Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36134/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 April 2015	**On 29 April 2015**

Before

LORD BANNATYNE
UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAYODE SOLOMON OSIBANJO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Nath, Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

Introduction

1. The appellant is the Secretary of State and is hereinafter referred as "the Secretary of State". The respondent is hereinafter referred to as "the applicant".

2. This is an appeal against a decision of the First-tier Tribunal promulgated on 18 December 2014 which allowed an appeal by the applicant against a decision of the Secretary of State made on 5 September 2014 to refuse to

vary leave to remain in the United Kingdom as a parent of a United Kingdom citizen and to remove by directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

3. The applicant is a citizen of Nigeria. The application to the Secretary of State was refused on the basis that insufficient income had been demonstrated and on Article 8 grounds. The appeal was allowed by the First-tier Tribunal on immigration grounds, the First-tier Tribunal having held that the applicant could not meet the requirements of Appendix FM of the Immigration Rules went on to consider the exception in EX.1 namely: would it be reasonable to expect the applicant's child to leave the UK? It held that it would not.

4. For the purposes of this appeal the following findings in fact of the First-tier Tribunal are material:

- The appellant and his partner have lived together for a period of three years. They have a daughter born on 22 October 2014.
- The applicant's partner is a self-employed hairdresser. She would lose her business if she had to go to Nigeria.
- "I find that the couple have a committed relationship as claimed, indeed that was not doubted in the reasons for refusal, and is evident from the clear oral evidence heard today. I find that both witnesses were truthful as to their employment history, it was corroborated for the appellant by slips from his previous employment agency, and for his partner from her wage slips when employed. From the oral evidence I accept that she is now self-employed as claimed. I also find that the appellant works as a personal trainer and sport's coach, though I have inadequate evidence to quantify the earnings he receives". (See: paragraph 20).
- "I find that the child in this case is a young baby, a British citizen within the UK, who must clearly remain with her mother, a British citizen, in view of her age. I accept from the oral evidence heard that she also has a close bond with her grandparents in the UK who care for her from time to time. I find in addition that she has the close bond to be expected for a young child to her father, he lives with her and also shares her care. There is a genuine and subsisting relationship between father and child. I find that in the absence of any other factors, it would be [sic] clearly be in the best interest of the child for her to remain with her parents". (See paragraph 26).
- "In considering that question (whether it would be reasonable to expect the child to leave the UK) I keep in mind that such a young baby must in my judgment remain with her mother. Neither mother nor child have ever been to Nigeria, and to move there would separate them from their parents and grandparents, together with compelling Miss Grundy to leave her business in the UK and start afresh". (See paragraph 31).
- "The child and mother in this case are British citizens and matters of some gravity are required to justify them effectively being compelled to leave the UK by going to Nigeria. I keep in mind the need for the fair application of immigration control, and the economic position of the UK. But I also note

> that my findings above are [sic] indicate that though the appellant has not produced sufficient financial evidence to show his actual income, I have found that he has worked legally for all of his period in the UK, and continues to do so. I do not find that it would be reasonable to expect this child to leave the UK, she is a British citizen innocent of any wrongdoing, would face separation at an important point in her life, a point at which bonds are formed, from her country of birth and familiar family members. It would also require her mother, a British citizen, to leave the UK since a child of such age cannot be separated from her mother". (See: paragraph 32).

5. No adverse credibility and reliability findings were made with respect to the applicant and his partner. The applicant had always been legally present in the UK.

6. On the basis of the foregoing the First-tier Tribunal held as follows:

> "I find that the appellant does meet the provisions of appendix FM as they apply to a parent seeking limited leave to remain as a parent".

Submissions of behalf of the Secretary of State

7. Two arguments were made on behalf of the Secretary of State by Mr Nath.

8. First, the First-tier Tribunal had failed to consider and apply the law as set out in Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 00063 (IAC). It was his position that there was no consideration at all of the possibility of the applicant returning to Nigeria in order to make an entry clearance application as a spouse.

9. Secondly he contended that the First-tier Tribunal had failed to direct itself as to the seriousness test in VW (Uganda) v SSHD [2009] EWCA Civ 5. In elaboration of that submission he argued that paragraph 32 of the First-tier Tribunal's determination listed nothing more than matters of choice or inconvenience. His position was that the First-tier Tribunal had treated the fact that the appellant had a British citizen child as a trump card, which was impermissible having regard to ZH (Tanzania) v SSHD [2011] UKSC 4 at paragraph 30.

Reply for the Applicant

10. The applicant on his own behalf directed our attention to paragraphs 16, 19, 26 and 32 of the First-tier Tribunal's determination which he said properly assessed the question of whether it was reasonable for the child to go to Nigeria.

