



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01467/2015
IA/01469/2015
IA/01470/2015

THE IMMIGRATION ACTS

**Heard at Field House
on 19 February 2016**

**Decision & Reasons Promulgated
on 23 February 2016**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

SHAMSUN NAHAR

[WR]

[DR]

(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Parkinson - Senior Home Office Presenting Officer.

For the Respondent: Mr M Islam of London Law Associates.

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge S Taylor promulgated on the 25 August 2015 in which the Judge dismissed the appeals under the Immigration Rules but allowed it by reference to Article 8 ECHR which is challenged by the Secretary of State.

Background

2. The first respondent is a citizen of Bangladesh born on the 21 July 1982, the second and third respondents are her children born on the 13 October 2005 and 29 August 2012. On 24 October 2014 they applied for leave to enter the UK as the spouse and children of a person present and settled here. The first respondent and her sponsor were married in Bangladesh on 18 September 2002.
3. Judge Taylor sets out the findings at paragraphs 12-14 of the determination.
4. The appeal under the Immigration Rules was conceded for although it was claimed the earned income was in excess of the requirements of the Rules, the respondents failed to submit the required documents in accordance with Appendix FM-SE. The respondents had failed to provide bank statements that corresponded with the submitted payslips. The rationale behind this requirement is to ascertain whether the payslips represent genuine income earned and paid into the recipient's bank account which was not proved.
5. In relation to EX.1 the Judge found the first respondent unable to qualify as a partner or parent as the second and third respondents are not UK citizens and had not been in the UK for a period of seven years immediately preceding the application. It was noted that the second respondent had been out of the United Kingdom from January 2012 to August 2013, that all three respondents had lived with first respondent's mother in Bangladesh with no evidence of any difficulties that would be faced on return. No private life had been established that enabled the respondents to succeed under the Rules and nor had the first respondent demonstrated any significant obstacles to her integration on return to Bangladesh. The appeal under the Rules by reference to both family and private life was dismissed [12-13].
6. The Judge considered this is a case that warranted consideration of Article 8 outside the Rules [14].
7. It was found family life exists between the sponsor, who is a UK citizen, and the respondents who have lived together intermittently since 2008 and continuously for the last two years. It is claimed the respondents provided evidence to prove they earned sufficient funds but failed to provide the prescribed documents.
8. When considering the proportionality of the decision [14] the Judge found:

“... On the question of proportionality, I accept the submission that expecting the appellants to return to Bangladesh to make an application, both as a spouse the children of a UK citizen, would result in prolonged separation of the sponsor and his wife and children, while they returned to Bangladesh to lodge applications and the application were processed.

I find that such removal would be disproportionate interference with the family life of the family unit and contrary to Chikwamba 2008 UKHL 40 which concluded that it would be rarely proportionate to expect a parent to leave the UK to apply from abroad. In addition, S55 of the 2009 Act requires that the interest of the child is a primary consideration and the case of Zambrano is authority that the interest of the child is to be brought upon the presence of both parents. I find that the interest of the second and third appellants is best served by being in the presence of both parents and a long term separation would be contrary to the principles of S55 of the 2009 Act."

Discussion

9. It is not disputed the family life exists in this case. It is not disputed that the requirements of the Rules cannot be met as a result of the omission of important documents relevant to the verification of the claimed income. Although the Judge records in paragraph 14 that evidence had been provided to prove sufficient funds were available the Judge also records the failure to provide the bank statements and fails to make a specific finding that the funds are genuinely available. If this is to be inferred from paragraph 14 it is important to note that in ZY (Turkey) v Secretary of State for the Home Department [2011] EWCA Civ 65 the Court of Appeal said that, amongst other things, the fact that the Claimant was not a burden on the state was not capable of carrying any weight; not needing to have recourse to public funds was a pre-condition imposed by the Immigration Rules but it was not sufficient for entry, and it was impossible to understand how it could outweigh the need for effective immigration control.
10. It is arguable the Judge misapplied the decision in Chikwamba in importing a legal test from that decision which the courts have since said does not exist.
11. In Jeunesse v the Netherlands Application 12738/10 the ECtHR stated that in principle Contracting States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad. They are thus under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.
12. In Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan (Mauritius) [2012] EWCA Civ 1054 the Court of Appeal outlined the following guidance as to the effect of Chikwamba and the subsequent decision of the Court of Appeal in TG (Central African Republic) [2008] EWCA Civ 997 and SZ (Zimbabwe) [2009] EWCA Civ 590 and MA (Pakistan) [2009] EWCA Civ 953 in which it had been considered: (i) Where an applicant who did not have lawful entry clearance pursued a claim under Article 8, a dismissal of the claim on the procedural ground that the policy required that the applicant should have made the application from his home state might, but not necessarily would, constitute a disruption of family or private life

sufficient to engage Article 8, particularly where children were adversely affected; (ii) Where Article 8 was engaged, it would be a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so; (iii) Whether it was sensible to enforce that policy would necessarily be fact sensitive, and potentially relevant factors included the prospective length and degree of disruption of family life and whether other members of the family were settled in the UK; (iv) Where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant had no lawful entry clearance; (v) Nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues as laid down in seminal cases as Razgar and Huang; (vi) If the Secretary of State had no sensible reason for requiring the application to be made from the home state, the fact that he had failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise (para 30).

13. It is not said by the House of Lords said in Chikwamba that that it would always be Kafkaesque to require those who are in this country illegally or who have no other right to be here to return to their country of origin to reapply in accordance with the laws of the United Kingdom.
14. It is also important to note that Chikwamba was decided in 2008. Cases such as Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC), MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC) and Nagre do not deal directly with the issue of whether it would be reasonable to expect an applicant to return home simply to reapply for entry in the correct capacity although they do comment specifically on the strength that is now to be given to the requirements of the Immigration Rules.
15. In R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children

(per Burnett J, as he then was, in R (Kotecha and Das) v SSHD [2011] EWHC 2070 (Admin)).

16. The Judge also appears to have been influenced by what is described in the determination as a 'prolonged separation' without defining this term or explain why this would be so. In SA (Article 8 –burden of proof) Algeria [2008] UKAIT 00054 the Tribunal held that the European Court of Human Rights has not seen a period of delay of limited duration (before an applicant can be considered for re-admission to the country where he had established family ties) as in itself giving rise to disproportionality.
17. The finding by the Judge in this appeal is inadequate reasoned.
18. In relation to section 55 and the best interests of the children, the guidance provided by the House of Lords in Zoumbas [2013] UKSC 74 :
 - (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
 - (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
 - (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
 - (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
 - (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
 - (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
 - (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.
19. Although the starting point is that the best interests of a child are to be brought up by both parents this is not the determinative factor and Zambrano did not make it so. The Judge was required to identify what the best interests of the children are and then factor this important element into a proper proportionality assessment. It is arguable this process has not been properly undertaken.

20. In such an assessment, as the date of the decision is 25 August 2015 (the date of promulgation) and hearing 30 July 2015 it was necessary for the Judge to consider Part 5 of the Nationality, Immigration and Asylum Act 2002. From 28 July 2014 section 19 of the Immigration Act 2014 was brought into force by the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which applies where the Tribunal considers article 8(2) ECHR directly i.e. outside of the Rules. These provisions bring in mandatory statutory requirements relating to the weight to be attached to the public interest under Article 8 which override existing case law.
21. A fundamental error in the determination is the lack of any mention of section 117 or indication that the Judge was even aware of its provisions. This is relevant as it is a statutory provision and it has an impact upon pre- 28 July 2014 case law. Mr Islam eventually accepted that there was no mention of these provisions but claimed the omission was not material for the Judge had considered all the relevant elements. Although I accept that if this had been the case the lack of specific reference to section 117 may not be material error, the difficulty in this case is that it has not been made out that the Judge has considered the required elements and made specific findings upon the same, including the weight given to the public interest [section 117B].
22. It is also noted that the Judge refers the impact on separation whilst an application is made but failed to factor into that assessment the fact the first and second respondents returned to Bangladesh between November 2008 and May 2010 when the third respondent was not born, and again between January 2012 and August 2013 where the third respondent was born.
23. The determination is fatally flawed. I find legal error material to the decision made out. The determination shall be set aside.
24. As there has yet to be a proper assessment of the Article 8 ECHR element outside the Rules the case shall be remitted.

Decision

25. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I case is remitted to Taylor House for a rehearing to allow a full and proper assessment of the merits of this appeal.**
26. **Case management directions, including a hearing date shall be issued by the First-tier Tribunal at Taylor House in due course.**

Anonymity.

27. 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 no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 22 February 2016