



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

Appeal Number: IA/28066/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22 April 2015**

**Decision & Reasons Promulgated
On 30 April 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SANDY ALMANZA SAJUL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Narh, Legal Representative from Imperial Visas
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for, and do not make, an order restricting reporting about this appeal.
2. The appellant is a citizen of the Philippines. He was born in May 1979 and so is now nearly 36 years old. His wife and sponsor entered the United Kingdom as a work permit holder with leave to remain until 1 May 2014. The appellant was given permission to join her as a dependant on 28 December 2011. His leave lasted until 24 February 2014.
3. The appellant made a timely application to extend that leave but the application was refused on 17 June 2014 because he had not produced a prescribed certificate of competence in the English language and although he has a child, who was born on 7 October 2013 in the United Kingdom and appears entitled to British citizenship, the appellant could not rely on his relationship with the child to create an exception under the Immigration Rules because he did not have sole responsibility for the

child. In the opinion of the respondent, the entire family could return to the Philippines and establish themselves there.

4. The respondent maintained that the decision had proper regard for her obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009 because the best interests of the child lay in staying with her parents.
5. However it is important to emphasise that the primary problem in the appellant's application was that he did not have the necessary certificate to prove his English language competence.
6. His explanation for that sets out a Kafkaesque scenario which, if made out on the evidence, might well have illuminated the claim on human rights grounds.
7. It is the appellant's case that, without the benefit of independent legal advice, he was advised by the respondent to make his application in a particular way and it was only when the application was refused that he realised that he should have supported the application with a prescribed certificate. When the matter was drawn to his attention he tried to pass an examination to be awarded a certificate. However, none of the colleges would accept his application to sit an examination without his passport as proof of identity. As his leave had lapsed on 14 February 2015 the Home Office would not release the passport used to support the application. It is not Home Office policy to return the passport of a person known to be in the United Kingdom without leave. The Home Office provided a certified copy but none of the colleges he approached would accept it as acceptable evidence of his identity.
8. The result is that the appellant could not provide evidence of his competence in the English language of the prescribed kind.
9. He did, however, produce evidence that he had taken some language courses organised by ESOL.
10. I find it a very significant feature of this case that the appellant did not offer any evidence of his command of English.
11. Mr Parkinson for the respondent could not be expected to comment on advice that may have been given to the appellant by an unidentified Home Office official about what application he should make. Mr Parkinson said that much depended on what the appellant actually said that he wanted. The appellant did not need a language certificate to extend his leave. It only became necessary to prove his linguistic competence if he intended to settle. Mr Parkinson could see how the appellant could have gained the impression that he did not need a language certificate without anyone giving incompetent, still less mischievous, advice.
12. I can also accept that a college would have been reluctant to accept anything other than a proper national passport as proof of identity for the purposes of an examination although I remain uncertain what the refusal to accept a Home Office certified copy tells us about the colleges' attitude to the Secretary of State.

13. It is, I find, a very significant gap in the evidence in this appeal that the appellant has not sought to prove his competence by another means. I note from the First-tier Tribunal Judge's Record of Proceedings that when the appellant gave evidence at the hearing at Hatton Cross on 21 October 2004 the appellant used an interpreter who spoke the Tagalog and English languages. I do not draw any adverse conclusion from his use of an interpreter. Many people with a good command of conversational English would want an interpreter in circumstances where the precise use of language might be material. However, his use of an interpreter does nothing whatsoever to persuade me that he has achieved any particular standard in his use of English.
14. I make it plain that the evidence before me does not support the conclusion that the appellant would have passed the language test if he had been allowed to sit it and the Kafkaesque circumstances indicated above have not been made out.
15. The First-tier Tribunal agreed with the Secretary of State. The appellant had not made out his case. He did not satisfy the requirements of the Rules and had not made out an exception under the Rules or at all.
16. The appellant was given permission to appeal because it was thought arguable that the absence of insurmountable obstacles to returning had not been established properly, insufficient weight had been given to the appellant's relationship with a British citizen child and **Chikwamba (FC) v SSHD [2008] UKHL 40** was not applied properly with regard to applying from overseas and that the principle in **Zambrano (C-34/09)** was ignored. It was also said that there was a failure to show why there were not insurmountable obstacles and Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 had not been considered properly.
17. I have been considerably assisted by the reported decision of Upper Tribunal Judge Gill in **R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)**. For the reasons given there I find that the First-tier Tribunal did not err by ignoring or misapplying the decision in **Chikwamba**. The appellant did not make out a case to show that he did, or at least was likely to, satisfy the requirements of the Rules and, as **Chen** explains, that is a precondition for appellants seeking to rely on **Chikwamba**.
18. Further the appellant did not make out in any but the most sketchy way his reasons for not returning to the Philippines to make an application. His wife is in regular work, so different childcare arrangements would have to be made if the appellant did leave the United Kingdom but I am not persuaded that that is a particularly compelling aspect of the case. The decision in **Chikwamba** does not operate to override the ordinary requirements of the Immigration Rules but to sound a note of caution when the person to be removed would satisfy the Rules and return promptly. I do not know if this is such a case.
19. Ms Narh relied on her grounds and I consider them more carefully below. The first point taken in the grounds is that the appellant is married to a person present and settled in the United Kingdom and he has a genuine

and subsisting relationship with his child. She suggested that it follows from this that it would be unreasonable for the appellant to continue his family life in the Philippines and it is not reasonable to separate a family involving a British child.

20. It may be that Section 117B(6) will attract guidance from the higher courts. It says in its material parts:

“In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

21. Read literally this could mean that there is no public interest in removing a parent when it would not be reasonable to expect the child to leave the United Kingdom. Given that a child who is a British citizen has a right to live in the United Kingdom it is hard to make a case that it is ever “reasonable” to expect such a child to leave (see, for example, **Sanade and others (British children - Zambrano - Dereci) [2012] Imm AR 597**).
22. This argument, although seductive, is fallacious. It is in the public interest to remove someone to maintain effective immigration control and the fact that that person cannot speak English (as may be the case here) is a further illustration of how the public interest is served by refusing an application from such a person. This is unremarkable and has statutory force. I do not read Section 117B(6) as meaning that there is *no* public interest in removing a person such as the appellant. Rather the public interest is diminished to so that it is not *required* in the way that it is required, for example, in deportation cases. In other words, there is a lower hurdle for the appellant to leap. The fact is that the child would be cared for properly in the United Kingdom by its mother. Of course it is right to think carefully before making a decision that either breaks a family or requires the parent and child to uproot, particularly when that child is a UK national. However, there is no suggestion in this case that the appellant will never be able to satisfy the requirements of the Rules. Possibly because he was not properly advised (this has not been proved) his application was refused. There is no reason to think that he cannot organise his affairs to be able to make a successful application in the reasonably near future and that he can keep in good contact in the meantime. The child was born in October 2013. She is not yet two years old. I have no doubt that the appellant’s wife would greatly appreciate his support and the child will probably sense some change in her domestic arrangements but there is no evidence that the appellant’s absence would be harmful rather than merely less than ideal.
23. I see nothing to support and argument that the First-tier Tribunal has somehow misdirected himself or reached a conclusion not open to him it in the way suggested in the grounds.
24. The grounds then go on to assert there is no “sensible reason for expecting the claimant to return to the Philippines” to seek entry

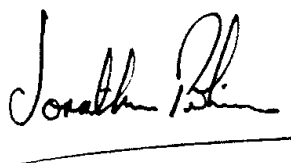
clearance but, as explained above, he has not shown he satisfies the Rules and that is a very good reason indeed for insisting that he removes and make a proper application to prove that he can.

25. The grounds also complain that the Tribunal has wrongly applied an insurmountable obstacles test but I cannot see that that is made out. Rather the Tribunal has applied the Rules and then, correctly, looked for “any exceptional or compelling circumstances which are not sufficiently recognised under the Rules” but found none.
26. The grounds also allege perversity but this is not made out. The fact that small children are generally best off with both parents might be a reason for the appellant’s wife and child to accompany him to the Philippines. It is not a reason in the context for the rest of the case to say the appellant is entitled to remain in the United Kingdom. He has not shown he satisfied the Rules.
27. There is absolutely no evidence that the appellant’s inappropriate application was the result of malicious advice from the Secretary of State and this was not suggested. I find Mr Parkinson’s explanation of how there could have been an honest misunderstanding is likely to be right although the explanation is based on speculation rather than hard evidence. However, in the absence of evidence that the appellant would have satisfied the Rules if he had appreciated that he had to give a certificate of competence in the English language, the point goes nowhere.
28. It follows that I see no material error made out on the part of the First-tier Tribunal Judge and I dismiss the appeal.
29. I do add this rider. If the appellant had been able to show that he would have satisfied the Rules had he not misunderstood the advice given by the Secretary of State and that, but for that error, he would have met the requirements of the Rules to remain I may well have found the Article 8 balancing exercise richly illuminated to the appellant advantage. That is not the case on the evidence before me but if he is able to produce evidence to the Secretary of State of his ability to satisfy the language requirements of the Rules before he is made to leave the United Kingdom it may be that the Secretary of State will need to look at it again.
30. For the avoidance of doubt I dismiss the appeal before me.

Notice of Decision

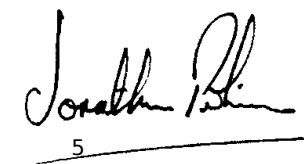
The appeal is dismissed

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Jonathan Perkins

Dated 30 April 2015



Jonathan Perkins

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