



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25189/2014
IA/25194/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10th August 2015

Decision & Reasons Promulgated
On 24th August 2015

Before

UPPER TRIBUNAL JUDGE FINCH

Between

KRISTINE DIANNE BRAVO IBAJAN
JONATHAN IBAJAN
(No anonymity order made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. E. Tufan, Home Office Presenting Officer

For the Respondent: Mr. O. Manley, Counsel, instructed by Permits2Work.Ltd

DECISION AND REASONS

History of Appeal

1. The 1st Respondent, who was born on 23rd March 1991, is a national of the Philippines. The 2nd Respondent, who is her son, was born on 18th November 2007 and is also a national of the Philippines. The 1st Respondent met her British husband in the United Kingdom in February 2012. She subsequently returned to the Philippines and re-entered as his fiancée on 13th September 2013, bringing her son

with her. The 1st Respondent married her husband in the United Kingdom on 13th February 2014.

2. On 25th February 2014 the Respondents applied for leave to remain as dependents of the 1st Respondent's husband. When doing so, they relied on paragraph EX.1 of Appendix FM of the Immigration Rules as their sponsor had had a period of unemployment since November 2013 and, therefore, they could not meet the income requirements of Appendix FM. The Appellant refused their applications.
3. They appealed and their appeal was heard by First-tier Tribunal Judge O'Rourke. In a decision and reasons, promulgated on 23rd January 2015, he dismissed their appeals under the Immigration Rules but allowed their appeals under the European Convention on Human Rights.
4. The Appellant applied for permission to appeal on 19th March 2014. She asserted that the First-tier Tribunal Judge had not directed himself to the correct approach to Article 8 outside the Immigration Rules and had, therefore, ignored her view on the appropriate threshold for proportionality. In addition, she asserted that the First-tier Tribunal Judge had erred when he found the only sub-sections 117B(1) and (3) of the Nationality, Immigration and Asylum Act 2002 were relevant to their appeal. She also noted that the First-tier Tribunal Judge had relied on the case of *MM (Lebanon) v Secretary of State for the Home Department* [2013] EWHC 1900 despite the fact that it had already been overturned by the Court of Appeal. Finally, she asserted that the First-tier Tribunal Judge had misdirected himself as to the *ratio* of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 as there had been no concession on her part that entry clearance was bound to be granted if the Respondents were to return to the Philippines and there was no evidence that the sponsor was a refugee from there.
5. Upper Tribunal Judge Deans refused permission to appeal on 17th March 2014 but permission was granted by Upper Tribunal Judge Coker on 4th June 2015. She found that it was arguable that the First-tier Tribunal Judge had misdirected himself in failing to have adequate regard to the whole of section 117B of the Nationality, Immigration and Asylum Act 2002 and had also relied on *MM* and misapplied the *ratio* in *Chikwamba*.
6. Counsel for the Respondents had submitted a Rule 24 notice in reply, dated 19th June 2015.

Error of Law Hearing

7. The Home Office Presenting Officer began his oral submissions by noting that the Respondents had not established that there were entitled to leave to remain under the Immigration Rules, including paragraph EX.1. He also noted that in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74 the Court of Appeal endorsed the approach in *R on the application of Nagre v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).
8. In addition, he submitted that in *The Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387 the Court of Appeal found that an Applicant had to meet the requirements of Appendix FM-SE and referred to

paragraph 25 of *The Queen on the application of Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440. He also noted that the Respondents' immigration status was precarious, as found in *AM (S117B) Malawi* [2015] UKUT 260. He then submitted that the Respondents needed to establish that temporary separation would give rise to a breach of Article 8. They could not just assert that *Chikwamba v Secretary of State for the Home Department* [2008] UKHL applied regardless of their circumstances.

9. Counsel for the Respondents then replied. He submitted that the Appellant had not been granted permission to appeal on the "two stage" approach and that the case of *Singh* had not been promulgated until 12th February 2015 and, therefore, it could not amount to an error of law for the First-tier Tribunal Judge to not refer to it. He also asserted that *AM* was promulgated after the First-tier Tribunal Judge's decision and reasons and that this was a family life case and not a private life case. He then submitted that *Chikwamba* did apply as the Appellant had made a concession, as recorded in paragraph 11(i) of the First-tier Tribunal's decision and reasons.
10. He added that any errors made by the First-tier Tribunal Judge were not material and that it was not reasonable to expect the Respondents to return to the Philippines. He also continued to rely on *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41.
11. At paragraph 21 of the First-tier Tribunal Judge's decision and reasons he correctly referred to the obligation to take into account sections 117A-D of the Nationality, Immigration and Asylum Act 2002, when considering Article 8.2 of the European Convention on Human Rights and he copied these provisions into his decision and reasons. Subsequently, at paragraph 22 he stated that "only s117B(1) and (3) are relevant in this matter and they have already been considered in this determination". In her grounds of appeal the Appellant submitted that this was an error of law as sub-section 117B(5) was also engaged. Upper Tribunal Judge Coker gave permission to appeal on this ground on the basis that the First-tier Tribunal Judge had failed to have adequate regard to the whole of s.117B.
12. In relation to sub-section 117B(1) the First-tier Tribunal Judge had already noted in paragraph 18 that as the Respondents could not meet the requirements of the Immigration Rules interference with their family life rights was legitimate as it was for the purpose of controlling immigration. He did not explicitly state that immigration control was in the public interest but this was an inference which could be read into his reference to *Razgar*.
13. At paragraph 11 of his decision and reasons the First-tier Tribunal Judge noted that by the time of the hearing the 1st Respondent could meet the income threshold and that her husband had been a scaffolder all of his working life. Therefore, it is clear that he had considered sub-section 117B(3).
14. The Appellant submitted in her grounds of appeal that the First-tier Tribunal Judge should also have taken into account sub-section 117B(5). However, this states that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious" and in paragraph 8 of his decision and reasons the First-tier Tribunal Judge had noted that the Respondents' appeals were on the basis of family and not private life. As a consequence, I do not find that the

First-tier Tribunal Judge erred in his approach to section 117B of the Nationality, Immigration and Asylum Act 2002.

