



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU059292015

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2017

Decision & Reasons Promulgated
On 20 July 2017

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

MRS ANOUBHA KANDASAMY
(ANONYMITY DIRECTION NOT MADE)

Appellant

Representation:

For the Appellant: Mr Melvin, Home Office Presenting Officer
For the Respondent: Ms Jones, Counsel, instructed by York Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Rodger promulgated on 4 October 2016 in which she allowed the appeal of Mrs Anoubha Kandasamy against the decision of the Secretary of State to refuse her human rights claim.

2. Mrs Kandasamy whom we refer to as the appellant as she was below, entered the United Kingdom most recently on 22 December 2014 with leave as a visitor. She had previously lived in the United Kingdom with leave as a Tier 4 student and had returned to Mauritius. She is, and this is not in doubt, married to a British citizen, that marriage having taken place in Mauritius on 5 June 2014. She then came to the United Kingdom and prior to her leave to enter as a visitor expiring made an application for further leave to remain using form FLR (FP), it being submitted in the covering letter that she was entitled to leave to remain pursuant to paragraph EX.1 of Appendix FM and on the basis of paragraph 276ADE of the Immigration Rules.
3. The Secretary of State refused that application, noting that as the applicant had entered as a visitor she did not and could not meet the suitability requirements in the Immigration Rules which prohibit in effect people switching out of the category as a visitor.
4. The appeal proceeded on the basis that it would be a breach of the appellant's human rights pursuant to Article 8 to require her to return to Mauritius, The judge concluded that it would be a breach of the appellant's human rights bearing in mind amongst other factors the decision in Chikwamba and Section 117A and 117B of the 2002 Act that a decision in this case requiring the applicant to leave was disproportionate.
5. The Secretary of State sought permission to appeal against that decision, primarily on the basis that it would generally be the correct course of action for applicants who are in the United Kingdom on a visit visa to have to return to the country of origin to make an application unless there are compelling circumstances and there was nothing identified by the judge in this case that leads to that conclusion.
6. We heard submissions from Mr Melvin on behalf of the Secretary of State and Ms Jones on behalf of the appellant. We consider that the starting point in the assessment of whether the judge was right or not is that it is now established law that it will only be in exceptional circumstances that where somebody does not meet the requirements of the Immigration Rules that nonetheless it would be disproportionate to remove them. That is not to say that there must necessarily be anything exceptional about the case but merely that there is a high threshold which has to be overcome, bearing in mind particularly the strong public interest in the maintenance of immigration control. As was noted in Agyarko [2017] UKSC 11 at [49]:

49. In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". Where this is the case, the court said, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8" (para 108)

7. We consider that the maintenance of immigration controls involves the treating of like cases alike. There is a strong public interest in the system of Rules being adhered to by everybody and it is noticeable that in effect what this appellant is seeking to do is to say that the Rules should not apply to her. We consider that there are good reasons of policy as to why an individual should not be entitled to apply to stay in the United Kingdom on the basis of marriage when they have entered as a visitor. That is clearly the Secretary of State's policy.
8. We consider that the appellant's situation is precarious in the sense meant in the Nationality, Immigration and Asylum Act 2002 and in Agyarko. She had no expectation of being able to stay here, having entered as a visitor. She had no expectation of being allowed to remain as a spouse of a British citizen and her situation was clearly precarious on that basis alone. It is difficult to see that there is anything in this case which comes anywhere near reaching the high threshold such that it would be disproportionate to require her to return to Mauritius to apply to return nor, in our view, does the judge come anywhere near setting out any basis on which it could be said that interference was disproportionate in this case, bearing in mind the very strong public interest which she appears not properly to have engaged with in the maintenance of immigration control.
9. We note that it was submitted by Ms Jones that in this case the applicants had fulfilled the requirements of the Immigration Rules with particular regard to it being a subsisting relationship and with regards to the financial requirements. We find little merit in that observation. The application was not in this case supported by the necessary documents which would have been required under Appendix FM-SE, as is clear from the covering letter. It is a requirement of the Immigration Rules that the requirements of Appendix FM-SE are met and there appears to be no basis for the conclusion that those were in fact met by the appellant in this case. More importantly one requirement of the Rules, that is the requirement not to have entered as a visitor, did apply.
10. We do not consider taking into account Ms Jones' submission that this is a case which can fairly be said to fall within the rubric of Chikwamba. There is nothing in this case which brings it anywhere near the circumstances of that case where there was a child involved and where it was an impossibility, the appellant's husband being unable to go to Zimbabwe because of the grant of refugee status, that comes near this case.
11. We accept, as we must, what is said by the Supreme Court in Agyarko, particularly at paragraphs 50 to 53, but we do not consider that this is a case in which the judge could properly have found that the public interest was on an analogy with Chikwamba as understood and as explained in Agyarko such that there was sufficient diminution in the public interest that the decision in this case was disproportionate.
12. We are not satisfied that the matter of Zhang is of any assistance in this case. It does deal with a somewhat different situation of a student and the provisions of the Rules

are different. It also appears that the decision predates the changes brought into the 2002 Act which clarified and, I think, in reality strengthened the consideration to be given to the public interest and this is clearly a public interest matter. That is the large number of cases on the weight to be attached to the public interest which have issued from the Court of Appeal certainly in the four years since **Zhang** was decided.

13. We consider finally, as said before, that the judge appears not to have looked properly at the provisions of the public interest in immigration control. She appears to have taken issue with the fact that there is a blanket prohibition on switching in this case which we consider is not one she should have taken. It is not for her to decide whether the Secretary of State should have put a blanket requirement nor does she appear to have appreciated that of course that type of requirement carries considerable public weight it being a clear expression of policy.
14. Accordingly, for these reasons we find that the decision of the First-tier Tribunal should be set aside and remade.
15. Having canvassed the issue with Ms Jones she submitted that this is a matter which should be remitted to the First-tier, given that there are several additional issues now which she wishes to raise. We consider that as it is now being said, although this was not apparently mentioned before the judge below, that there are family ruptures whereby the appellant cannot return to Mauritius without some difficulty that this is a matter which needs further extensive fact-finding that it should be remitted to the First-tier.
16. As we are remitting the matter to the First-tier we have considered whether any of the findings should be preserved. We are not satisfied that in the circumstances of this case it would be appropriate for us to preserve any of the findings of fact made and we make no directions to that effect.

SUMMARY OF CONCLUSIONS

- 1 The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
- 2 We remit the appeal to the First-tier Tribunal for a fresh hearing on all matters.

Signed

Date: 20 July 2017



Upper Tribunal Judge Rintoul