11. It was his position that his having to go back to Nigeria to obtain entry clearance would result in considerable disruption and stress. It would mean that his partner would have to give up her self-employment to look after their very young child resulting in her having to claim state benefits.

Discussion

12. With respect to the first argument advanced on behalf of the Secretary of State we observe that Sabir was not founded upon before the First-tier Tribunal by the Secretary of State.

13. It appears to us that if the Secretary of State believed that in the circumstances of the instant case Sabir was a relevant authority the First-tier Tribunal should have had its attention directed to that case.

14. Turning to look at the substance of the first argument put forward by Mr Nath we are not persuaded that the failure by the First-tier Tribunal to consider Sabir amounts to a material error of law.

15. In Sabir the Secretary of State sought to distinguish Chikwamba [2008] UKHL 40 on this basis:

> "… in Chikwamba it was plain that the claimant in that case met the requirements of the Rules and it was therefore a 'pointless exercise' to require her to leave the UK to apply for entry clearance which would be granted. In this case, the claimant did not meet the financial requirements of the Rules. The claimant had not applied for asylum."

16. When the First-tier Tribunal turned to consider that submission it held this:

> "18. It is plain that the claimant in this case does not and cannot meet the Immigration Rules as set out in Appendix FM".

17. The circumstances in the case before us were not that the applicant "does not and cannot meet the Immigration Rules". Rather the position was nearer the situation in Chikwamba. In the instant case the appellant and his partner's evidence was accepted in its entirety. Their problem was in failing to adequately vouch their earnings. Having regard to the whole terms of the determination there is no real reason to believe that if the application were made in Nigeria the applicant would not satisfy the requirements of the Immigration Rules. In these circumstances the observations of Lord Brown in Chikwamba at paragraph 46 are relevant:

> "This appellant came to the UK to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer".

Applying those observations to the case before us we are satisfied that it cannot be said that the applicant who is settled in this country, who has a very young child should return to Nigeria, have his life and the life of his

partner and child seriously disrupted in order to apply for entry in circumstances where almost certainly he will be granted entry and allowed to return to live with his family.

18. Beyond the guidance given in Chikwamba further helpful guidance regarding this matter has recently been given by Upper Tribunal Judge Gill in R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR 2015 UKUT 00189 (IAC). The judge begins by noting that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family in the UK.

20. Upper Tribunal Judge Gill held at paragraph (i) of the headnote as follows:

> "There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate".

21. At paragraph 24 of her determination she sets out her reasoning for reaching that conclusion:

> "(ii) I raised the question whether, if an individual accepts that there are no "insurmountable obstacles" to family life being enjoyed in his or her home country, it would be in breach of Article 8 to require the same individual to return to his or her home country temporarily for the purpose of making an application for entry clearance. Neither Mr Palmer nor Ms Thelen addressed me on this issue but, having reflected on it, I am inclined to the view that Mr Mandalia was right to suggest in R (Iqbal) that there may well be cases in which there are no insurmountable obstacles to the continuation of family outside the UK, but the requirement to return to the applicant's country of origin to make an application for leave to enter the Uk would be a disproportionate interference with their Article 8 rights. The latter may apply to individuals affected by the decision being separated temporarily because circumstances arise which make such temporary separation disproportionate but which would not arise if they were to continue their family abroad. This possibility was envisaged in Hayat, where (at para 18) Elias LJ said:
>
> > 'It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application [for entry clearance], even though a subsequent decision to refuse the application on the merits will not. The reason is that once there is an interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain"

This case we believe is one where the Secretary of State in now seeking to rely on Sabir, is insisting on compliance with formal procedure and the absence of the applicant in Nigeria, even temporarily, would result in his partner becoming unemployed and having to rely at least temporarily on state benefits. When weighed against the public interest, this we are satisfied, would on its own be disproportionate.

22. Accordingly it seems to us for the above reasons that the failure to consider Sabir does not amount to a material error of law.

23. Turning to the second ground of appeal we observe that the First-tier Tribunal's decision in relation to the proportionality issue is carefully written and well reasoned. In particular the First-tier Tribunal has not used the child as a trump card. It seems to us that the approach to the child's position is in conformity with the guidance given by the Supreme Court at paragraph 10 in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74. The First-tier Tribunal then properly weighs the considerations regarding the child against the identified public interest and comes to an adequately reasoned decision as to why in the instant case the balance falls on the side of the applicant. This is a case in which a differently constituted Tribunal might have reached a different decision. However, in our view the first-tier Tribunal was entitled to reach its decision and in reaching its decision did not err in law.

24. For these reasons we dismiss the appeal.

25. No anonymity direction is made.

Signed Date **23 April 2015**

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal