



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41822/2014
IA/41826/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 June 2015

Decision & Reasons Promulgated
On 23 June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MISS SHRIKA EMMPALLY (A MINOR)
(2) MR SREEDHAR EMMPALLY
(ANONYMITY DIRECTION NOT MADE)

Respondents/Claimants

Representation:

For the Secretary of State: Ms Alice Holmes, Specialist Appeals Team
For the Respondents/Claimants: Mr V Makol, solicitor, Maalik & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Pears sitting at Richmond Magistrates' Court on 23 February 2015) allowing the claimants' appeal under the Rules, and in the alternative under

Article 8 ECHR, against the decision by the Secretary of State to refuse to grant them leave to remain as the dependants of a Tier 4 Student Migrant. The student in question is the mother of the first claimant, and the wife of the second claimant. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants require to be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission

2. On 21 April 2015 First-tier Tribunal Judge Juliet Grant-Hutchison granted the Secretary of State permission to appeal for the following reasons:

It is arguable that the judge has misdirected himself in law by failing to properly apply the correct Immigration Rule because he was unable to find paragraph 319C(i) which was referred to in the refusal and substituted 319C(b)(i) instead. As such the assessment under Article 8 of ECHR is arguably flawed.

The Background

3. The claimants are all nationals of India. The first claimant was born in India on 23 June 2008, and was thus aged six at the date of application. The first claimant is the daughter of Mrs Kalyani Emmpally.
4. Both claimants first entered the UK on 1 November 2010 with valid entry clearance as Tier 4 Student Migrant dependants from 7 October 2010 until 30 March 2012. They were granted further leave to remain as Tier 1 dependants until 7 August 2014. On 7 August 2014 Mrs Emmpally applied for leave to remain as a student, and the claimants applied at the same time for leave to remain as her dependants. The Secretary of State granted Mrs Emmpally's application on 6 October 2014, but refused the applications of the claimants two days later on 8 October 2014.
5. In the letter addressed to the second claimant, Mr Emmpally, the Secretary of State explained that his wife, Mrs Emmpally, was not a government-sponsored student. She was studying CIMA, which was a QCF/NQF level 7 course from 29 July 2014 until 25 May 2017 at Saint Patrick's International College. This was not a higher education institute. So the Secretary of State was not satisfied he met the requirements of the Rules to be granted leave to remain as a dependant partner of a points-based system migrant. It had therefore been decided to refuse his application under paragraph 319C(i) of the Rules.
6. An identical letter was sent to the first claimant, incorrectly describing her relationship to Mrs Emmpally as that of a partner, rather than Mrs Emmpally being her mother. Both claimants were given a right of appeal as the Secretary of State made a concomitant decision to remove them from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

The Findings of Judge Pears

7. In his decision, the judge made inter alia the following findings:
 18. The [SSHD] has not shown the decisions made were in accordance with the law and the reasons stated are impossible to understand and in relation to the first [claimant] there are issues with the decision that are set out in paragraph 4 above. Further, in any event, the [SSHD] has failed to mention or consider that Mrs Emmally was allowed to switch categories and was granted leave until 2017. I therefore conclude the decisions were therefore not 'otherwise in accordance with the law' and I would allow the appeals and that the cases, for those reasons, to be remitted for the [SSHD] to consider them appropriately.
 19. However the [SSHD] served a One-Stop Notice on each of the [claimants] and the [claimants] have raised Article 8.
 20. I find the [claimants] have met the Immigration Rules as I can see no reason in law why they do not; Mrs Emmally was permitted to change categories, the [claimants] in the past have changed categories and the [SSHD] has not referred to any Immigration Rule, factor or evidence which prevents their applications being granted. I therefore allow their appeals.
 21. Further or alternatively the [claimants] have raised a more than arguable basis for the exercise of discretion outside the Rules in relation to their Article 8 rights on the basis of page 5FF of the skeleton argument. The [SSHD] wholly failed to take into account relevant factors such as the impact of the decisions on the family unit and the impact on the first [claimant], given the grant of leave to Mrs Emmally. I find therefore I should consider this matter outside the Rules as an evaluation for the first time is necessary ...
 27. It seems to me that, in the circumstances of this case and particularly as Mrs Emmally has leave but only until 2017, the decisions to refuse to vary leave and require them to leave the UK would be wholly disproportionate.

Reasons for Finding an Error of Law

8. Paragraph 319C sets out the requirements for entry clearance or leave to remain as the partner of a relevant points-based system migrant. To qualify for entry clearance or leave to remain as the partner of a relevant points-based system migrant, an applicant must meet the requirements listed in paragraph 319C. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
9. The requirements at the beginning of paragraph 319C include the following:
 - (b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who:
 - (i) has valid leave to enter or remain as a relevant points-based system migrant; or

- (ii) is, at the same time, being granted entry clearance or leave to remain as a relevant points-based system migrant.
10. In order to ascertain whether Mrs Emmally is a relevant points-based system migrant, it is necessary to consider 319C(i) which contains restrictions and conditions on a Tier 4 (General) Student being treated as a relevant points-based system migrant. In order for the student to be a relevant points-based system migrant, he or she must meet one of the conditions set out in sub-paragraphs (i) to (iv).
 11. Condition (i) is that the relevant points-based system migrant must be a government-sponsored student. Condition (ii) is that the relevant points-based system migrant must, among other things, be sponsored by a sponsor who is a recognised body or a body in receipt of funding as a higher education institution from, in the case of Mrs Emmally, the Higher Education Funding Council for England.
 12. Condition (iii) is that the relevant points-based system migrant must be applying for or have been granted leave to remain, as a Tier 4 (General) Student on the doctorate extension scheme.
 13. Condition (iv) is that the following conditions must be met:
 - (1) The relevant points-based system migrant must be applying for entry clearance, leave to enter, or leave to remain, to undertake a course of study that is longer than six months and either:
 - (a) have entry clearance, leave to enter, or leave to remain as a Tier 4 (General) Student Migrant or as a student to undertake a course of study longer than six months; or
 - (b) have last had entry clearance, leave to enter, or leave to remain within the three months preceding the application as a Tier 4 (General) Student or as a student to undertake a course of study longer than six months; and
 - (2) the partner must either:
 - (a) have entry clearance, leave to enter, or leave to remain as the partner of a Tier 4 (General) Student or a student with entry clearance, leave to enter, or leave to remain, to undertake a course of study longer than six months; or
 - (b) have last had entry clearance, leave to enter, or leave to remain within the three months preceding the application as the partner of a Tier 4 (General) Student or as a student to undertake a course of study longer than six months; and
 - (3) the relevant points-based system migrant and the partner must be applying at the same time.
 14. Mr Makol accepted that the effect of paragraph 319C(i)(iv) was to prevent a dependent partner, such as the second claimant, from switching from the status of a Tier 1 dependant to a Tier 4 dependant unless one of the conditions contained in subparagraphs (i) to (iii) were met.

15. Mrs Emmpally was not applying for leave to remain on a doctorate extension scheme, so the only conditions which were potentially in play were whether she was a government-sponsored student or whether she was sponsored by a sponsor who was a recognised body or a body in receipt of funding as a higher education institution. Mrs Emmpally did not satisfy either of these two conditions, as rightly asserted in the refusal decision. Accordingly, the decisions appealed against were in accordance with the Rules, and the judge erred in law in finding to the contrary.
16. There are also clear flaws in the judge's reasoning under Article 8 ECHR. Firstly, he did not follow the required two-stage approach, beginning with an analysis of whether the claimants had a viable private or family life claim under Appendix FM or Rule 276ADE. Secondly, while the claimants had an arguable Article 8 claim outside the Rules applying **Zhang [2013] EWHC 891 (Admin)**, to which the judge refers in paragraph [11] of his decision, the judge's proportionality assessment was fatally flawed by his incorrect starting point, which was there was nothing in the Rules to prevent the claimants from switching their status from being Tier 1 dependants to Tier 4 dependants.

The Remaking of the Decision

17. It is not necessary to either remit this appeal for further fact-finding evidence or to adjourn to enable me to hear further evidence. There is no challenge to the record of the evidence set out by the judge in his decision, and I am able to remake the decision on the basis of the evidence that was before the First-tier Tribunal.
18. For the purposes of remaking the decision, Mr Makol invited me to follow an unreported and unappealed decision by First-tier Tribunal Judge Hanley.

Discussion and Findings

19. The claimants do not qualify for leave to remain under the Rules, and it is not suggested that they have a viable family life claim under Appendix FM or a viable private life claim under Rule 276ADE.
20. Turning to an Article 8 claim outside the Rules, I refer to the five-point **Razgar** test. As the threshold for the engagement of private life rights is relatively low, I accept that questions 1 and 2 of the **Razgar** test should be answered in favour of both claimants with regard to the establishment of private life in the United Kingdom, as they have resided here lawfully since 2010. I am not persuaded that there is a prospective interference with family life, as it is open to Mrs Emmpally to return to India with her husband and child. She had no legitimate expectation of being able to continue to enjoy family life in the United Kingdom with her husband and child while at the same time embarking upon a further course of study that did not meet the conditions set out in paragraph 319C(i) of the Rules.
21. Questions 3 and 4 of the **Razgar** test must be answered in favour of the Secretary of State, and so the crucial question is whether the proposed interference is proportionate. In considering this question, I bear in mind the factors set out in Section 117B of the 2002 Act. As held by the Upper Tribunal in **AM (S117B) Malawi**

[2015] UKUT 260 (IAC) the statutory duty to consider the matters set out in S117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant. An appellant can obtain no positive right to a grant of leave to remain from either Section 117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

22. The main argument advanced on behalf of the claimants is that their predicament is similar to that of the successful claimant in Zhang.
23. In Zhang, the claimant had been living in the UK lawfully on a continuous basis since September 2003. In July 2011 she was offered a new post at a university. But the university made it a condition of her taking up her employment that she must have leave to be in the UK on a visa which was not dependent upon a certificate of sponsorship. The solution which she hit upon to resolve her visa problem was to seek to re-categorize her status. If her husband was successful in his outstanding application, she would fall into the category of a partner of a relevant points-based system migrant. The claimant consulted solicitors who advised her that she could, indeed, go down this route but in order to do so she would have to return to China and make her application from there.
24. By a letter dated 2 September, the Secretary of State, having learnt the claimant had lost her previous job, told her that the expiry of her leave to remain under her general visa had been brought forward to 1 November 2011. She concluded that she had no option but to go back to China and stay there for as long as it took to surmount the bureaucratic hurdles which awaited her before she could expect to be granted leave to re-enter the UK as a partner. The prospect of being separated from her husband caused the claimant to suffer a level of stress and anxiety which led to a visit to her GP on 13 September 2011. He diagnosed mild depression and prescribed antidepressants. On 15 September 2011, the claimant returned to China in the expectation that as soon as she started the process, the sooner she would be able to legally return to the UK. In due course, her husband was informed that he had been issued with a post-study work visa and her solicitors were equipped to make the necessary application on her behalf for her entry clearance under the partner category. Entry clearance was granted on 25 October 2011 and communicated to the claimant on 12 November 2011. Regrettably by that time the university had lost patience and withdrawn the job offer.
25. The claimant sought to challenge, by way of judicial review, "the legality of that Immigration Rule the implementation of which her solicitors had advised her was the basis upon which she could not make an application for a "partner" visa unless she returned to China so to do": see paragraph [12] of Zhang.
26. The Rule under examination in Zhang was paragraph 319C(h)(i) which at the time provided that an applicant who is applying for leave to remain, must have, or have last been granted leave:

(i) as the partner of a relevant points-based system migrant.

27. As from 1 October 2013 a less restrictive version of sub-paragraph (h) has been introduced, which would not have prevented the claimant in **Zhang** from making an in-country application to remain on a partner visa.
28. In paragraph [78] of **Zhang**, Turner J found that the application of the blanket requirement to leave the country imposed by paragraph 319C(h)(i) of the Immigration Rules was unsustainable. It was simply not consistent with the ratio of the decision in **Chikwamba** that this paragraph, as presently worded, should continue to form part of the Rules. He was not prepared to make a formal declaration on the matter. It was not the function of the court to redraft the Rules, but he predicted the Secretary of State would in future face difficulties in enforcing requirement (h)(i) as presently worded in all but a small number of cases in which Article 8 was engaged.
29. On the particular facts of the case before him, he found that the Rule could not be lawfully applied to the claimant. His reasoning was that she was in a loving marriage and had no real option but to endure separation from her new husband for about two months. She had an impeccable immigration record and both she and her husband were very likely to continue to make a valuable contribution to the economic wellbeing of the UK. The claimant was the sort of applicant in respect of which immigration should be encouraged rather than deterred:

Those who show the sort of promise to make a valuable contribution to the UK could only be discouraged from coming here in the first place if it were the case that if they were to marry a foreign national here then, as a matter of routine, that spouse would be required to return to his/her country of origin as a precondition of 'switching' to a 'partner' visa.

30. **Zhang** was not appealed to the Court of Appeal, and the Secretary of State appears to have responded to the criticisms of the Rule under discussion in **Zhang** by relaxing it considerably. The restriction is now limited to applicants who have last been granted entry clearance as a visitor (apart from one minor exception), or who have been granted temporary admission or temporary release. So the mischief identified by Turner J has been addressed.
31. **Zhang** was decided in April 2013, and the legal landscape then was significantly different from what it is now. Any proportionality assessment now has to take into account Section 117B of the 2002 Act as amended by the Immigration Act 2014, and the Court of Appeal in **PG (USA) [2015] EWCA Civ 118** held as follows at paragraph [28]:

In the instant case, the Immigration Rules do not provide a 'complete code' and although 'the proportionality test (was) more at large' (**MM (Lebanon) and others v SSHD**), the Rules nonetheless help illuminate the regulatory and policy context which the judge needed to take into account, along with a range of other factors. The First Tier Tribunal judge did not analyse what, in this sense, is said to be the legitimate end the respondent was seeking to achieve. The expression by the judge at [39] of his Decision that the interference may not have been justified at all appears to indicate that he did not take account of the respondent's policy to restrict the category of relatives of migrant workers who are able to join the person who is temporarily living in the

United Kingdom and to limit the circumstances in which someone in the appellant's position can qualify as a dependent. I stress that the existence of this policy was not in any sense necessarily determinative, but it should have formed part of the judge's reasoning on the issue of proportionality.

32. As Mr Makol accepts, this is not a Chikwamba-type case. The effect of the Rule under scrutiny in this appeal is not to put the claimants to the inconvenience of having to go back to their home country in order to make an entry clearance application which is bound to succeed. Its effect is actually more far-reaching than the version of Rule 319C(h) which was under scrutiny in Zhang. 319C(i) applies as much to applications for entry clearance as it does to applications for leave to remain. The claimants are simply not eligible for leave to enter or leave to remain as dependants of Mrs Emmally, and so the choice faced by the family is a completely different one from that faced by the claimant in Zhang. This family face the stark choice of returning to India to continue their family life together there, or Mrs Emmally can choose to remain in the United Kingdom on her own to continue with the course of study for which she has been granted leave to remain.
33. In view of the fact that the Rules are laid before Parliament, and taking into account the guidance of the Upper Tribunal in Shahzad, I do not consider that the Secretary of State has to justify the purpose which underlies Rule 319C(i), which is to restrict severely the ability of PBS migrants to switch from other PBS categories to a student category, while at the same time being able to keep in the country, or bring into the country, their dependants. Immigration control is a desirable end in itself, as is now recognised in Section 117B(1).
34. It will be very disappointing for Mrs Emmally not to be able to carry on following a course which she commenced on 29 July 2014, and where she has paid some and maybe all of the course fees of £6,150, as found by Judge Pears at paragraph [8] of his decision. But, as stated earlier, she did not have a legitimate expectation of being able to both follow this course and at the same time to continue to enjoy family life with her husband and daughter in the United Kingdom. The judge appears to have accepted the evidence of the second claimant that he was shocked to get the refusal, given the family's past history. But the Rules are clear, and the relevant requirements have been in place for some time. So the blame for the surprise of the second claimant and his wife cannot be laid at the door of the Secretary of State.
35. The first claimant is not a qualifying child for the purposes of Section 117B(6) as she has not lived in the United Kingdom for seven years and she is not a British national. Although she attends school here, it is not thereby contrary to her best interests for her to return with her parents to the country of her nationality. It would be contrary to her best interests if her mother chose to remain here until 2017, but that is not something which her mother is compelled to do.
36. In conclusion, I find that the interference consequential upon the refusal of leave to remain to the claimants, and the concomitant decision to remove them under Section 47 of the 2006 Act, is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Conclusion

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: these appeals against the refusal of leave to remain, and against removal, are dismissed under the Rules and under Article 8 ECHR.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson