



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18451/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13th November 2013

Determination Promulgated
On 5th December 2013

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MILESH CHANDUBHAI PATEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Hutton instructed by Shah Law Chambers
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Borsada made following a hearing at Birmingham on 20th August 2013.

Background

2. The Appellant is a citizen of India, born on 23rd October 1981. He came to the UK in 2001 on a visit visa and overstayed.
3. He was arrested in June 2009 on suspicion of immigration offences. He subsequently made an application for leave to remain as the unmarried partner of a person present and settled in the UK which was refused. A second application was again rejected in February 2010. The Appellant did not leave the UK but instead married his UK Sponsor in January 2012 and made an application for leave to remain for a purpose not covered by the Immigration Rules.
4. The application was refused on the basis that the Appellant did not meet the requirements of Appendix FM of the Immigration Rules.
5. The judge accepted that the Appellant and Sponsor were in a long-term relationship and intended to stay together permanently as a couple. The Appellant knew that he was illegally in the country for a very long period of time and chose to do nothing about it. He noted that it was conceded that the couple made a mistake in not seeking to regularise his stay before 2009 following the expiry of his initial leave to remain.
6. He said that it was the Sponsor's evidence that she could not leave the UK after living here for such a long period of time. She is a naturalised British citizen having originally come to the UK as a spouse from India and then been widowed. She has two adult children. The judge said that it would not be reasonable for her to return with the Appellant to India although it would not be impossible for her to do so. He accepted that the Sponsor was dependent on the Appellant for a number of domestic duties but her adult son lives at home and could help her and her other student son could offer assistance during his holidays.
7. He said any separation would be time limited given the expectation that the Appellant would be able to obtain a grant of entry clearance. He had a place to return to in India. The relationships which he enjoys with the Sponsor's children are adult relationships and there is no evidence of any emotional dependency.
8. He was not satisfied that it would be disproportionate for the Appellant to be removed. He noted that the Appellant had been here for a very long time but the longevity of the residence was achieved by his failing to regularise his stay and this seriously counted against him in the balancing exercise. He wrote as follows:

"I also do not find that anything has been stated in evidence which amounts to compelling compassionate circumstances and having regard to the adverse impact on the couple I am not satisfied that this is sufficient to tip the balance in favour of the Appellant given the need to maintain effective immigration control in circumstances in which the Appellant has remained unlawfully in the UK for a very long time."

The Grounds of Application

9. The Appellant sought permission to appeal on the grounds that the judge had not applied the principle in Chikwamba v SSHD [2008] UKHL 40, unlawfully applied a test of compelling compassionate circumstances and misapplied the weight in the proportionality exercise. The House of Lords in Chikwamba stated that it would be comparatively rare that the appeal would be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave to enter from abroad. The Chikwamba principle can apply where there are no children involved (Hayat v SSHD [2011] UKUT 00444).
10. The test of compelling compassionate circumstance was unlawful and contrary to the spirit of Chikwamba. Alternatively the decision was perverse and ought to be re-made.
11. On 8th October 2013 the Respondent served a reply defending the determination. It was acknowledged that the judge did not specifically reference Chikwamba but this case was distinguishable and in any event the requirements of the Immigration Rules have changed since the case was decided.

Submissions

12. Ms Hutton relied on her grounds and her skeleton argument. This was a long-term relationship. She relied on the proposition in EB (Kosovo) v SSHD [2008] UKHL 41 for the proposition that:

“It will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal.”
13. In this case the judge had found that it was not reasonable for the wife to go and live in India.
14. She submitted that the judge ought to have considered Chikwamba and was wrong to base his decision on the basis that separation would only be for a matter of weeks. It was not possible to say on the evidence before the judge whether the maintenance requirements could be met nor indeed whether he could pass the English language test although her instructions were that he could.
15. She also submitted that the judge had applied the wrong test in referring to compelling, compassionate circumstances which was equivalent to a requirement of exceptionality.
16. Ms Isherwood submitted that there was no error of law in the decision. She noted that the Appellant used an interpreter in court and the question of whether he could pass the relevant test was unproven. His circumstances in the UK had not been

assessed. This case was wholly different from the Appellant in Chikwamba who was returning to Zimbabwe and who, it was accepted, could meet the requirements of the Rules. The judge had not said that it was impossible for the wife to return with him to India and there was nothing to stop the Appellant making the appropriate application.

Findings and Conclusions

17. There is no error of law in the judge not referring to the case of Chikwamba. It is by no means clear that the Appellant's application for entry clearance would be a mere formality. The evidence at the hearing was that the Sponsor had earnings of £1,000 net from her shop and rental income but no proper assessment of her circumstances have been made. It is also far from clear that the Appellant would meet the English language requirements.
18. The assessment of proportionality was a matter for the judge. Ms Hutton referred to EB (Kosovo). The Sponsor in this case originally comes from India and she has no dependent relatives for whom she is responsible in the UK. It was generous of the judge to find that it would not be reasonable for her to go with her husband, although that was his finding, and he did say that it would not be impossible for her to do so. However, against that, he balanced the Appellant's terrible immigration history and the fact that he had been here unlawfully for a very long period of time. That was a judgment for him to make.
19. The grounds are right to state that compelling compassionate circumstances are not the correct test in the assessment of Article 8. However even if the judge had applied the correct test his conclusion would have been the same. It is not disproportionate in all of the circumstances of this case to expect the Appellant to make the correct application for entry clearance and to demonstrate that he can meet the requirements of the Immigration Rules in the normal way. There is no error in the judge coming to that conclusion.

Decision

20. The judge's decision will stand. The Appellant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor