



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

Appeal Number: IA/37735/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2014**

**Determination
Promulgated
On 12 January 2015**

Before

**THE HONOURABLE MRS JUSTICE CARR DBE
DEPUTY UPPER TRIBUNAL JUDGE FROM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**CECILIA MERCEDES CHUICA RAMOS
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Ms L Targett-Parker, Counsel

DECISION AND REASONS

1. The respondent to this appeal, Ms Chuica Ramos, is a citizen of Peru born on 8 September 1979. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Scobbie, who allowed Ms Chuica Ramos's appeal against the decision, dated 29 August 2013, to refuse to vary her leave on article 8 grounds and to remove her under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. We shall therefore refer to Ms Chuica Ramos from now on as “the appellant” and the Secretary of State as “the respondent”.
3. We were not asked and saw no reason to make an anonymity direction.
4. The appellant is the partner of Mr Luis Alfredo Palacios Ocles, a British citizen. They have a child, Avril Dakotha Palacios Chuica, born on 6 March 2013. The appellant first came to the UK in October 2011 as a student. She returned to Peru before her visa ended. She came back to the UK on 12 October 2012 with leave as a student until 13 August 2013. On 9 August 2013 she made an application for further leave on form FLR(O). The respondent gave reasons for refusal in a letter dated 29 August 2013. In short, the appellant could not meet the requirements of Appendix FM of the rules or paragraph 276ADE(1) of the rules. There were no exceptional circumstances which might warrant consideration of a grant of leave.
5. Judge Scobbie allowed the appeal after a hearing on 19 August 2014. The appeal appears to have been pursued outside the rules. The judge found the appellant and Mr Palacios Ocle were in a genuine and subsisting relationship. He found that, if the appellant left the UK, she would take the child, who was a British citizen, with her, thereby breaking up the family, at least in the short term. He also found it was not appropriate to expect Mr Palacios Ocle to accompany the appellant to Peru because he is British and he has a good job here. He found the appellant was likely to be granted entry clearance if she returned to Peru and found, applying *Chikwamba v SSHD* [2008] UKHL 40, that it would not be reasonable to send the appellant home for this purpose. Removal would therefore be disproportionate.
6. The grounds seeking permission to appeal argued that the judge had misdirected himself in law because he did not identify compelling circumstances not recognised by the rules. The judge had failed to provide adequate reasons. He had not considered why the appellant's partner could not care for the child while the appellant returned to apply for entry clearance. It was open for the appellant's partner to relocate to Peru. This was a matter of choice for the appellant.
7. Permission to appeal was granted by Judge P M J Hollingworth on all grounds.
8. The appellant has not filed a response opposing the appeal.
9. We heard submissions as to whether the judge had made a material error of law in his decision. Ms Isherwood relied on the written grounds seeking permission to appeal, particularly paragraphs 4 and 5. She argued that the couple had options as to where they exercised their right to enjoy family life. She pointed to the judge’s finding in paragraph 20 of

his decision that the appellant would take the child with her. She argued that the judge gave insufficient reasons for that finding. She argued the judge erred by applying *Chikwamba* (supra) and also that the judge failed to give sufficient weight to the public interest as defined by section 117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

10. In reply Ms Targett-Parker relied on her skeleton argument. She argued that the judge had identified compelling circumstances justifying his decision to allow the appeal on article 8 grounds. He had not misdirected himself with regard to his approach to article 8 outside the rules. The facts found by the judge amounted to compelling circumstances entitling him to allow the appeal outside the rules. In making his proportionality assessment the judge had proper regard to section 117B. Ms Isherwood made no reply.
11. We reserved our decision as to whether the judge made a material error of law. Having done so, we find no material error of law and the judge’s decision, allowing the appellant’s appeal on article 8 grounds, shall stand. Our reasons for this conclusion are as follows.
12. The first disputed matter is whether the judge erred in his approach to article 8 outside the rules. The grounds argue the judge failed to apply the approach set out in *R (Nagre) v SSHD* [2013] EWHC 720 (Admin) and *Gulshan (Article 8 - new Rules - correct approach)* [2013] UKUT 00640 (IAC). Ms Targett-Parker argued the correct approach had been applied. In *R (Oludoyi & Ors) v SSHD (Article 8 - MM (Lebanon) and Nagre)* IJR [2014] UKUT 00539 (IAC), the Tribunal explained there is no ‘threshold test’:

“20. There is nothing in *Nagre*, *Gulshan* or *Shahzad* that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the IRs and which could lead to a successful Article 8 claim. If, for example, there is some feature which has not been adequately considered under the IRs but which cannot on any view lead to the Article 8 claim succeeding (when the individual’s circumstances are considered cumulatively), there is no need to go any further. This does not mean that a threshold or intermediate test is being applied. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance given must be read in context and not construed as if the judgments are pieces of legislation.”

13. In paragraph 8 of his decision the judge set out the respondent’s reasons for refusal, that the rules in Appendix FM were not met because the appellant had not resided for two years prior to the date of application with Mr Palacios Ocle so as to fall for consideration under the partner route. She could not succeed under the parent route either because she did not have sole responsibility for the child. He moved on to consider article 8 outside the rules. He did not direct himself at all in terms of the *Gulshan* exercise. He certainly did not set a threshold test.

The remaining paragraphs of the decision (13 to 24) give reasons why the appeal should be allowed outside the rules. In doing so the judge said he found good grounds for considering family life outside the rules (paragraph 21). He does not refer to the need to find compelling circumstances but, in the light of *Oludoyi*, he should not have fettered his assessment of article 8 in any event. We find that the judge approached his task correctly in that he looked at the evidence as a whole to decide whether there were matters which were not covered by the application of the rules.

14. As seen, Ms Isherwood took issue with the judge's assessment in this respect. Before considering her challenge, we shall identify the key findings made by the judge. He began by confirming he found the appellant and her partner to be open and credible witnesses and that they were in a genuine and subsisting relationship (paragraph 14).
15. The judge then referred to the principle established in the CJEU decision in *Ruiz Zambrano* (C-34/09). That case decided that an EU citizen must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For a minor, that freedom may be jeopardised if, although legally entitled to reside in the EU, she is compelled to leave EU territory because an ascendant relative upon whom she is dependent is compelled to leave. The judge in this case correctly directed himself that the test resolved itself to the critical question of whether the appellant's British daughter, aged 18 months, was dependent on the appellant for the exercise of her rights (see paragraph 15). As seen, he decided towards the end of his decision that the appellant would take her daughter with her. He found that her partner would not have time to look after the child on his own because he would have to give up a good job (see paragraph 20). In the first sentence of paragraph 24 of his decision the judge referred to the idea of the appellant taking her British daughter with her as "not something which the courts favour."
16. Although the judge's reasoning is short, it is not inadequate so as to render the decision vitiated by legal error. We note he referred to the case of *Sanade and others (British children - Zambrano - Dereci)* [2012] UKUT 48 (IAC), in which the Presidential panel considered the effect of the *Zambrano* principle in the context of an article 8 claim in deportation proceedings. The appellant in this case was not seeking to show she had a derivative right of residence for the purposes of Community law. However, the application of *Zambrano* would plainly be highly influential in the assessment of proportionality in the context of an article 8 claim. We are satisfied from our reading of paragraph 15 of the decision that the judge had the essential elements of the *Zambrano* test in mind.
17. We also note that the judge referred to *ZH (Tanzania) v SSHD* [2011] UKSC 4, in which it was held that the fact a child is British is a strong pointer towards her future lying in the UK.

18. Ms Isherwood sought to attack the judge's assessment of the facts and suggested the facts found did not justify his conclusion. It is true to say the decision is short and lacks the detailed assessment which would generally be expected. However, we are persuaded that the judge's reasoning is adequate. He heard oral evidence and found the appellant and Mr Palacios Ocle credible. The judge may have taken a generous view when he found that the consequence of the appellant's removal would be that the child was compelled to leave the UK as well because the alternative would mean Mr Palacios Ocle giving up a good job. However, it was a finding which was open to him to make on the evidence before him. The judge accepted that the cousins identified by the presenting officer would not be able to help out with child care because the appellant's evidence on this was not challenged.
19. The judge also considered, albeit briefly, the possibility of the appellant returning with entry clearance so that the interference with family life would only be temporary. He stated his reasons in the second sentence in paragraph 24 of his decision that an application was likely to be successful in view of Mr Palacios Ocle's level of earnings (see paragraph 18). He also noted that it was likely the appellant would qualify as a partner due to the length of time she had cohabited with him. In effect, applying *Chikwamba*(supra), he found that there was little public interest in insisting the appellant return to Peru to apply for entry clearance due to the disruption to family life which this would engender. He noted she could not reasonably be expected to take her husband (sic) with her. Again the judge took a generous view but it was one which was open to him. In *Chikwamba* (supra) Lord Brown of Eaton-under-Heywood said that "*the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant.*" The judge was entitled to find there was no sensible reason for requiring the appellant to leave just for the sake of deterrence.
20. We note that the judge appears to have had the public interest factors set out in section 117B of the 2002 Act in his mind, as shown by paragraph 23 of his decision. We see no error in his approach. In light of his findings, an application of subsection (6) would appear to support the conclusion reached by the judge.
21. The judge's decision does not disclose any material error of law and shall stand.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error on a point of law and his decision allowing the appeal on article 8 principles shall stand.

No anonymity direction has been made.

**Signed
2014**

Date 18 December

**Judge Froom, sitting as a Deputy Judge of
the Upper Tribunal**