15. The Appellant also appealed on the basis that the First-tier Tribunal Judge erred in law by referring to an extract from *MM and others v Secretary of State for the Home Department* [2013] EWHC 1900 (Admin). The First-tier Tribunal Judge clearly referred to this case in paragraph 23(i) of his decision and reasons when considering the question of proportionality. In particular, he found that “it is unreasonable to expect the sponsor to live in the Philippines. He is a UK citizen and has lived here all [his] life and applying *MM* it is not reasonable to expect him to leave the UK to be with his wife”.
16. However, in paragraph 3 of his decision and reasons the First-tier Tribunal Judge had noted that the parties had accepted that at the date of the Appellant’s refusal the Respondents did not meet the income requirements of Appendix FM of the Immigration Rules. The Respondents had also applied for leave to remain in reliance on paragraph EX.1 of Appendix FM and been refused leave on this basis. This should have been the starting point for considering Article 8 outside the Rules and not the extract from *MM*.
17. In paragraph 29 of *Nagre*, Mr. Justice Sales found that after considering the Rules and if there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 it will be necessary to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave. (I have also noted that subsequent to the First-tier Tribunal Judge’s decision and reasons the Court of Appeal endorsed this approach in *Singh*.)
18. I have noted that permission to appeal was not granted on the “two stage” approach but the First-tier Tribunal Judge’s reliance on the decision of *MM* in the High Court required me to consider the approach subsequently taken by the Court of Appeal in Article 8 cases. This approach required the First-tier Tribunal Judge to take into account the fact that the Respondents had also applied for leave relying on paragraph EX.1. It was not disputed that the 1st Respondent had established a genuine and subsisting relationship with her husband. But the First-tier Tribunal Judge had failed to consider whether there were insurmountable obstacles to family life continuing outside the United Kingdom. In the light of *Nagre* and subsequent cases she had to show that there were additional and compelling circumstances over and above there being insurmountable obstacles to her husband returning to the Philippines with her. The First-tier Tribunal Judge’s reasons failed to take this into account and merely applied a test of reasonableness.
19. Before both the First-tier Tribunal Judge and myself the Respondents’ counsel argued that Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 and Sedley LJ in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5 had established an alternative domestic test of reasonableness. This argument was fully explored and rejected by Mr. Justice Sales in paragraphs 46 to 48 of *Nagre*. I adopt his reasoning in those paragraphs and, in particular, note that he found that “contrary to the submission of ... I do not think that it is right to try to read Lord Bingham’s statement in *EB (Kosovo)* as a canonical formulation of the test to be applied. The basic point he made was that the

domestic courts should seek to follow the general approach to the application of Article 8 in immigration cases to be identified from the Strasbourg case law. His reference to what could reasonably be expected of a spouse was a loose, compendious summary of how the ECtHR tends to look at the issue, rather than a detailed and authoritative expression of the approach to be adopted, arrived at after a careful analysis of the relevant Strasbourg case law". He also found that nothing in Sedley LJ's judgment in *VW (Uganda)* qualified this interpretation of *EB (Kosovo)*.

20. In addition, he failed to take into account the decision by the Court of Appeal in *The Queen on the application of Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440 where Lord Justice Sales found that "the mere fact that ... is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and may be reluctant to re-locate to ... could not constitute insurmountable obstacles to his doing so".
21. In paragraph 23(ii) of his decision and reasons the First-tier Tribunal Judge also found that it was 'pointless' applying *Chikwamba* to send the Respondents back to the Philippines, simply for the purpose of them applying to enter UK to rejoin the sponsor. In her grounds of appeal the Appellant asserted that the First-tier Tribunal Judge had misdirected himself as there did not appear to be any concession on behalf of the Secretary of State that entry clearance was bound to be granted. I accept that paragraph 11(I) of the decision and reasons notes that it was accepted by the Appellant had the 1st Appellant could now meet the income threshold which was the sole basis upon which her application had been refused.
22. However, the First-tier Tribunal Judge made no findings of fact in paragraph 11 of his decision and reasons about whether a short absence abroad in order to apply for entry clearance now that she would meet the income threshold would amount to a breach of Article 8 of the European Convention on Human Rights even though counsel for the Respondents appears to have submitted that this absence may affect the 2nd Respondent's education and may take some time. The judgment in *Chikwamba* clearly indicates that a judge must consider whether on the particular facts of the case a temporary separation would give rise to a breach of Article 8. This approach was recently confirmed in paragraph 38 of *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba - temporary separation - proportionality)* IJR 00189 (IAC) where Upper Tribunal Judge Gill found that "if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced".
23. Unfortunately in this case the First-tier Tribunal Judge did not make any findings of fact which would have enabled him to apply *Chikwamba* correctly.
24. For all these reasons I am satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and reasons and that it should be set aside in its entirety. I am also satisfied that, as there will need to be a complete re-hearing, this is a proper case for remission to the First-tier Tribunal.

Directions

1. The appeal is remitted to the First-tier Tribunal for a *de novo* hearing.
2. The appeal should not be re-listed before First-tier Tribunal Judge O'Rourke.

Date 18th August 2015

A handwritten signature in black ink that reads "Nadine Finch". The signature is written in a cursive style with a large initial 'N'.

Upper Tribunal Judge Finch