



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08576/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 19th June 2014

Determination Promulgated
On 10th July 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

YASIN TAYYARE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Pickering of Counsel instructed by Jason Nicholson Solicitors
For the Respondent: Mrs R Pettersen, HOPO

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Grimshaw made following a hearing at Bradford on 4th December 2013.

Background

2. The Appellant is a citizen of Turkey and the spouse of Rebecca Mandy Tayyare who represented him at the hearing before the First-tier judge. She is a British citizen and met the Appellant in Turkey in May 2008. They married on 8th June 2010 and have a daughter, Ela, born on 19th February 2011. He applied for entry clearance to join her

in the UK on 19th January 2013 but refused because he could not meet the financial requirements of the Immigration Rules.

3. It was not argued before the judge that the Rules could be met. The Sponsor put her case on the basis that the appeal ought to be allowed under Article 8 of the ECHR.
4. The judge accepted the Sponsor's evidence and found that the couple were in a genuine and subsisting relationship. She also accepted that she had strong commitments to her family in the UK and her concerns about her daughter's health and welfare would make it very difficult for both of them to live in Turkey. She recorded that they could however visit the Appellant there, and could use modern technology to keep the family alive during periods of separation. Furthermore the Appellant was not prevented from making a fresh application for entry clearance to the UK in the future if circumstances changed.
5. She took into account the best interests of the child and said that they required both parents to be living in the UK. However all issues had to be considered in the round and the best interests of the child, whilst a primary consideration, are not the sole primary consideration.
6. She wrote as follows

“When striking a balance as I must between the public interest and the interests of the Appellant my overall conclusion is that the interests of the Appellant in allowing him to join Miss Tayyare must give weight to the greater weight to be apportioned to the legitimate aim of protecting this country's economic wellbeing by maintaining proper immigration control. I bear in mind that respect for the right to family life does not and cannot prevent the state from establishing conditions which conflict with family life if such conditions maintain an appropriate balance between private life and the public interest. Respect for family life does not necessarily mean that members of one family can establish themselves in the country of their choice.”

7. On that basis she dismissed the appeal.

The Grounds of Application

8. The Sponsor drafted her own Grounds of Appeal. She said that Judge Grimshaw had not explained why the reasons given do not amount to insurmountable obstacles and there were many reasons why it would not be justified to expect her and her daughter to uproot their lives and move to Turkey. Her parents would be devastated. As a British citizen her child has rights which she could not exercise if she was to move to another country. It is not possible to make a further application because the family situation does not allow them to meet the financial requirements. The Sponsor is a single mother and not able to maintain a job which would change her circumstances enough to successfully sponsor her husband. She relied on the case of *MM and Others v SSHD* [2013] EWHC 1900. Her husband had taken steps to find work in the UK and would not in fact have access to public funds since the visa he would be given prohibits recourse to them. She felt that she had not been given a

proper hearing because it was very short and her parents were not called upon to give evidence.

9. Permission to appeal was granted by Judge Keane on 8th April 2014.

Submissions

10. Miss Pickering made a number of challenges to this determination. She submitted that the judge had incorrectly directed herself as to the law. The Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 had confirmed that the correct test was not insurmountable obstacles but reasonableness.
11. Second she submitted that the judge should have addressed the case of MM and Others v SSHD [, an extract of which was before her. In this case there was evidence that the Appellant had been looking for work at a level which would bring him within the lower level of income cited by Blake J as being a reasonable level. Furthermore there was evidence that the Sponsor's father would offer third party support, which is excluded by the Rules, but the disregard was cited by Blake J as being potentially disproportionate.
12. Third, the judge did not properly consider all of the evidence in relation to the child. The letter from the nursery recorded that Ela had found it difficult to settle and the separation from her father was having a negative effect on her. The evidence from the Children's Commissioner, also in the Appellant's bundle, was that the separation of a child from a parent has particularly serious consequences for very young children.
13. She relied on the Supreme Court decision in ZH Tanzania which held that the best interests of the child should ordinarily dictate the outcome of the appeal, and on Chikwamba, and submitted that the judge had failed to consider the fact that the Sponsor was a single parent who would find it very difficult to meet the Rules and the likely result of the decision would be that the couple would be separated for a lengthy period of time.
14. Mrs Pettersen defended the determination. With respect to MM she said that Blake J was giving guidance to Immigration Judges and indications of his view of what might be disproportionate. The judge was entitled to take her own view and there was nothing in MM which would dictate an outcome in the Appellant's favour. The judge had clearly had the best interests of the child at the forefront of her mind.

Findings and Conclusions

15. There is no legal error in this determination.
16. First, with respect to ME, it is not authority for the proposition that insurmountable obstacles are the wrong test. The Court of Appeal specifically declined to make any finding on the issue, simply observing that if insurmountable obstacles were

obstacles which were impossible to surmount, such a stringent view would be contrary to Article 8.

17. In any event there is no such direction in this determination. The judge in fact said, at paragraph 19

“If the Appellant cannot show that there are insurmountable obstacles to establishing a family life with Miss Tayyare and Ela in Turkey but it would be unreasonable so to do the appeal may be allowed on human rights grounds.”

18. Second, with respect to MM, this is a Sponsor who is in receipt of state benefits. She falls a long way short of the suggested lower minimum income level of £13,400. The evidence of vacancies to do bar work would not be a sound basis for concluding that the Appellant had sufficient earning capacity during the 30 month period of his initial entry to meet either the lower level suggested by Blake J or the present level of £18,600. Although there was no reason at all to doubt the Sponsor’s father’s willingness to offer third party support there was no credible and reliable evidence of support effected by deed and supported by evidence of ability to fund.
19. Even if the judge had referred to MM in her decision it would not have led her to make a decision in the Appellant’s favour, and the omission is immaterial.
20. It is plain that the best interests of Ela were at the forefront of the judge’s mind. She was not required to make specific reference to the document from the nursery school. The letter, dated some four months after Ela started at the day care centre, said that she had taken a long time to settle and had only just begun to develop a secure attachment to her key worker. The judge accepted that Ela’s welfare was best served by her remaining in the UK with her mother, but was fully entitled to weigh against that the public interest in maintaining proper immigration control, in circumstances where the Appellant cannot meet the financial requirements of the Rules. That was a decision for the judge to make.
21. So far as Chikwamba is concerned, the facts are entirely different. That was a case where the House of Lords decided that it would be unreasonable to require a person to return to her country of nationality to make an application for entry clearance which would be bound to succeed. In this case, on present circumstances, there is no chance of success. Allowing the Article 8 appeal would be a plain circumvention of the Immigration Rules

Decision

22. The judge did not err in law. Her decision stands. The appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor