additionally, the application was refused under paragraph 276ADE because the appellant did not qualify.
4. The appellant appealed to the First-tier Tribunal and her appeal was heard by First-tier Tribunal Judge Thorne who in a determination dated 8<sup>th</sup> October, 2013 dismissed the appellant's appeal under the Immigration Rules and dismissed her human rights appeal.
5. The judge heard evidence from the appellant and from her husband, a British subject. The appellant explained that she had originally intended to visit her mother-in-law for three months and when she had applied for her visa on 24<sup>th</sup> September, 2012, her British husband was working and living in Japan. He had started living and working in Japan in 1996. The appellant had been living in Davao City in the Philippines with her sister and two children. She married her husband on 5<sup>th</sup> February, 2007 but they had never lived together permanently because she was unable to obtain a visa to live in Japan and he was not able to obtain a visa to live in the Philippines. They met every month in Thailand. The appellant's husband moved back to the United Kingdom on 25<sup>th</sup> October, 2012 to be with his wife. The appellant's husband explained that he was currently unemployed and in receipt of income support. He had no right of abode in the Philippines and was not happy to live in Davao City in any event, because it was dangerous for "whites and Westerners". The judge noted a Foreign and Commonwealth Office bulletin of September 2013 advising against "all

but essential travel” to that part of Mineanao where Davao City was situated, because of “ongoing terrorist activity and clashes between the military and insurgent groups”.

6. The judge found that the appellant did not meet the requirements of the Immigration Rules having entered the United Kingdom as a visitor, because of the effect of paragraph E-LTRPT3.1 of Appendix FM. The judge found that she could not satisfy the requirements of paragraph 276ADE because she had not lived in the United Kingdom for twenty years and could not be said to have lost ties to her home country.
7. The judge considered the appeal under Article 8 jurisprudence. In doing so, he asserted that he had applied *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 and *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 and *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40.
8. The judge noted that the appellant’s child was a British citizen and asserted that he had considered and applied Section 55 of the Borders, Citizenship and Immigration Act 2009 together with *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 WLR 148 as well as *EA (Article 8 – best interests of the child) Nigeria* [2011] UKUT 00315 (IAC). He concluded that it is in the best interests of the child to remain with its parents.
9. First-tier Tribunal Judge Thorne suggested that there was no “adequate” evidence as to why it would not be reasonable for the appellant’s husband to apply for entry to the Philippines to live with the appellant and their child and “no adequate” evidence as to why it would not be reasonable for the appellant to return to the Philippines with her child to make the appropriate application to enter the United Kingdom once she qualifies.
10. Permission was granted by a First-tier Tribunal Judge on the following basis:-
 

*“Notwithstanding the judge’s structured Article 8 assessment and citations of a number of authorities including Chikwamba v Secretary of State for the Home Department [2008] UKHL 40, it is arguable that the latter authority was not in substance considered together with those authorities cited in the grounds seeking permission with reference to assessing best interests of the child, more especially, where the child is a British citizen however young.”*
11. At the hearing before me on 13<sup>th</sup> September, Mr Said told me that he relied on various authorities but unfortunately did not have copies for me. He suggested that the decision of the judge was not proportionate because by refusing her appeal the appellant would have to return to the Philippines and wait until her husband had found suitable employment so that she could meet the requirements of the Immigration Rules. That, he suggested, was unfair on the appellant.
12. Unfortunately, Mr Said was ill-prepared and did not have copies of the authorities he sought to rely on, nor could he direct me to particular paragraphs of the opinions

and judgments on which his submissions were based. In the circumstances, I concluded that it was in the best interests of the appellant that the proceedings be adjourned to enable Mr Said to properly prepare so that he could return on another occasion with copies of the authorities on which he relied.

13. At the hearing before me on 7<sup>th</sup> February, Ms Faryl told me that it was accepted on behalf of the appellant that she could not meet the requirements of the Immigration Rules. As a result, Ms Faryl suggested, the appellant has three alternatives. She could; leave the United Kingdom without her child and return to the Philippines; she could leave the United Kingdom and return to the Philippines with her child; or she could leave the United Kingdom with both her child and her husband and make application for settlement at a later date. She referred me to paragraph 46(vii) of the judge's determination where on the one hand, the judge appears to accept that it is in the best interests of the child to remain with its parents but then suggests in paragraph 46(ix) that the appellant's husband and child can be separated while the appellant and her child return to the Philippines to make an appropriate application once they qualify.
14. Ms Faryl suggested that in order to consider the question of proportionality fully, the judge would have needed to make a clear finding on whether the appellant's husband can return to the Philippines with the appellant. He says in paragraph 46(viii) "There is no adequate evidence as to why it would not be reasonable for the husband to apply for entry to the Philippines to live with the appellant and their child" but that simply fails to take account of the Foreign and Commonwealth Office advice to which the judge had earlier referred warning against all but essential travel. The appellant is from Davao City in Mindanao which is specifically mentioned in the Foreign and Commonwealth Office advice.
15. Mr Harrison suggested that the determination was well written and that the conclusion reached by the judge at paragraph 46(vii) demonstrates that the judge has considered the best interests of the child but concluded that the public interest outweighs the rights of the appellant and that the decision is proportionate.
16. Responding briefly, Counsel suggested that more consideration should have been given by the judge to the Foreign and Commonwealth Office advice. She asked what the point was of making the appellant return to the Philippines until such time as she could meet the requirements of the Immigration Rules.
17. I reserved my decision.
18. It has been conceded on behalf of the appellant that she cannot meet the requirements of the Immigration Rules. I believe that at the time she entered the United Kingdom she knew very well that she was pregnant.
19. In his determination, the judge purports to apply the decision of Their Lordships in *Chikwamba*. Where Article 8 is engaged, a decision maker should not, without some

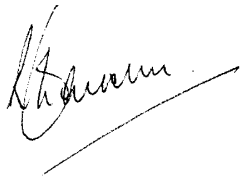
good reason, fail to engage with the merits and dismiss a claim on the basis that an application should be made from abroad.

20. In *MA (Pakistan) v Secretary of State for the Home Department* [2009] EWCA Civ 953 an appellant who had originally been granted leave to enter the United Kingdom as a student, had married and had subsequently travelled to Pakistan but returned to the United Kingdom following a disagreement with his father. He had given up studying when his funding was withdrawn. His leave to remain was cancelled by the Secretary of State when it was discovered that he was no longer a student. He unsuccessfully appealed that decision and a reconsideration was ordered on the grounds that the Immigration Judge had failed to consider the appellant's human rights. At a rehearing, the Immigration Judge decided that the appellant could return to Pakistan and make a fresh application which, in all likelihood, would be granted as the spouse of a British national. The judge suggested that either the appellant and his wife could go to Pakistan together, or that they would only be apart long enough for the fresh application to be made and determined. The judge concluded that any inconvenience did not amount to an insurmountable obstacle such as to constitute a disproportionate interference with family life.
21. Applying *Chikwamba*, Lord Justice Sullivan said at paragraph 9:-
 

*“The real question was not whether there were ‘insurmountable obstacles’ to the appellant returning to Pakistan in order to make an application for entry clearance from there, but whether there was any sensible reason as to why they should be required to do so.”*
22. The Court of Appeal allowed the appeal, finding that there was no sensible reason.
23. In this appeal, it has been conceded that the appellant cannot meet the requirements of the Immigration Rules. The evidence before the judge was that the appellant's husband was in receipt of income support.
24. The judge clearly demonstrates that he was aware of the fact that the appellant's child is a British subject. He concluded that it must be in the best interests of the child to remain with its parents. However, as the Supreme Court made clear in *ZH (Tanzania)* the interests of the children are paramount and must be carefully and fully considered. On the one hand, the judge recognised that there is a legitimate interest in maintaining effective immigration control. I believe that he did err by failing to consider the best interests of the appellant's child.
25. First-tier Tribunal Judge Thorne suggests in paragraph 49 of his determination that because the child is young he could easily adapt to life with his parents in the Philippines. However, that means that the child is effectively being denied the benefits of his nationality referred to in paragraph 30 of *ZH (Tanzania)* where Baroness Hale refers to the decision in *Wan v Minister for Immigration and Multi-Cultural Affairs*. It may be some considerable time before the appellant's husband is earning sufficient funds to enable the appellant to qualify under the Immigration Rules (if ever) and during that time the family life which the appellant's husband

enjoys with his son will be interrupted. That interruption will not be for a matter of weeks and could be for a considerable period of time. The alternative is for the appellant's husband to go to the Philippines with her and their child (and to another part of the Philippines, if they fear life in Davao City because of the advice of the Foreign and Commonwealth Office), but then the child is denied the opportunity of growing up in the homeland of his father and his own nationality and deprived of the benefit of linguistic and cultural development as well as possibly the benefit of a British education.

26. I have concluded that the First-tier Tribunal Judge did err in law and I set aside his decision. I remake it allowing the appellant's Article 8 appeal.

A handwritten signature in black ink, appearing to read 'Chalkley', with a long horizontal stroke extending to the right.

Upper Tribunal Judge Chalkley