



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28817/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10 September 2018

Decision & Reasons Promulgated
On 18 September 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/Secretary of State

and

AKM

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant/Secretary of State: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Mr A Alam, Counsel, instructed by M & K
Solicitors

DECISION AND REASONS

1. For convenience, I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. There were two Appellants before the First-tier Tribunal, AKM and his wife, MY. They appealed against different decisions and their appeals were heard together and both allowed. MY appealed against the decision to revoke protection status. There is no challenge by the Secretary of State against that decision. MY is not a party to these proceedings. I have granted the Appellant anonymity given the age of his daughter.

2. The Appellant is a citizen of India whose date of birth is 10 March 1984. His wife, MY, is a citizen of Pakistan. Her date of birth is 10 January 1986. They have a child together AK. The child was born in the UK on 9 January 2013. MY made a claim for asylum on 1 June 2013. Her application was refused on 23 June 2013. Her appeal was allowed on Article 3 grounds on 7 September 2013. The judge hearing her appeal accepted that she was an unmarried mother and that the father of the child (AKM) was a non-Muslim Indian man. The judge accepted that the Appellant would be returning to Pakistan where she would be at risk of serious harm.

3. The Appellant came to the UK on 12 October 2009 with entry clearance as a Tier 4 (General) Student valid from 29 September 2009 until 5 February 2012. He was granted leave as a Tier 1 (Post-Study) Migrant from 3 July 2012 until 3 July 2014. He made an in-time application as a spouse which was refused on 22 June 2015. The Appellant appealed against the decision of the Secretary of State and his appeal was allowed by Judge of the First-tier Tribunal Cameron in a decision dated 22 May 2018, following a hearing on 1 May 2018. Permission was granted to the Secretary of State by Judge of the First-tier Tribunal Parkes.

The decision of the FtT

4. The judge found that there would be insurmountable obstacles on return by the Appellant and his family to Pakistan. There is no challenge to the judge's findings in relation to return to Pakistan. The judge made the following findings in relation to return to India:
 - “63. It is relevant to take into account the fact that neither the first appellant nor the second appellant has the automatic ability to live in either of the other party's respective countries. The first appellant cannot be removed to Pakistan but only to India and similarly the second appellant cannot be removed to India but only Pakistan.

 - ...
 69. The current position therefore is that the second appellant and presumably given the age of her daughter her daughter would be removed to Pakistan given that neither of them have the right to go to India and the respondent could not remove either of them to India.

 - ...
 73. As already indicated the first appellant cannot be removed to Pakistan and if the second appellant were removed from this country as a result of the revocation of her humanitarian protection status, the respondent could only remove her to Pakistan.

 - ...
 75. That however in my view is subsidiary to the main point that the first appellant cannot be removed to Pakistan. The second appellant would therefore if she were removed from this country be removed to Pakistan, her home country, and her daughter would presumably be removed with her. The second appellant would therefore be a lone female without family protection with an illegitimate child.

...

79. After taking into account all of the evidence available and bearing in mind that the first appellant cannot be removed to Pakistan and that the second appellant cannot be removed to India, I find that if the second appellant were removed to Pakistan with her daughter she would be in the same position as was found by Judge Gibbs in that the second appellant would be a lone female without family protection with an illegitimate child.

...

87. The first appellant's application was refused primarily on the grounds that he did not meet the maintenance requirements of the rules. That clearly was correct at the time of the decision. I must however consider the position under human rights which I consider as at the date of hearing.

88. In MM (Lebanon) [2017] UKSC 10 at paragraph 100 the court indicate that a broader approach may be required in drawing the fair balance required when considering the question of means.

89. The financial documentation submitted by the appellants now indicates that they have a combined income in excess of the requirements even considering that they have a child which would be £22,400 per annum.

90. In relation to article 8 outside of the rules in Razgar [2004] UKHL 17 Lord Bingham set out at paragraph 17 the five questions which should be asked. I also take into account that s.19 Immigration Act 2014 now applies where article 8(2) is engaged and that paragraph 117B now sets out the public interest requirements to be taken into account.

91. Section 117B (1) states that the maintenance of effective immigration control is in the public interest. The relationship between the first and second appellant commenced when both had lawful status and they undertook an Islamic marriage at a time when again they both had lawful status. There is some confusion with regard to the date of application in relation to the refusal of 22 June 2015. The appellant indicated he had only made one application however there is clearly a refusal dated 29 July 2014 which is stated to be in relation to an application on 1 July 2014. No appeal was lodged against that refusal.

92. The first appellant gave his evidence in English although my attention has not been drawn to a formal English language certificate taken by the first appellant I do take into account the level of his English when he gave evidence which would indicate that he ought to be also obtain such certificate without difficulties.

93. The court in Agyarko [2017] UKSC 11 reiterated at paragraph 60 that the test was whether a fair balance had been struck. The public interest is clearly a relevant consideration.

94. In view of the fact that I accept that the first appellant's wife is entitled to humanitarian protection together with the fact that I also accept to all intents and purposes that the first appellant would meet the requirements of the immigration rules taking into account the findings in MM, I do not consider that the public interest would require the first appellant's removal to India

simply to reapply to return to this country. I do take into account Chikwamba [2008] UKHL 40 when coming to this finding.

95. After taking into account all of facts in favour of the and balancing these against the respondent's legitimate aim of the maintenance of immigration control I come to the conclusion that the balance falls in favour of the appellant and that the respondent's decision is therefore disproportionate to the respondent's legitimate aim of the maintenance of immigration control."

The Grounds of Appeal

5. The Secretary of State asserts in his grounds that the judge erred when finding that the combined income of the Appellant and his wife at the date of the hearing was sufficient to meet the financial requirements of the Immigration Rules. He took into account excluded income with reference to E-ECP.3.2. It is submitted that a combined income would be precluded in a future entry clearance application. At paragraph 92 the judge erred when he found that whilst there was no English language certificate the Appellant could obtain one without difficulty.
6. The findings disclose a misunderstanding of the Immigration Rules and the Chikwamba principle. It is unclear on what basis the First-tier Tribunal Judge invoked the case of MM (Lebanon) [2017] UKSC 10. At paragraph 88 of the decision the judge referred to MM stating that the Supreme Court indicated that a broader approach may be required. It is argued that paragraph 100 of MM does not reflect this. The case considered the rights of British citizens and the court found the financial requirements of the Rules lawful.
7. The judge failed to consider insurmountable obstacles to family life continuing in India either under EX1 or outside of the Rules. In this respect the Respondent relies on Agyarko [2017] UKSC 11.
8. I heard submissions from Ms Isherwood. I clarified with her that there was no challenge to the finding of the judge, at paragraph 89, that the Appellant at the date of the hearing satisfied the substantive maintenance requirements of the Rules. This was confirmed by Ms Isherwood. Ms Isherwood argued that there was no evidence that would satisfy the Rules relating to the Appellant's English language ability.
9. Mr Alam submitted that the judge considered insurmountable obstacles with reference to his findings that the Appellant's wife and daughter could not return to India and he referred me specifically to paragraphs 63 and 69. Mr Alam submitted that these findings are not challenged by the Secretary of State in the grounds. Mr Alam submitted that the Appellant was able at the date of the hearing to satisfy the substantive financial requirements of the Immigration Rules and that there was no challenge to the judge's findings at paragraph 89 of the decision. Mr Alam referred me to the documentation relating to the Appellant's income and argued that this reduced significantly the public interest in removal. He referred me to the findings which he understood led the judge to allow the appeal under Article 8 on substantive and procedural grounds.

10. Mr Alam did not accept that English language was an issue that was raised by the Respondent in the refusal letter. However, at the hearing before me he submitted an English language certificate from the University of Bath indicating that the Appellant had been awarded an MBA on 25 October 2011. In his submission this was a document that was in the Respondent's possession because the Appellant had submitted it with an application in 2014. Ms Isherwood objected to the admission of the document to decide whether the judge erred. However, she indicated that the document would meet the English language requirements of the current Rules.

Conclusions

11. The judge did not make a finding in respect of insurmountable obstacles in the context of return to India. This was an error. The difficulties that the family may encounter on return could not amount to insurmountable obstacles and the judge did not find otherwise. However, the error is not material on the unusual facts of this case. The judge was entitled to allow the appeal under substantive Article 8 outside of the Rules on the basis that there were compelling circumstances, taking into account section 117B of the 2002 Act.
12. The judge found that the Appellant could meet the substantive requirements of the Rules. There was no suggestion that this was no longer the case. Therefore, the public interest in removal was significantly diminished. The Supreme Court in MM discussed, at paragraph 100, third party support which was not the issue here. However, the court advocated a broader approach to the assessment of the Rules that possess an Article 8 element when considering where the balance lies in Article 8 cases when assessing proportionality. The point made by the judge is that the Appellant was able to meet the substantive requirements of the Rules which was a significant factor in the assessment of proportionality outside of the Rules. In relation to the Appellant's English language, the judge was entitled to take the view he did. If the matter were to be re-made, it was accepted by Ms Isherwood that Appellant would now satisfy the English language requirements of the Rules.
13. The Appellant and his partner's evidence was that they would encounter difficulty in relocating to India. The Appellant describes these at para 3 of his witness statement dated 18 May 2017. The Appellant's partner describes difficulties at paras 7 - 10 of her witness statement of the same date. It can be reasonably inferred from the decision of the judge that he found the Appellant and his wife to be credible in respect of their claim under Article 8 and that he accepted that there would be difficulties in relocating to India as they described.
14. The judge did not assess the child's best interests. She was pre-school age. It is in her best interests to remain with both parents. On the evidence before the judge, notwithstanding her age, it is in the child's best interests to remain with her parents in the UK, albeit by a relatively narrow margin, considering the difficulties her parents, particularly her mother would face relocating to India. This is a primary consideration but not determinative of the outcome.

15. I have taken into account what the Supreme Court said in Agyarko at [57]

“In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control”,

Whilst this is a precarious family life case, and this affects the weight to attach to family life in the balancing exercise and removal is in the public interest, the public interest in the maintenance of immigration control is very much diminished because the Appellant can meet the substantive requirements of the Rules. A proper reading of the decision makes it clear that the judge considered that this amounted to exceptional or compelling circumstances. There was no properly articulated challenge to this. This conclusion was open to him. I have considered that there are no insurmountable obstacles to integration and this is a factor which weighs heavily in favour of removal. However, on the unusual facts of this case considering the unchallenged findings of the FtT, the judge was entitled to take the view that the strength of public policy in immigration control was outweighed by the strength of the Appellant’s article 8 claim so that he should be permitted to stay. If I were to remake the decision, on the findings of the judge and applying the case law as it stands, I would allow the appeal.

16 It was not necessary for the judge to consider the Chikwamba point because the appeal was allowed on substantive Article 8 grounds. However, he may have erred in respect of Chikwamba because it does appear that an Applicant’s own income would not be taken into account when making an application for entry clearance. His partner’s income alone would not satisfy the requirements of the Rules. However, it is not entirely clear to me that would apply where the Appellant has a job and has been employed in the UK rather than simply a job offer and when considering the MM.

17. The decision of the judge does not disclose a material error of law and the decision to allow the Appellant’s appeal under Article 8 maintained.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Amended decision pursuant to Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (draft decision sent out in error)

Signed *Joanna McWilliam*

Date 18 September 2018

Upper Tribunal Judge McWilliam