



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01337/2015

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 3 November 2015

Determination Promulgated
On 12 November 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Adetutu Shakirat Mebude
[No anonymity direction made]

Respondent

Representation:

For the claimant: Not represented
For the appellant: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Somal promulgated 23.6.15, allowing the claimant's appeal against the decision of the Secretary of State, dated 18.12.14, to refuse her application made on 8.4.14 to vary leave to enter or remain in the UK and to remove her from the UK pursuant to section 47 of Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 8.6.15.
2. First-tier Tribunal Judge Molloy granted permission to appeal on 17.9.15.
3. Thus the matter came before me on 3.11.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Somal to be set aside and remade. For the reasons given, I have dismissed the appeal.
5. The relevant background can be summarised as follows. The claimant and her husband, a British citizen, married in Nigeria. He returned to the UK after the marriage. The claimant applied for entry clearance as a family visitor on the assertion that she intended to remain only a few weeks and certainly no more than the permitted 6 months. She entered the UK on 25.2.14 accompanied by her two-month old daughter. A few weeks later, on 8.4.14, she applied for leave to remain as a spouse of a person settled in the UK. To Judge Somal she stated that, "she found it to be such a relief to be living with him and the baby once she was here." She also told me that she fully intended to return. She relied on the fact that she discovered that she had TB and began a course of NHS medical treatment.
6. Her application was first refused on 5.6.14, but First-tier Tribunal Judge McGinty allowed the appeal on 6.11.14 by purportedly remitting the case to the Secretary of State, on the basis that there had been no consideration of the best interests of the claimant's daughter. The application was thus reconsidered, both under the Rules and outside the Rules under article 8 ECHR, taking account of the duty to have regard to the best interests of the child, pursuant to section 55 of the Borders Citizenship and Immigration Act 2009. The application was again refused on 17.12.14, with a decision to remove the claimant from the UK. It is against that decision the claimant appealed to the First-tier Tribunal.
7. First-tier Tribunal Judge Somal found that the claimant could not meet the requirements of the Immigration Rules for leave to remain as a spouse under Appendix FM, or on the basis of private life under paragraph 276ADE. In particular, the claimant is not eligible under Appendix FM as having entered as a visitor she fails under the eligibility requirements of E-LTRP 2.1. As such the claimant does not get as far as consideration of the exceptions under EX1. However, Judge Somal considered EX1(a) and (b), concluding that the claimant could meet neither exception. The judge found that there were no insurmountable obstacles preventing her from continuing family life with her British citizen partner in Nigeria. "Her husband is a British citizen who has lived in the UK over 20 years and almost all his life. With the assistance of the appellant and her family he would be able to adjust to life in Nigeria with their baby. It would be very difficult but no more than that."
8. Similarly, the judge considered paragraph 276ADE, concluding that the claimant has family in Nigeria, where she has spent the vast majority of her life. "Although she may face some difficulty upon return, she is well educated and has lived there 28 years she has not lost all ties to Nigeria. I do not find there would be very significant obstacles to her integration to Nigeria if required to leave."
9. The judge then went on from §15 to consider article 8 outside the Rules. However, this approach was flawed. As confirmed in SSHD v SS (Congo) & Ors [2015] EWCA

387, it is necessary only to consider article 8 outside the Rules if there are compelling circumstances insufficiently recognised in the Rules which would render the decision unjustifiably harsh. In MS v SSHD [2013] CSIH 52 it was held that the new Immigration Rules would be likely to deal adequately with the great majority of cases where Article 8 rights to family life were in issue and that in that event there was no need to go on to consider Article 8 separately using the analysis set out in Razgar, unless a refusal, under the Immigration Rules, would result in an unjustifiably harsh consequence for an appellant such that refusal would not be proportionate.

10. Judge Somal made no consideration at all as to whether the circumstances of the claimant, her husband or their child, were so compelling as to require an assessment outside the Rules on the basis of private and/or family life under article 8 ECHR. Given that the judge found that the claimant could meet neither Appendix FM nor paragraph 276ADE, having applied the tests of insurmountable obstacles and very significant obstacles, it is difficult to see why the judge considered that further consideration of private or family life outside the Rules was justified.
11. Further, case law has made it clear that even if article 8 ECHR is to be considered, the assessment has to be made through the lens of the Immigration Rules, the Secretary of State's response to private and family life claims under article 8, balancing those human rights with the public interest in maintaining immigration control. This was not the approach adopted by Judge Somal. On the findings in relation to insurmountable obstacles and very significant obstacles, there is no basis or need to consider private and family life outside the Rules, as the considerations within the Rules amount to a proportionality assessment between the rights of the claimant and her family on the one hand and the legitimate and on the other the necessary aim of the state to protect the economic well-being of the UK through immigration control.
12. It is beyond comprehension how the judge could reach the conclusions that there are no insurmountable obstacles preventing the claimant's family life continuing with her husband and child in Nigeria, and that there are no very significant obstacles to the claimant continuing her private life in Nigeria and yet find at §19 that it would be "unreasonable and unduly harsh to expect the husband to uproot and move to Nigeria given the life he has made for himself in the UK. It would be unduly harsh to expect the appellant to leave her baby behind with her husband and make an application for entry clearance from Nigeria with no real indication whether it would be a matter of weeks or many months." The two sets of findings are entirely inconsistent with each other.
13. Even if the judge was justified in considering article 8 outside the Rules, the assessment failed to consider the extent to which the claimant did not meet the requirements of the Rules or whether there was any prospect that the claimant could meet the requirements of entry clearance as a partner. In considering that it would be unduly harsh to expect her to leave her child behind with her husband and make an application from outside the UK, the judge failed to take account of the decision in R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) ILR [2015] UKUT 00189, where it was held that "if it is

shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced." No such evidence had been adduced to show that the claimant would meet the requirements of the Rules. In fact, she entered on a family visit visa because they could not meet the requirements of the Rules, particularly in relation to the financial income threshold. In effect, they have sought to circumvent the Immigration Rules by applying for leave to remain once the claimant and her daughter entered the UK.

14. In all the circumstances, the decision of the First-tier Tribunal is flawed, demonstrating a misconception of the correct legal principles, and cannot stand.
15. In remaking the decision in the appeal I adopt all the factual findings set out in the First-tier Tribunal decision and there is no need for any further evidence. However, in her submissions to me, the unrepresented claimant pleaded to be considered as a special case. She said that they knew they did not meet the requirements of the Rules, but that they could not live or survive in Nigeria as her husband would have no job to go do. In essence she submitted that they should be allowed to remain on human rights grounds outside the Rules. She added that her daughter, a citizen of Nigeria, is in school in the UK and that she is being treated for TB, which she claimed she was entitled to.
16. I take into account the best interests of the child of the family. However, it is clearly in the best interests of that child to remain with and be raised by both of her parents. The child is not a British citizen and has no entitlement to remain or be educated in the UK.
17. As is common ground, the claimant cannot meet the requirements of the Rules for leave to remain as a partner or as the parent of a child, or on the basis of private life. I am not satisfied on the facts of this case that there are any compelling circumstances at all to justify granting leave to remain outside the Rules on the basis that to remove the claimant would be unduly or unjustifiably harsh or disproportionate.
18. Even if it were appropriate to consider their circumstances outside the Rules on the basis of article 8 ECHR, which I do not accept, I also find that in applying the Razgar staged approach, there is nothing disproportionate or unjustifiably harsh in the decision of the Secretary of State to remove the claimant.
19. Any article 8 assessment has to take account of to what extent the claimant met the requirements of the Rules. Whilst any consideration under Appendix FM fails at the eligibility requirements, and thus EX1 does not apply, I adopt the unappealed findings and reasoning of Judge Somal that on the EX1 assessment there are no insurmountable obstacles to continuing family life in Nigeria. The claimant has lived most of her life in Nigeria, where she has family as well as social and cultural ties. Her very young daughter was born in Nigeria and is too young to have formed any associations or attachment outside the family unit. Obviously the husband, as a British citizen, cannot be required to leave the UK; it is matter for him whether he will accompany the claimant to Nigeria, where he was born. But the fact that he is a

British citizen, settled, and employed in the UK, does not entitle the claimant, by those facts alone, to settle with him and their daughter in the UK. The state owes him no entitlement to a home or employment in Nigeria or the UK. They married at a time when it was far from clear that the claimant would ever be able to settle with him in the UK and thus took the risk that they would not be able to continue family life in the UK.

20. There is a route for entry as a partner, which it appears the claimant cannot meet. She certainly cannot meet the route for leave to remain as a partner and this is highly relevant to any article 8 proportionality assessment. It has not been shown that she would succeed in an application for entry clearance. It is a matter for the couple to decide whether to separate whilst she makes application from Nigeria, or whether they should all go together. However, there is nothing unreasonable or unduly harsh in the expectation of continuing family life outside the UK.
21. I have taken into account that the claimant is receiving TB treatment in the UK. It is questionable whether she is in fact entitled to such medical treatment from the NHS free of charge, but the claimant has not shown that she would be unable to obtain suitable treatment in Nigeria, which has a functioning health system. That she is receiving treatment does not render her removal disproportionate.
22. Section 117B of the 2002 Act requires the Tribunal to take account of the fact that immigration control is in the public interest and that little weight should be given to any private life developed in the UK whilst her immigration status was precarious, as it was. The decision of the Secretary of State does not require the separation of the family, but neither are they entitled to settle as a family in the UK just because that is their choice and they happen to have contrived to be together.
23. In all the circumstances, it is clear that there is no merit in the claimant's application, either under the Immigration Rules or even outside the Rules on the basis of private and family life under article 8 ECHR.

Conclusions:

24. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.



Signed
Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

A handwritten signature in black ink, appearing to read 'Judith', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup