



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11720/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 5 February 2014

Determination Promulgated
On : 11 February 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TROY MCCORMICK

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, instructed by Kent Immigration & Visa Advice

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the First-tier Tribunal's decision allowing Mr McCormick's appeal against the respondent's decision of 27 March 2013 refusing his application for leave to remain in the United Kingdom.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr McCormick as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The appellant is a citizen of New Zealand, born on 29 July 1992. He first arrived in the United Kingdom on 5 March 2011 on a Tier 5 (youth mobility) migrant visa valid until 28 February 2013. On 12 November 2012 he made an application for leave to remain as a partner of a person present and settled in the United Kingdom. His application was refused for reasons set out in the respondent's letter of 27 March 2013. In that letter the respondent considered that the appellant was unable to meet the eligibility requirements of the immigration rules in paragraph E-LTRP1.2 since his sponsor was not considered to meet the definition of "partner" under GEN 1.2. The reason for that was that at the date of the application the appellant and the sponsor had not lived together in a relationship akin to marriage or civil partnership for at least two years, having resided together only since August 2011. For the same reasons the appellant was considered not to be able to meet the requirements of EX.1.(b) of the rules.
4. The appellant's appeal was heard on 6 September 2013 by First-tier Tribunal Judge Emerton. It was conceded on behalf of the appellant that he could not meet the requirements of the immigration rules and the appeal was pursued on Article 8 grounds only. The judge heard from the appellant, his partner and his partner's mother and accepted, on the basis of the evidence before him, that the appellant and his partner were in a stable, long-term relationship akin to marriage or civil partnership and that they had been living together from the second half of April 2011. Accordingly, at the date the application was made they had been living together for almost 19 months; at the date of decision for just under two years; and at the date of the hearing for two years and almost five months. He noted that the appellant had had to make his application before the required two year period in order to avoid overstaying, given that his leave expired in February 2013. He accepted that the appellant had established a family life in the United Kingdom with his partner and that the requirement for him to leave the United Kingdom interfered, albeit probably only temporarily, with that family life. With regard to proportionality, he accepted the submissions made before him that the principles in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 applied so as to enable the appellant to succeed on the basis that by the time of the hearing he was able to meet the requirements of the rules. He allowed the appeal on Article 8 human rights grounds.
5. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to identify any exceptional circumstances resulting in an unjustifiably harsh outcome for the appellant, pursuant to the principles set out in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Nagre, R (on the application of) v SSHD [2013] EWHC 720.
6. Permission to appeal was granted on 17 December 2013.

Appeal hearing and submissions

7. The appeal came before me on 5 February 2014. The appellant and his partner were in attendance but were not required to give oral evidence. I heard submissions from both parties in regard to the error of law.

8. Mr Saunders relied on the grounds of appeal, submitting that there was not sufficient in the appellant's case to show that the outcome was unjustifiably harsh. There was nothing exceptional to take his case outside the rules.

9. Mr Coleman relied on the Administrative Court judgment in Zhang, R (on the application of) v SSHD [2013] EWHC 891 which in turn confirmed the principles in Chikwamba and which he submitted concerned exactly the same point as that arising in the appellant's case. The appellant was able to meet all the requirements of the immigration rules at the date of the hearing, aside from the requirement for entry clearance in the correct capacity, and in accordance with the principles in those cases he ought not, therefore, to be required to return to New Zealand solely in order to make an entry clearance application. He submitted that there was no requirement to show exceptional circumstances and MF applied only in deportation cases.

10. In response to my enquiry, Mr Saunders confirmed that there was no dispute as to the appellant's ability to meet the requirements of the rules in other respects, such as in regard to maintenance, and that the issue of lack of appropriate entry clearance had not been taken against him. The only issue taken against the appellant was the fact that he had not been living with his partner for two years prior to making his application and it was on that basis alone that it had been decided that he could not meet the requirements of the rules. In such circumstances the appellant could only succeed under Article 8 if he could show that the decision refusing to grant leave led to an unjustifiably harsh situation, which he could not.

11. Both parties agreed that, in the event of an error of law being found and the decision being set aside, there was no further evidence to be submitted and the decision could simply be re-made on the information already available.

Consideration and findings

12. In my view Judge Emerton erred in law in his decision by failing to give any consideration to the principles in MF and Nagre and by failing to identify any exceptional circumstances such that it could be said that the appellant's removal would involve unjustifiable hardship.

13. Whilst it is the case that MF involved a deportation decision, the Court of Appeal in that case clearly relied upon and endorsed the principles in Nagre, emphasising at paragraph 41 "The fact that *Nagre* was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the ECtHR of the phrase "exceptional circumstances"." The Administrative Court in Nagre, in turn, endorsed the

guidance issued by the UKBA in circumstances where the requirements of the immigration rules could not be met, finding at paragraph 14 as follows:

“The definition of "exceptional circumstances" which is given in this guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of Article 8. The practical guidance and illustrations given in the passage quoted above support that interpretation. No challenge is brought to the lawfulness of this guidance. In my view, it gives clear and appropriate guidance to relevant officials that if they come across a case falling outside the new rules, they nonetheless have to consider whether it is a case where, on the particular facts, there would be a breach of Article 8 rights if the application for leave to remain were refused.”

14. In such circumstances it seems to me that Mr Coleman’s submission, as to the limitation of such principles to cases involving deportation, is not correct.

15. However, even leaving aside the question of “exceptional circumstances” and “unjustifiable hardship”, it is plain that Judge Emerton failed to consider the strong public interest in meeting the requirements of the immigration rules, as emphasised in recent case law. Whilst he properly considered, at paragraph 23, the genuineness of the appellant’s intentions and his reasons for being unable to submit his application at a time when he could have met the rules in terms of the two year period of cohabitation, he appeared to attach little weight to the fact that the rules could nevertheless not be met. Instead he attached considerable weight to the fact that the appellant was able to meet the rules by the time of the hearing and indeed that was the point upon which Mr Coleman sought to rely in his submissions. However, such a consideration was clearly misconceived. The rules specifically link the two year period to the date of the application and accordingly whether or not the appellant had lived with his partner for two years by the date of the hearing, he still could not succeed under the rules at that time. Had the two year period been calculated up to the date of the hearing, the appellant would have had to have made his application at a time when he had no valid leave and would thus still have had to satisfy the requirements of EX.1.(b) which includes the question of “insurmountable obstacles”, a matter not considered in terms by the judge, albeit perhaps briefly touched upon at paragraph 24.

16. It was Mr Coleman’s submission that the appellant’s case was on all fours with the case of Zhang which, in turn, relied upon the principles in Chikwamba. However I do not consider that to be the case. The principles in those cases apply to circumstances where an applicant was able to meet all the requirements of the immigration rules other than the requirement for entry clearance or previous leave in the appropriate capacity (ie for “switching”). However, as Mr Saunders clarified, the respondent, in refusing the appellant’s application, had not taken that particular point against him but had found that he could not meet the requirements of the rules as a result of his inability to meet the definition of “partner” in GEN.1.2. Accordingly, the appellant’s situation could not be resolved by applying the principles in Zhang and Chikwamba.

17. For the above reasons I consider that the judge materially erred in law in his Article 8 assessment. The circumstances referred to at paragraphs 23 and 24 of his determination do

not go anywhere near establishing a case of “exceptional circumstances” in terms of “unjustifiable hardship” or “unjustifiably harsh consequences”. Neither, for the purposes of EX.1.(b), has the appellant established, on the evidence before me, that there would be insurmountable obstacles to family life with his partner continuing outside the United Kingdom. For those reasons, I consider that the interference with the appellant’s private and family life caused by the requirement for him to leave the United Kingdom would not be disproportionate to the legitimate aim of maintaining an effective immigration control. The appellant is now able to meet the definition of “partner” in section GEN.1.2 and would therefore be able to make an application from New Zealand, which I am told would take up to about eight weeks to be considered. Mr Coleman advised me that he may lose his job if he took the slower and cheaper application route, but that would not necessarily be the case if he took the more expensive faster route. In any event there is no reason why he would not be able to obtain another job. Although that would involve some inconvenience to the appellant, I do not consider that it can be said on any interpretation of the law that that would involve a breach of his Article 8 rights. Accordingly, in re-making the decision, I find that the respondent’s decision is not in breach of Article 8 of the ECHR.

DECISION

18. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside that decision and to that extent the appeal made by the SSHD is allowed. I re-make the decision and dismiss the appellant’s appeal on all grounds.

Signed

Date

Upper Tribunal Judge Kebede