



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

Appeal Number: OA/09580/2014

THE IMMIGRATION ACTS

Heard at: Birmingham

**Decision and
Promulgated
On 14 March 2016**

Reasons

On 24 February 2016

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

**MR JEROME BINUYA PASTORIN
(NO ANONYMITY DIRECTIONS MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Selwood of Counsel
For the Respondent: Mr Mills, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellants' appeal to the First-tier Tribunal was against the decision of the respondent dated 5 August 2014 to refuse his application for entry clearance as a partner under Appendix FM of the Immigration Rules.
2. First-tier Tribunal Judge Chapman dismissed the appellant's appeal in a determination promulgated on 19 March 2015. Permission to appeal was initially refused by First-tier Tribunal Judge Heynes on 15 June 2015 and subsequently granted by Upper Tribunal Judge Coker on

21 August 2015 in respect of ground 2 which was that in the Judges article 8 assessment, there was a failure to determine whether it was in the interest of the two stepchildren's that the appellant reside with them in the United Kingdom, failure to conclude that the refusal to grant entry clearance amounted to permanent separation of the appellant from his family, the approach to public interest, the approach to section 117B in giving sufficient weight to the requirement to the legitimate aim, section 117B does not represent an override of Article 8 case law, no consideration given to section 117B (2) or (6). Permission was granted on this ground alone.

3. Thus the appeal came before me.

Error of Law

4. The First-tier Tribunal dismissed the appellant's appeal, concluding that:

"[21] there were no issue of credibility in this appeal. I found the sponsor to be honest and truthful witness.

[22] "I was also assisted by the acknowledgement by Mr Selwood that the appellant did not meet the financial requirements of Appendix FM and that the appeal could not succeed under the Rules. On the evidence before me, this was an entirely proper concession to make, and I would have found that appendix FM was not satisfied had that been an issue in these proceedings."

[27] "in respect of article 8: in doing so, I remind myself that this is now well established jurisprudence that I must take into account the impact of the decision on anyone affected by it. It is also well established by statute in jurisprudence that I must also consider the best interests of any child affected by the decision. Their best interest must be a primary, if not paramount, consideration in reaching my decision. In **MM Lebanon and others v SSHD [2014] EWCA Civ 985** it was said that this consideration should not be used as a trump card. I hasten to add that I do not consider that that it is the appellant's intention to use the children in this way. I find that the love, affection, and concern show for the children are genuine and real."

[28] "in considering the best interests of the children, I take into account that all three children are British nationals. They have spent the whole of their lives in the United Kingdom. They are now all being educated here.... The two eldest children have a strong relationship with their father, who they see regularly. I do not consider it would be reasonable that they, or indeed, the younger brother should relocate to the Philippines. There is no evidence of any ties up there apart from the appellant".

[29] "it is well established jurisprudence in immigration matters and elsewhere, that the best interests of children are to remain with their parents, in the absence of other factors which I have variously been described as countervailing, compelling or very strong contraindications,

they should be no movement from the starting point. These are of course general principles and can be affected by specific factors in individual's case".

[33] "I must in line with section 117B attach significant weight to the legitimate aim".

[34] "on the appellant's behalf, Mr Selwood argued that there is only one barrier to him meeting the rules, namely the financial barrier. I do not consider this to be insignificant. Financial independence has been identified as being in the public interest in the Immigration Act 2014, which introduced section 117B. Mr Selwood seeks to overcome this barrier with evidence that third parties have offered financial assistance. Third-party funding is specifically excluded by the Rules and, on the side of the proportionality exercise, is something to which I attach little weight".

[43] "in summary, on the one hand I must consider the weight to be attached to the appellant's immigration history, that he does not satisfy the financial requirements of the Immigration Rules, the legitimate aim itself, and the way it is expressed in section 1 117B. On the other hand, I must consider the weight to be attached to the best interests of the children, the importance of, and the need to promote the respect to family life, and the particular circumstances of the appellant's family life".

[44] "having carefully weighed all these factors, I am satisfied that the scales dip in favour of the respondent's legitimate aim, and that, on the evidence before me, the decision made by the respondent was proportionate."

5. Mr Selwood argued in his submissions before me said that the appellant was in the United Kingdom before he returned to the Philippines to make an application from there. His passport had been taken by the respondent, pending some investigations which is why the appellant overstayed in the United Kingdom. If he had remained in the United Kingdom, he would have qualified under EX 1 because there would have been insurmountable obstacles for him returning to the Philippines.
6. He further submitted that in respect of paragraph 117B (6) the appellant would have qualified to remain in the United Kingdom. The Judge had perverse reasoning when he said that the appellant's appeal for entry clearance must be looked at differently because the appellant is not in this country. The Judge also stated that paragraph 117B is the respondent's understanding of proportionality. He said that in the determination does not have any analysis on paragraph 117B (6). He said had the Judge considered this section, the outcome in the appeal would have been different. He referred to authorities where it was found that Judges must have regard to paragraph 117. He said that the public interest in the prevention of crime carries far more weight than the public interest in the economic well-being of the country.

7. Mr Mills in his submissions said that there is no material error of law in the determination. He said that paragraphs 117A-D are only relevant for removal decisions and it is not relevant for entry clearance decisions. The Judge did not have to consider 117B (6). The Judge found that the economic well-being of the country was a strong countervailing factor in the appeal as stated by the Court of Appeal in **MM Lebanon**.
8. Mr Selwood in reply stated the 117B factors must be determined. He referred to the case of **SS Congo [2015] EWCA Civ 387** at paragraph 39 which makes it an exception in cases involving children.
9. This appeal therefore involves two steps, the first being to determine whether there is an error of law in the determination of First-tier Tribunal Judge and the second, if I find there was an error of law, to hear evidence or submissions to enable me to remake the decision.
10. I have paid careful attention to the determination to see whether there is a material error of law. The Judge having considered the evidence concluded that the appellant's children cannot live in the Philippines as they are all British citizens. He also concluded that the children cannot leave the country because first, they are British citizens and second, their biological stepfather lives in this country. He further found that the two eldest children have a strong relationship with their biological father whom they see regularly. The Judge also found that the best interest of the appellant's own child, Rico is to be with the appellant. He said that this factor is not quite the same for the other two children because they have their own father here, who is a very much part of their life lives. He said that still however, the family unity is affected by the appellant's absence and to a lesser extent, I consider that the appellant's presence in their lives *is in their best interests* (emphasis mine).
11. The Judge also found that the children have spent all their lives in the United Kingdom and they are being educated here and their education should not be interrupted. The Judge also found that the children are now starting to develop their ties and relationship in the United Kingdom which will set their paths for the future and stated that today know nothing else. He also found that it would not be reasonable for the children's younger brother should relocate to Philippines. The Judge found that there is no evidence of any ties for the children in the Philippines apart from the appellant.
12. Having found that the appellant's children's best interests lie with living with the appellant in the United Kingdom, the Judge went on to find that the respondent's interest in the economic well-being of the country trumps that of the appellant's children's interests.

13. Paragraph 117B states that 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.
14. I find that the Judge erred in law materially after having resoundingly found that the appellant has a genuine and subsisting parental relationship with British citizen children who are qualifying children and finding it would be not reasonable to expect the children to leave the United Kingdom.
15. In **SS Congo** at paragraph 39 iv, it was stated "on the other hand, the fact that the interests of a child are an issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the State authorities would otherwise enjoy. Article 8 has to be interpreted and applied in light of the UN Convention on the Rights of the Child 1989.... However, the fact that the interests of a child are an issue does not simply provide a trump card so that a child applicant for positive action to be taken by the State in the field of Article 8 (1) must always have their application succeed..... Under article 3 (1) of the UN Convention on the Rights of the Child, the interests of the child are a primary consideration, i.e. an important matter-not *the* primary consideration. It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the State authorities in deciding what to do. The age of the child, the closeness of their relationship with other family members in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind."
16. I accept that there are insurmountable obstacles to family life been enjoyed in the Philippines because all the children concerned are British citizens. It cannot be expected of them to leave the country and the benefits of education here, to join their father in the Philippines. I take into account that two children have their biological father living in this country and therefore cannot leave. The biological children both parents are also British citizens. I give some credit to the appellant having left this country voluntarily to make an application for entry clearance from the Philippines.
17. The Judge made it clear at paragraph 27 of his determination that the children are not being used as a trump card and that hastened to add that he does not consider that it is the appellant's intention to use the children in this way. He said that he finds love, affection, and concern shown for the children are genuine and real. I find that the British citizens children's best interests, which must be my primary consideration, is to

live with their father which can only happen in this country as their insurmountable obstacles for family life to be enjoyed elsewhere.

18. I also find that it is well established jurisprudence that the best interests of children are to remain with their parents and absence of other factors which are described as “countervailing”, “compelling “or “very strong contraindications”. There are no such factors in this case which can be so described. Parenting cannot be conducted from a distance through modern means of communication.
19. I am in agreement with Mr Selwood that had the Judge considered paragraph 117B (6) and based on his findings about the appellant and his children circumstances, the outcome would have been positive for the appellant.
20. I find that the appellant has demonstrated that his exclusion from the United Kingdom will breach his right pursuant to Article 8 of the European Convention on Human Rights.
21. I set aside the decision of the first-tier Tribunal Judge, I reconsider it and allow the appellant’s appeal.

DECISION

For the reasons given above, the determination of the First-tier Tribunal is set aside.

Appeal allowed pursuant to Article 8 of the European Convention on Human Rights.

Signed by

Deputy Judge of the Upper Tribunal
Mrs S Chana

this 3rd day of March 2016