



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05114/2016

THE IMMIGRATION ACTS

Heard at Field House, London
On 6 March 2018

Decision & Reasons Promulgated
On 23 March 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

AYESHA SALEEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright, instructed by Signature Law LLP

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 22 December 1985 and is a citizen of Pakistan.

Immigration and appeal history

2. The appellant arrived in the UK on 15 February 2008 and has had a complex immigration history, having been granted various periods of leave as student, outside the rules and most recently as a spouse. Her latest period of leave was granted under the five-year partner route of appendix FM to the Immigration Rules. It commenced on 15 July 2013 and covered the thirty months to 15 January 2016. On

11 January 2016 she applied for further leave for thirty months as a spouse. Because her application was made in time, her leave has been statutorily extended by section 3C of the Immigration Act 1971.

3. On 15 February 2016, the respondent refused to grant the appellant further leave to remain as a spouse. The respondent accepted the appellant met the suitability, relationship, immigration and English language requirements of appendix FM but that she failed to meet the financial requirements.
4. This was because her own income over the 12-months immediately preceding the date of application was less than the minimum income requirement, and her husband had been made redundant in October 2015, meaning his previous income could not be taken into consideration. Nor did the Immigration Rules permit consideration of the fact he had secured employment, with an annual salary of £22,500, which commenced on 8 February 2016.
5. The respondent also decided that the appellant was not excused from the minimum income requirement by application of paragraph EX.1 of appendix FM. The couple did not have children and there were no insurmountable obstacles to their family life continuing overseas.
6. The respondent's decision is deemed to be a refusal of a human rights claim by Home Office policy; for this reason, the appellant had a right of appeal, which she exercised on 4 March 2016. The appeal was in time because the refusal decision does not appear to have been served until 29 February 2016. The appeal was heard by First-tier Tribunal Judge A M S Green on 1 June 2017. In his decision and reasons statement that was issued on 19 June 2017, Judge Green dismissed the appeal because he found there were no insurmountable obstacles to family life continuing overseas.
7. The appellant was dissatisfied with this outcome and sought permission to appeal to the Upper Tribunal. Permission was granted by First-tier Tribunal Judge Landes on 3 January 2018, primarily because although Judge Green had considered numerous issues, it was arguable that he had failed to engage with the appellant's reliance on "what may be described as the Chikwamba point".
8. This is a reference to paragraph 51 of the Supreme Court's judgment in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11. It reads:

"51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*. [[2008] UKHL 40]"

Finding there is legal error

9. Before looking at the grounds of appeal, I remind myself what the House of Lords decided in *Chikwamba*. At paragraph 6, Lord Scott of Foscote provide the following analysis.

“6. The appellant, in her appeal, relies on article 8 of the Convention and, for my part, I regard the decisions of the lower courts as clearly unreasonable and disproportionate. It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it. I would allow this appeal.”

10. It summarises the more detailed discussion of the issues given by Lord Brown of Eaton-under-Heywood at paragraphs 35 to 46, which were agreed unanimously by all members of the bench. The clear reminder is that it is for the respondent to justify the interference in family life resulting from the proposal to expel the appellant.
11. Mr Plowright relied on the grounds of appeal. He reminded me, in case I might overlook what is probably the fundamental issue in this appeal, that the Supreme Court had considered in *R (MM (Lebanon) & Ors) v Secretary of State and another* [2017] UKSC 10 how alternative sources of funding to secure the minimum income requirement should be considered. At paragraph 100, Lady Hale and Lord Carnwath concluded.

“100. As already explained, we do not see this as an issue going to the legality of the rules as such. What is necessary is that the guidance to officers should make clear that, where the circumstances give rise to a positive article 8 duty in the sense explained in *Jeunesse*, a broader approach may be required in drawing the “fair balance” required by the Strasbourg court. They are entitled to take account of the Secretary of State’s policy objectives, but in judging whether they are met, they are not precluded from taking account of other reliable sources of earnings or finance. It is open to the Secretary of State to indicate criteria by which reliability of such sources may be judged, but not to exclude them altogether.”

12. Mr Kotas informed me that he accepted that Judge Green had materially erred by failing to engage with the *Chikwamba* point. The Home Office records show that Mr Plowright, who represented the appellant in the First-tier Tribunal, made submissions in relation to this point and they have not been addressed. Mr Kotas also informed me that on the evidence now available, were the appellant to travel to Pakistan and make an entry clearance application, it was bound to succeed because the financial requirements are satisfied. They were, in fact, satisfied at the date of decision and the date of hearing because the appellant’s spouse had resumed employment.

13. Mr Kotas informed me that he was unable to concede the whole appeal because the respondent's view is that it remains reasonable for the appellant to go to Pakistan and apply for entry clearance. This is proportionate given that at the date of application she did not satisfy the financial requirements of appendix FM-SE. Although there might be a period of enforced separation, it was likely to be of a limited duration because most entry clearance applications are decided within 90 days. In answer to my question, Mr Kotas clarified that the only public interest consideration in this appeal had been that the appellant had not satisfied the immigration rules and that was sufficient to engage s.117B(1) in that it was in the public interest of maintain effective immigration controls.
14. As I announced at the end of the hearing, I accept there is a material error in the decision and reasons statement of Judge Green that requires me to set aside his decision.
15. Judge Green's decision and reasons statement is perhaps over complicated. In paragraphs 83 and 84 of *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, Lord Thomas suggests a simpler structure:

"83. One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.

84. The use of a "balance sheet" approach has its origins in Family Division cases (see paras 36 and 74 of the decision of the Court of Appeal *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2014] 1 WLR 563). It was applied by the Divisional Court in *Polish Judicial Authority v Celinski* [2016] 1 WLR 551 to extradition cases where a similar balancing exercise has to be undertaken when article 8 is engaged - see paras 15-17. Experience in extradition cases has since shown that the use of the balance sheet approach has greatly assisted in the clarity of the decisions at first instance and the work of appellate courts."
16. Instead of following this balance sheet approach, Judge Green follows the immigration rules. This approach, unfortunately, runs the risk of restricting the broad view a judge must have about a person's fundamental rights. It is, of course, those rights which must be assessed, not whether the person meets the immigration rules. Whether a person meets the immigration rules is a factor to consider when assessing the strength of the public interest in expelling a person. It can be determinative, but often will remain a factor to balance with others.
17. It is in this context that I accept what is conceded on behalf of the respondent. I find the failure of Judge Green to engage with the *Chikwamba* point is a material error on a point of law and undermines his decision and reasons statement. By following the provisions of the immigration rules, he focused on whether there were insurmountable obstacles to family life continuing overseas and failed thereby to consider the broader issues relating to the right to respect family life.

18. I add one additional observation. Judge Green's comment at the end of paragraph 21, that there was "no justification for [him] to go outside the Immigration Rules under Article 8 ECHR" is wrong in law. The leading judgments from the Supreme Court, particularly paragraphs 39 to 53 of *Hesham Ali*, remind judges that their duty is to apply article 8 and this cannot be replaced by an application of the immigration rules. There was no question of having to go outside the immigration rules; the law requires a judge to apply article 8 to determine this type of appeal.

Remaking the decision

19. Having set aside the decision and reasons of Judge Green, I invited the representatives to make submissions as to how the decision should be remade. As I have indicated, there is no dispute as to the facts in this case. Judge Green made positive findings regarding the evidence and those findings are unchallenged. Neither party wished to present or call further evidence. I decided there was no reason to adjourn the hearing or to remit the appeal.
20. Mr Kotas relied on the submissions he made earlier, which I have recorded at paragraph 12 above. He had nothing to add. Mr Plowright relied on his earlier submissions and said this case fell squarely within the *Chikwamba* point.
21. In deciding that the appeal against the refusal decision of 15 February 2016 should be allowed, I have applied the balance sheet approach recommended by the Supreme Court.
22. The appellant enjoys family life with her husband. They have established their family life in the UK, and met the requirements of immigration control until the application for further leave leading to this appeal. In making the application that led to the refusal decision, the appellant was candid about her spouse's situation. She acted diligently, providing evidence before a decision was made that her husband had secured employment with sufficient income to meet the minimum income requirement.
23. The evidence indicated, as Judge Green found at paragraph 17 of his decision, that the appellant and her husband would suffer inconvenience and hardship were she required to leave the UK. This establishes that the level of interference arising from the proposed expulsion is likely to significantly affect the couple's enjoyment of family life.
24. Taken together, these two points establish the appellant has discharged the burden on her in relation to article 8(1).
25. The burden shifts to the respondent to justify the decision to expel the appellant from the UK. In this regard, as confirmed by Mr Kotas, the respondent relies solely on s.117B(1) of the Nationality, Immigration and Asylum Act 2002 and within that argues that the failure of the appellant to meet the requirements of appendix FM means she needs to be expelled to ensure effective immigration controls are maintained. In reaching this conclusion, the respondent has considered whether there would be an insurmountable obstacle within the meaning of paragraph EX.1 and EX.2 of appendix FM to the couple enjoying family life overseas and found none.

26. As recorded above, Mr Kotas added a further dimension to this, that it was in any event proportionate to expect the appellant to leave the UK and apply for entry clearance from overseas.
27. I mention that the appellant does not argue there are insurmountable obstacles to her returning to Pakistan to apply for entry clearance, but that such a requirement is unreasonable in all the circumstances and therefore not proportionate. Nor does the appellant allege there are insurmountable obstacles to her living with her husband in Pakistan. It would present significant difficulties but ones they could overcome. Again, her argument is that the requirement to do so is unreasonable and therefore not proportionate.
28. Having identified the personal circumstances relied on by the appellant and the public interest factors relied on by the respondent, I turn to my task of deciding where a fair balance lies between these competing interests. I am satisfied that the nature of the appellant's family life in the UK is strongly established. She and her husband have set up home together here and that is deserving of respect. They have done so in compliance with the immigration laws.
29. The reason the appellant did not satisfy the immigration rules was that her husband was made redundant. The timing could not have been worse in terms of immigration control because the appellant's leave was coming to an end. But this was not a situation of their making. The appellant and her husband were candid about the change of circumstances, and acted diligently in securing employment and notifying the respondent of it. This means at all relevant dates other than the date of application, the minimum income requirement is satisfied.
30. I am satisfied that the policy requirement in appendix FM-SE to provide evidence of the financial circumstances were satisfied at the date of application was a policy decision imposed for practical reasons. As identified in *MM (Lebanon)*, a broader approach is needed to ensure the positive obligation of respect in article 8 is observed. This has subsequently been written into the immigration rules. Although the appellant cannot benefit from that change in policy, the fact the Supreme Court found the immigration rules too narrowly drawn is a factor that I must consider when assessing whether the public interest in s.117B(1) is engaged.
31. I find it is not. The provisions of s.117B(1) are not congruent with the immigration rules. The statutory provision refers to the need to maintain effective immigration controls. Usually that will mean that a person must demonstrate that the immigration rules have been satisfied. But given the *Chikwamba* point, that cannot be the only consideration under s.117B(1).
32. In this appeal, I find that the appellant's failure to meet the immigration rules is a technicality and occurred merely because of the timing of the redundancy of her husband. As indicated by Lord Scott in *Chikwamba*, raising technicalities to the level of dogma will undermine respect for the right to family life. I find that to be the case here. I do not find the respondent has provided adequate justification for the decision to expel the appellant. Such a decision in all the circumstances is disproportionate.

33. I remake the decision and allow the appeal against the respondent's refusal decision of 15 February 2016.

Observation

34. I add the following observation. Although I find the decision to expel the appellant is disproportionate in all the circumstances, that does not mean I find she should be granted the leave to which she would have been entitled had she been able to show she met the financial requirement of appendix FM-SE. It is accepted by the appellant that she did not satisfy the rules at the date of application because her own income did not meet the minimum income requirement and her husband was at that time unemployed.
35. As a result, there is no duty on the respondent to grant the appellant further leave to remain under the five-year route to settlement because the eligibility criteria were not met because of the technicality. What leave is granted is a matter for the respondent, but bearing in mind the current provisions of paragraph GEN.3.1, it may be reasonable to treat the findings I have made as exceptional circumstances. I mention that the consequences of expulsion would amount to "unjustifiable harshness" because the expulsion decision itself is not justified in law. I understand that means the respondent will grant the appellant leave as a partner under the ten-year route. But, at the risk of repeating myself, this is merely an observation and what leave is granted is a matter for the respondent. I make this observation to ensure that neither party thinks my decision restores the appellant to her previous position under the five-year route.

Notice of Decision

The First-tier Tribunal's decision and reasons statement is set aside because it contains legal error.

I remake the decision and allow the appeal against the respondent's decision of 15 February 2016.

Signed

Date 21 March 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal