Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07604/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 9th September, 2014	**On 19th September 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

RODNEY DARRELL AZEMIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss R Frantzis, Counsel, instructed by Legal Justice Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Grimshaw made following a hearing at Bradford on 3rd July 2014.

Background

2. The Appellant is a citizen of the Seychelles born on 4th November 1981. His wife and children are British citizens. They began their relationship in the Seychelles in November 2002 and their children were born on 25th December 2003 and 14th January 2009. They lived together as a family unit until June 2012 when the Appellant's wife came to the UK with the children. The Appellant accompanied them on a visit visa and returned to the Seychelles within the currency of that visa. He subsequently made an out of country application for entry clearance as a partner but was refused on maintenance grounds.

3. In May 2013 the Appellant returned to the UK for a visit and to spend time with his family. He made an in time application for leave to remain on the basis of his family and private life in the UK.

4. The Secretary of State refused the application under Appendix FM of the Immigration Rules. The Appellant could not succeed under the partner route because E-LTRP2.1 requires that the applicant must not be a visitor. Neither could he succeed under the parent route because he did not have sole responsibility for his child, nor under private life because he had not lived continuously in the UK for the requisite period.

5. The Secretary of State then considered whether there were any exceptional circumstances. In the refusal letter she wrote:

> "It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the ECHR might warrant consideration by the Secretary of State of a grant of leave to remain in the UK outside the requirements of the Immigration Rules. It has been decided that it does not, as the grounds raised by your application are covered by the consideration of the Rules above. Further, as your children are British citizens along with your spouse, they are not being expected to leave the UK as a result of this decision. Your application for leave to remain in the UK is therefore refused."

6. The judge relied on the case of Sabir (Appendix FM - EX1 not freestanding) [2014] UKUT 00063 which held that, from the architecture of the Rules as regards partners, EX1 is parasitic on the relevant Rule within Appendix FM that otherwise grants leave to remain. In Sabir the facts were similar to the present case. She said that the appeal had no realistic prospect of success under the Immigration Rules.

7. The judge stated that there was no question of the children being separated from their mother and she found as a fact that they were not required to leave the UK. She referred to the case of Gulshan (Article 8 – new Rules) [2013] UKUT 00640 which held that, after applying the requirements of the Immigration Rules, only if there may be good grounds

for granting leave outside them, because of non-standard or particular features to the application, is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances that have not been sufficiently recognised.

8. The judge said that the Appellant was granted entry clearance as a visitor, could not meet the financial requirements of the Immigration Rules or the eligibility criteria set out in Appendix FM, and the children could remain with their mother where they could continue to receive care and support which they needed and to continue with their education. The genuine and subsisting relationship that the Appellant enjoys with his children would not be severed by his return to the Seychelles.

9. She wrote as follows:

> "Unfortunately for the Appellant I do not believe that there are any non-standard or particular features of his application requiring leave to be granted outside the Rules. I am not persuaded that there are any aspects of the Appellant's private and family life that have not been fully taken into account by the Respondent. In short, I do not accept that the Appellant's circumstances are exceptional or compassionate or that it would be unjustifiably harsh to expect him to return to the Seychelles.
>
> I conclude that the removal of the Appellant pursuant to the decision to refuse to grant leave would not engage the operation of Article 8. In any event, I find such removal would be proportionate to the legitimate public end, namely the operation of a fair and effective system of immigration control."

The Grounds of Application

10. The grounds argue that, in effect, the Upper Tribunals decision in Sabir was wrong and that the judge erred in following it. The interpretation favoured by the Tribunal resulted in better treatment for overstayers or those on temporary admission than persons here lawfully as visitors and provide a perverse incentive for appellants like Mr Azemia to overstay or enter illegally.

11. Second, the judge erred in her approach to Article 8. No authority for the phrase "unjustifiably harsh consequences" is provided. The Supreme Court in Patel and Others v SSHD [2013] UKSC 72 reiterated that Lord Bingham's speech in Huang v SSHD [2007] 2AC 167 remains the most authoritative guidance on the correct approach of the Tribunal to Article 8. There is no separate test of exceptionality. The Court of Appeal authority in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 confirmed that the new Rules do not herald a restoration of the exceptionality test and that Article 8 requires a two stage approach. Exceptional circumstances or unjustifiably harsh consequence are not requirements. Furthermore, Nagre R (on the application of) v SSHD [2013] EWHC 720, relied on by the Tribunal in

Gulshan is a so-called precarious family life case whereas here family life was established years before the immigration question arose.

12. Third, the judge failed to consider the effect of the separation of the Appellant from his children on their family life and the children's best interests. There was undisputed evidence that the Appellant was heavily involved with the children's day-to-day care. He is of good character and the only legitimate aim being pursued is the economic wellbeing of the country – his wife works and he has a job offer – highly relevant to a proper consideration of the proportionality of the interference with family life.

13. Permission to appeal was granted by Judge Lobo on 30th July 2014.

14. On 8th August 2014 the Secretary of State served a reply defending the judge's application of Sabir. She argued that the judge did not in fact apply an exceptionality test because she had also reminded herself that the Appellant needed to show "good ground and compelling circumstances".

Submissions

15. Miss Frantzis sought to argue that the judge ought to have engaged with the arguments as to why Sabir was wrongly decided, and had she done so, it would have informed her decision on Article 8.

16. More profitably, she then submitted that the judge's decision was tainted by an exceptionality test and in any event her assessment of proportionality was flawed because she had not properly considered the impact of the severance of the Appellant's physical relationship with his children.

17. Mrs Pettersen submitted that the judge was correct so far as the Immigration Rules were concerned but accepted that her reasoning with respect to Article 8 was not adequate. It was clearly engaged. She said that she was content that the facts as outlined by Miss Frantzis in her submissions should form the basis of the decision since no challenge is made to them. She provided a landing card which confirmed the Appellant's history as claimed and which stated that he told the Immigration Officer that only a visit was intended, and he visited the UK last year and complied.

Consideration of the whether there is a Material Error of Law

18. There is no error in this determination so far as the application of the Immigration Rules is concerned. The judge was bound to follow the reported case of Sabir, which is the relevant authority and there was no obligation on her to engage in arguments which have already been decided.

19. However, it is right to say that the judge did err in her consideration of Article 8. There are non-standard and particular features to this application

which require the consideration of whether there are good grounds for granting leave to remain outside the Rules (Gulshan). The judge's conclusion that removal would be proportionate to the legitimate public end of a fair and effective system of immigration control is not adequately reasoned because there is no consideration of the impact of the Appellant's removal not only on the British citizen children but on the ability of his British wife to support the family without him.

Factual Basis of the Claim

20. The Appellant's wife acquired her British nationality by birth but lived in the Seychelles all her life until 2012 when a decision was taken that the family should come to the UK, principally because it was thought that the best interests of the children lay in their being raised here. She came with her two sisters and their children, but the older generation remain in the Seychelles, although there is a maternal uncle in the UK who is the chef manager for BUPA. He has offered the Appellant work either as a chef or as a care assistant.

21. The Appellant's wife works as a care assistant in two care homes, with two contracts, earning the national minimum wage and, because her husband is here to help with the children, is able to work 50 or 60 hours a week.

Submissions

22. Mrs Pettersen submitted that, on the evidence, the Appellant's wife was unlikely to be able to meet the income requirements of the Rules. She said that it would have been sensible for her to have used the time when her husband was here to earn sufficient money and provide the specified evidence in order to make a quick application for entry clearance on a return to the Seychelles. The children did not suffer from any particular medical conditions and their best interests lay in remaining with their mother. She accepted that, so far as the job offer was concerned, it was likely that the Appellant could obtain work through his family connections, but submitted that removal would be proportionate.

23. Miss Frantzis submitted that it would be unsafe to assume that the Appellant could meet the financial requirements for an entry clearance application, and in any event relied on the case of Chikwamba for the proposition that to require him to return to make an application would be disproportionate. The Appellant was of good character. He had sought legal advice upon arrival and had been told that he could make application for leave to remain. The effect on the family would be severe if he was required to leave, since normal family life could not properly be enjoyed if he was in the Seychelles.

Findings and Conclusions

24. Family life is enjoyed by the Appellant with his British wife and children. Removal to the Seychelles would be a clear interference with their enjoyment of family life which would manifestly be qualitatively different if he was apart from them and in the Seychelles.

25. Removal would be lawful, since the Appellant has no basis of stay in the UK.

26. The legitimate aim sought to be pursued is the economic wellbeing of the country. In this case the economic impact of the Appellant's removal, on the unchallenged evidence, is likely to be adverse so far as the UK is concerned in that it is accepted that his wife is only able to work 50 – 60 hours per week because of the Appellant's role in looking after the children. Furthermore, it was also accepted at the hearing that the Appellant was likely to be able to obtain work through his wife's maternal uncle, probably as a care assistant.

27. On the other hand the maintenance of effective immigration control is in the public interest. Since the Appellant has no basis of stay in the UK under the Immigration Rules, that is clearly a strong argument in favour of removal.

28. I turn to the issue of proportionality. This is not a precarious family life case. This couple have been together for some twelve years when there was no issue at all so far as immigration was concerned. The question of what constitutes public interest has been now set out in primary legislation in the 2014 Immigration Act which amends the Nationality, Immigration and Asylum Act 2002. It states that when a court or tribunal is determining an appeal on human rights grounds little weight should be given to a private life or a relationship that is established by a person at a time when the person is in the UK unlawfully or when his immigration status is precarious. However there is no such consideration here.

29. The significant aspect of this appeal is that it has never been argued by the Secretary of State that the British citizen children should leave the UK. The reasons for refusal letter states in terms that the children are not being expected to leave the UK. Mrs Pettersen also made it clear in her submissions that this was not the basis upon which the case was being argued. The children have spent the majority of their lives in the Seychelles, as have their parents, and there are strong family ties there. It might be thought that it would be difficult to resist the argument that they could not reasonably be expected to live there. However, that is not the basis of the Secretary of State's case. Indeed, she has consistently argued that EX1, which has a requirement that it would not be reasonable to expect to leave the UK, does not apply in this case. Her case is that it would be proportionate for the Appellant to return to the Seychelles and, in due course of time, make the appropriate application for entry clearance, and that the best interests of the children would be adequately safeguarded by the presence of their mother.

30. The best interests of the children are a primary consideration in this appeal although they can be outweighed by the cumulative effect of other considerations. They are clearly to remain as part of the stable family unit which they have always enjoyed. There is no criticism of the Appellant's conduct. He accompanied his family to the UK whilst they settled here, returned within the currency of his visit visa and then made the appropriate application from abroad. On his arrival in the UK on his second visit visa he sought legal advice and was informed that he could make an in time application for leave which he did. So far as the economic impact of his presence in the UK is concerned, the evidence is positive. Not only does he enable his wife to work the very long hours which she does, but he also has the opportunity to work here as well.

31. It is not for me to make the Secretary of State's case. She does not rely on the argument that it would be reasonable for the family to return as a unit to the Seychelles. The sole argument in her favour is importance of the maintenance of immigration control. That being the case, I conclude that the arguments in the Appellant’s favour outweigh the public interest in removal which would therefore be disproportionate.

Decision

32. The original judge erred in law. The decision is set aside. The Appellant's appeal is allowed.

Signed Date

Upper Tribunal Judge Taylor