



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/05710/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 20 November 2015**

**Decision & Reasons Promulgated
On 26 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**JOSEPH LLOYD
(NO ANONYMITY ORDER MADE)**

Respondent

Representation

For the Appellant: Mr S. Staunton, Senior Home Office Presenting Officer
For the Respondent: Mr Bartram, Counsel

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a citizen of St Lucia born on 6 November 1948. He entered the UK on 27 May 2014 as a visitor, with leave to remain until 27 November 2014. Shortly after arriving in the UK, on 3 August 2014, he married a British citizen (“the sponsor”).
2. On 29 October 2014 the claimant applied, unsuccessfully, for leave to remain as the sponsor’s husband. The Secretary of State refused his application on the basis that he was in the UK with leave as a visitor and

as such could not satisfy the requirements for limited leave to remain as a partner as set out in Appendix FM Section R-LTRP 1.1.

3. In a decision promulgated on 25 June 2015 First-tier Tribunal (FtT) Judge Widdup allowed the claimant's appeal. The Secretary of State is now appealing the FtT's decision.
4. The factual background, as accepted by the FtT, is that the claimant and sponsor were at school together in St Lucia. The sponsor came to the UK in 1962. The claimant and sponsor would see each other during visits by the claimant to St Lucia. They started a relationship some time ago and became engaged in 2013. In March 2014 the sponsor visited St Lucia and returned with the claimant to the UK, the claimant entering the UK on a visit visa. Notwithstanding the engagement in 2013, the claimant's position before the FtT was that the decision to marry was only made in July 2014, after he came to the UK. The marriage took place on 3 August 2014. With regard to the evidence given by the claimant and the sponsor about the timing of their marriage and engagement, the FtT stated at paragraph [23] that "it is difficult to reconcile their evidence that they were engaged in St Lucia from about 2013 but they only decided to marry in the UK in 2014."
5. The evidence before the FtT was that the sponsor's health is poor and she had two eye operations in 2014. She and the claimant live with her grandson, a UK citizen, who was born on 31 March 2003. The sponsor's grandson has contact with his father but lives with the sponsor and has done his whole life. The FtT found that the grandson has a good relationship with the claimant. He is also at an important stage in his education. It was also found that the sponsor's grandson helps look after the sponsor but the need for this has diminished because of the assistance provided by the claimant.
6. The FtT found that the claimant was unable to satisfy the requirements of Appendix FM because he entered the UK as a visitor. The appeal turned, therefore, on an assessment of Article 8 of the ECHR outside the Immigration Rules. Having determined that Article 8 was engaged, the FtT proceeded to consider proportionality. In finding that removal of the claimant would not be proportionate, the FtT gave particular weight to (a) its finding that if the claimant were returned to St Lucia his application for settlement would be highly likely to succeed; and (b) removal of the claimant would have a detrimental effect on the claimant's grandson who is presently relieved of the burden of caring for his grandmother because of the assistance provided by the claimant.
7. The Secretary of State's case, as set out in the grounds and in Mr Staunton's submissions, is that the FtT, having correctly recognised that the Immigration Rules were not met and that there is a public interest in discouraging visitors from circumventing the Rules, failed to follow established case law, as set out in *SS Congo* [2015] EWCA Civ 387, in relation to the weight that should be attached to the public interest in such

circumstances. Moreover, the Secretary of State's case is that FtT decided the case contrary to *R(on the application of Chen) v SSHD IJR* [2015] UKUT 189 (IAC) which makes clear that the burden is on the claimant to show temporary removal would be a significant interference with family life and that entry clearance from abroad would be granted. The claimant had not shown why a temporary visit to St Lucia would constitute a significant interference with family life or that an application from St Lucia would be successful.

8. Mr Bartram acknowledged that the claimant could not satisfy the Rules. He argued that the FtT had before it clear evidence that enabled it to ascertain whether an application for entry clearance from abroad would succeed and it had made a clear finding that it would. He referred to and relied on the High Court judgment *R(on the application of Zhang) v SSHD* [2013] EWHC 891 (Admin) and argued that it was not justifiable to impose a separation of the claimant from the sponsor and her grandson merely to comply with formal procedures in particular because of the negative impact on the grandson. Mr Bartram advised that entry clearance from St Lucia would take up to three months. He further argued that in assessing proportionality under Article 8, the FtT had explicitly referred to and taken into consideration the public interest in immigration control and in discouraging visitors from circumventing the Immigration Rules.

Consideration

9. The FtT has followed the structured and sequential approach set out in Razgar. It starts by finding that the claimant enjoys a family life with the sponsor and her grandson and that the decision to remove him has consequences of sufficient gravity to engage Article 8. This finding was clearly open to the FtT. The sponsor and claimant are a married couple living together and the genuineness of the relationship was not in question. Nor was it questioned that the claimant lives with, and has a good relationship with, the sponsor's grandson.
10. The FtT then - correctly - found that the decision to remove the claimant was lawful and a legitimate aim of immigration control.
11. The FtT then - also correctly - identified that in considering proportionality there must be a balancing of the interests of the claimant and other family members against the public interest.
12. In respect of the public interest, although reference is not made to sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") the FtT has identified the relevant interests; that of the maintenance of effective immigration control and of discouraging visitors from circumventing the Rules. At paragraph [45] the FtT properly identified that it is in the public interest "that those who wish to marry a UK citizen should apply in their own country in the normal way".

13. The judge balanced this against the interference with family life that would result from a temporary separation arising from the claimant relocating to St Lucia to make an application for entry clearance. In this regard the FtT noted that the impact would be felt by the sponsor, who relies on the claimant for help with her mobility and health problems, and the sponsor's grandson, who would have to take on responsibilities in respect of his grandmother currently taken by the claimant. The FtT also made clear its view, based on the evidence before it, that an out of country application by the claimant would be straightforward (paragraph [37]) and highly likely to succeed (paragraph [44]).
14. Mr Staunton drew my attention to paragraph [39] of *R(on the application of Chen) v SSHD IJR* [2015] UKUT 189 (IAC) and it is instructive to consider this appeal in light of that paragraph.

“In my judgement, 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. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts.”
15. The claimant has shown that on the balance of probabilities (a) an application for entry clearance from abroad would be granted; and (b) that there would be significant interference with family life by temporary removal, such interference, inter alia, affecting a child. Accordingly, using the language of paragraph [39] in *Chen*, “it will be easier to show that the balance on proportionality falls in favour of the claimant”.
16. This is a case in which the FtT was required to undertake a balancing exercise in which there were strong interests on both sides. Weighing against the claimant was that he had entered the UK as a visitor (there is a specific preclusion in the Rules on persons who enter the UK by this route, at paragraph E-LTRP 2.1 of Appendix FM of the Immigration Rules) and that he most likely intended to marry the sponsor at the time he entered the UK; that is, his circumvention of the Immigration Rules was intentional. Accordingly, the public interest in the maintenance of effective immigration control, as stipulated at paragraph 117B(1) of the 2002 Act, takes on a very significant weight in this appeal.
17. On the other hand, weighing in favour of the claimant is that he is very likely to succeed in an application from abroad and temporary separation

will negatively interfere with family life enjoyed not only by him and the sponsor but also by a child.

18. I remind myself that the issue before me is whether the judge made an error of law and not whether I, or a differently constituted tribunal, might have reached a different conclusion based on the same facts. The FtT has engaged in the balancing exercise required under Article 8 of the ECHR, taking account both of the public interest and the interference with family life that would arise from the claimant's removal. In these circumstances, although the FtT's conclusion might be considered somewhat generous to the claimant, I am satisfied that it was a finding that was properly open to it based on the evidence and therefore that the FtT has not made an error of law.

Decision

- a. The appeal is dismissed.
- b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.
- c. No anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 23 November 2015