



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

Appeal Number: IA/21265/2013

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and reasons
Promulgated**

On: 13 July 2015

On: 6 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MRS ASSIA HENACHE
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sajid, Legal Representative

For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Algeria born on 27 March 1982. However, for the sake of convenience, I shall continue to refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.
2. The appellant’s appeal to the First-tier Tribunal was against the decision of the respondent to refuse her application dated 13 June 2013 for leave to remain as the spouse of a person present and settled in the United

Kingdom and pursuant to Article 8 of the European Convention on Human Rights.

3. A Judge of the First-tier Tribunal, S. Taylor, allowed her appeal pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Ford in a decision dated 7 May 2014, granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge failed to follow the guidance in the case of **Gulshan (article 8-new rules-correct approach) [2013] UKUT 00640 (IAC)**, in particular failing to identify the compelling or compassionate circumstances that led him to conclude that the rules operated unduly harshly thus warranting an examination of Article 8 outside them.
4. Thus the appeal came before me.

First-tier Tribunal's Findings

5. The First-tier Tribunal allowed the appellant's appeal, concluding that:

"[12] ... The appellant claimed that she came to the UK for a short holiday and gave conflicting evidence as to her pre arranged accommodation arrangements for the visit. She claims that she stayed with the sponsor for a matter of a few weeks, having entered the UK on 7 September 2012, and she very quickly entered into a relationship with the sponsor, which resulted in the marriage less than three months later ... on 29 November 2012. The parties would have had to apply for the marriage at around the beginning of November 2012, so would have applied for the marriage license within two months of arrival in the UK. The appellant gave conflicting and contradictory evidence with regard to the arrangements for her visit and her background in Algeria, which was also inconsistent with the oral evidence given by her sponsor.

[12] ... the appellant stated that she comes from a very traditional background and that neither her parents nor her brothers would approve of a marriage which had not been arranged and that she would be in danger if she is returned to Algeria. This evidence is not consistent with her evidence that she is well educated and travelled on a mixed sex bus to university and gained a degree in Engineering and Computer Science. After her degree the appellant was not expected to stay at home but she worked in the family business interacting with customers and suppliers. She was permitted to travel to the UK with her sponsor's sister. The Tribunal finds that this evidence is far more consistent with the evidence of the sponsor who stated that he and the appellant's family were at the more liberal end of Algerian society and there would have been no cultural problem for the appellant to stay with her sponsor during the visit, as they were adults and also second cousins. I am not satisfied that the appellant came from a very traditional family as claimed and I find that the appellant would not be at risk on return to Algeria as a result of her marriage to the sponsor. The sponsor recently became divorced and on the balance of probabilities, I find it more likely than not that the appellant travelled to the UK for the purpose of marriage to the sponsor. The short timescale between the appellant's arrival in the UK and the

application for the marriage is a further indication of the true reasons for her visit to the UK.

13. Notwithstanding my findings in the above paragraphs, the parties were married in the UK on 29th November 2012 in a civil marriage. No query was raised at the time by the UK authorities given the short timescale [before the marriage] and [the fact] that the appellant had a [visitor] visa of less than six months. There is no dispute that the parties were married under civil law in the UK. The respondent has accepted that the parties are in a genuine and subsisting relationship. The parties now have a child born in the UK and the Presenting Officer accepted that a child of a person settled in the UK, with indefinite leave to remain in the UK, would be entitled to apply for a UK passport. The child's birth certificate has been submitted, indicating that he was born in London, and the parties are in receipt of child benefits in respect of their child. The payment of child benefit only indicates that the claimant is not subject to immigration control and does not indicate the status of the child, but it has been accepted that the child was entitled to apply for UK citizenship. I am satisfied that the appellant and sponsor are married and live in a subsisting relationship, I am further satisfied that the parties live in a family unit with a child, born in the UK who is entitled to UK citizenship.

14. On the question to insurmountable obstacles to return, the appellant has submitted no independent evidence of the sponsor's continued fear of return to Algeria. No evidence has been submitted that the circumstances of the sponsor leaving Algeria still apply over ten years later. I am not satisfied that the sponsor has a well founded continued fear to return to Algeria. Similarly I have not accepted the appellant's evidence that she would be at risk on return to Algeria due to her marriage to the sponsor. There was no personal objection to the sponsor, he was not a member of the appellant's extended family, and I have found that the appellant and sponsor both came from more liberal minded sections of Algerian society. However, the sponsor has not been granted UK citizenship, due to [his] involvement in some criminal activity, and still only has refugee travel document which precludes travel to Algeria. As the sponsor is prevented from travel to Algeria I find that there are insurmountable obstacles to the parties continuing their family life in Algeria.

15. ... the application was appropriately refused [under Appendix FM] ... it is clear that the exception in EX 1 is not freestanding and it is necessary for the appellant to meet all the requirements of the appropriate rules to be granted leave as a partner.

[15] ... Moving to the broader Article 8 test and applying the Razgar tests, it is accepted that the parties are married and have a child in the UK, there is no dispute that the parties have a family life in the UK and that the appellant's removal would be an interference with the family life. I accept that the removal would be for the legitimate aim of immigration control and in accordance with the law, being the application of the Immigration Rules, especially in view of my finding that the appellant had come [to the country] for the purpose of marriage and had not made the appropriate application [from Algeria]. On the question of proportionality, I have accepted that there would be insurmountable obstacles to the parties continuing married life in Algeria, when considering Appendix FM.

I accept that the parties could not resume married life elsewhere and also accept the submission that expecting the appellant to return to make the proper application would result in prolonged separation as the sponsor would be unable to meet the financial requirements of Appendix FM. I find that removing the appellant to Algeria to apply to return would cause prolonged separation of the father and child and interference with the family life of the family unit and contrary to [the case of] *Chikwaba [2008] UKHL 40* which concluded that it would be rarely proportionate to expect a parent to leave the UK to apply from abroad. In addition, the parties are responsible for a child in the UK who is entitled to apply for a UK passport. Section 55 of the 2009 Act (Borders, Citizenship and Immigration Act 2009) requires that the interests of the child is a primary consideration and the case of *Zambrano* is authority that the interests of the child is to be brought up in the presence of both [parents]. I find that the interests of the child is best served by being in the presence of both parents and a long term separation would be contrary to the principle of s.55 of the 2009 Act.”

The grounds of appeal

6. The respondent in her grounds of appeal states the following which I summarise. The Tribunal has erred in law in its approach to the Article 8 assessment in the following ways. It was made clear in **Gulshan** that the Article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the Immigration Rules. In this case the Tribunal has failed to provide adequate reasons for why the appellant’s circumstances are either compelling or exceptional that they amount to exceptional circumstances outside the Immigration Rules.
7. At paragraph 15 the Tribunal’s finding, that requiring the appellant to return to Algeria to seek entry clearance would result in a prolonged separation, is not an exceptional circumstance. The Tribunal has found at paragraph 12 that the true nature of the appellant’s visit was to marry her sponsor. It is proportionate to require her to return to Algeria to seek entry clearance. The appellant’s husband is entitled to work in the UK and there is no reason why he cannot find employment to meet the financial requirements of the Rules and it would not be considered exceptional for him to do so. Any separation will be proportionate given their attempts to circumvent the Immigration Rules. The appellant and her husband can maintain contact via modern methods of communication and by visits to a third country whilst she seeks entry clearance and there is no evidence that she cannot adequately care for their child whilst she does so. If the Tribunal had taken these issues into consideration they would have found that the decision to remove is proportionate.

The hearing

8. I heard submissions from both parties as to whether there is an error of law in the determination of the first-tier Tribunal.

9. Therefore the appeal involves two steps, the first being to determine whether there is an error of law in the determination of the first-tier Tribunal and the second, if I find there was an error, to hear evidence or submissions to enable me to remake the decision.

Decision on the error of law

10. Having considered the determination as a whole, I find the Judge's consideration of the appellant's appeal in respect of Article 8 is materially flawed. The Judge correctly accepted that the appellant does not meet the requirements of the Immigration Rules. He was then entitled to consider the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights.
11. The Judge accepted that the appellant is not credible and came to this country on a visitor's visa while her true intentions were to come to the United Kingdom in order to marry her sponsor. The Judge made adverse credibility findings against the appellant. The Judge was then duty-bound to consider the existence of compelling and exceptional circumstances where the appellant should succeed pursuant to Article 8 when she could not meet the requirements of the Immigration Rules as the Immigration Rules are Article 8 compliant.
12. The Judge appears to find the fact that the appellant sponsor, who is not working in this country and who is on benefits, would not be able to support her entry clearance application from Algeria to be exceptional and/or compelling circumstances. The Judge clearly fell into material error as this in itself cannot be considered an exceptional or compelling circumstances.
13. The Judge also found that there are insurmountable obstacles to the appellant and her husband continuing family life in Algeria because the appellant is not able to travel to Algeria because even though he has been in this country for 10 years he does not have a British passport and has refugee papers due to the sponsor's criminality. The Judge materially erred when took this into account in finding that the appellant should not return to Algeria to make an entry clearance application.
14. The Judge did not take into account the respondent's interest in an effective and fair immigration control and the appellant's attempts to circumvent the requirements of the Immigration Rules and present the respondent with a fait accompli.
15. The Judge also fell into material error by stating that the appellant's child cannot go back to Algeria with her/his mother even for a short period of time because the best interests of the child are to be with both the parents. The Judge stated that as the child is entitled to apply for British citizenship, it is not in the best interests of the child to leave the country even for a short period of time with his mother in order for her to make an application for entry clearance. This is a misunderstanding of the

case law as to the best interests of the child. It would be a matter for the appellant and her sponsor to decide how best they should proceed in light of the fact that the appellant has to return to Algeria to make an application for entry clearance.

16. The Judge's understanding of the case of **Chikwamba [2008] UKHL 40** is materially flawed. The Judge stated "I find that removing the appellant to Algeria to apply to return would cause prolonged separation of the father and child in an interference with the family life of the family unit and contrary to Chikwamba which concluded that it would be **rarely proportionate to expect the parent to leave the UK to apply from abroad.**" (*emphasis mine*)
17. I do not understand the case of **Chikwamba** exempts the appellant from satisfying the requirements to obtain an entry clearance from her home country. I do not understand **Chikwamba** to say that an appellant can circumvent the requirements of the Immigration Rules and therefore should not be required to return to her home country to make an application in the appropriate category. **Chikwamba** states that only in exceptional cases and cases which normally involve children that it would not be proportionate and more appropriate for the appellant to apply for leave from abroad.
18. In paragraph 41 of the speech of Lord Brown (in **Chikwamba**) he asked whether the real rationale for the policy was:

"... perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?"
19. The Judge failed to take into account that **Chikwamba** was fact and timeline specific. The appellant in that case was a Zimbabwean national and the Secretary of State was not removing anyone to Zimbabwe at the time.
20. Having considered the determination as a whole I conclude that the Judge erred in law in his evaluation of the appellant's appeal pursuant to Article 8 and I therefore set aside the decision in respect of Article 8.
21. The appellant's representative stated that if I was to find an error of law, the appeal should be sent back to the First-tier Tribunal to be reheard and findings of fact to be made in respect of Article 8.

DECISION

For the reasons given above, the determination of the First-tier Tribunal is set aside. I direct that the appeal be placed before a First-tier Judge other than Judge S Taylor to be heard on the first available date.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

The 30th day of July 2015