IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00154/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2016	**On 24 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS ANA MILENKOVIC
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood (Home Office Presenting Officer)
For the Respondent: Mr M Sowerby (Counsel instructed by Douglass Simon Solicitors)

DECISION AND REASONS

1. This matter comes before me following an application made by the Secretary of State that the First-tier Tribunal made a material error of law. In this decision the appellant is the "Secretary of State" and the respondent is Ana Milenkovic whom I shall refer to as the "claimant".

2. The Secretary of State appeals against a decision made by the First-tier Tribunal (Judge Samimi) ("FtT") who allowed the claimant's appeal on Article 8 grounds.

Background

3. The claimant is a citizen of Serbia and her date of birth is 23 June 1988. The Secretary of State refused her application for leave to remain as the partner of a British citizen settled in the UK because the parties had not been living together for two years prior to the date of the application and did not meet the requirements of Appendix FM under E-LTR.1.2 and with reference to R-LTRP.1.(c). The Secretary of State also considered paragraph EX1(a)(i)(b) of the Immigration Rules but concluded that the claimant's removal would not amount to insurmountable obstacles to continuing family life outside of the UK. It was accepted that the parties were in a genuine and subsisting relationship. The requirements of paragraph 276ADE(1)(vi) were not met.

4. The FtT found that the claimant was a talented artist, who had been awarded a distinction in her masters degree in fine art at Wimbledon College, London, and won the Clifford Chance award for her artwork leading to an exhibition. She was working as a studio manager for a well-established British artist. Her partner Mr Pomichal was also an artist with an impressive portfolio of nominations and awards. They had established friends and connections within the art community in London. The FtT heard the appeal with reference to Article 8 ECHR only. It found that as at the date of hearing the claimant and her British partner lived together for two and a half years and financial support was available. There were no insurmountable obstacles to the claimant's family life continuing outside of the UK. The claimant and her partner were exceptionally talented artists who had integrated into the art community in London, established a network of valuable connections and friends and had made notable contributions to the UK through their artwork [12].

5. The FtT followed the approach in **Gulshan (Article 3 – new Rules – correct approach) [2013] UKUT 640 (IAC)**, **Iftikhar Ahmed [2014] EWHC 300 (Admin)** and **Hayat (Nature of Chikwamba principle) Pakistan [2011] UKUT 444 (IAC)**. The Ft found at the date of hearing that the claimant met the requirements of the Immigration Rules and under Article 8 concluded that interference to private life was disproportionate. In the event of relocation to Serbia or Slovakia the ability for the claimant's partner to continue to work as an artist would suffer a major detriment due to the extensive network of support and contacts they have built in the UK [15]. The FtT relied on the **Chikwamba** principle in concluding that it was unreasonable to expect the claimant's partner to relocate to Serbia where he had no family, social or cultural connections and where his work as an artist would suffer [17]. In deciding that there were compelling circumstances justifying an exercise of discretion outside of the Rules and in considering the public interest, the FtT placed weight on the established connections made in the art world, cultural and social isolation from the art community in the UK for the claimant's partner, and the contributions by both to the art world within the UK.

6. At [19] the FtT considered Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended).

Grounds of Application for Permission to Appeal

7. The Secretary of State argued that the FtT made a material errors of law by firstly giving weight to immaterial matters and secondly failing to give adequate reasons on material matters.

8. Ground 1 - It was contended that its assessment was based determinatively on the fact that the couple could not return to Serbia because of the impact on the partner's work in the UK. The FtT failed to engage in a holistic assessment of the rights of the individual against the wider rights of society, **R (On the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)** at paragraph 35:

> "Thus it is misconceived to suggest, in reliance upon **Chikwamba**, that it is only rarely that it will be proportionate to expect a claimant to make an application for entry clearance from abroad irrespective of his or her individual circumstances."

9. The Secretary of State contended that the FtT erred in failing to identify and explain reasons why the claimant could not return to Serbia in order to make a fresh application and further that it was a matter of choice as to whether the claimant's partner accompanied her or not.

10. Ground 2 - The FtT's assessment of the public interest was superficial. The FtT failed to make lawful findings to support the conclusion that the claimant's family life outweighed the public interest and to explain reasons why comparable family life could not reasonably continue from Serbia.

11. Ground 3 - The FtT erred in considering the appeal outside of the Rules in the light of the fact that the claimant's circumstances fell within the ambit of the relevant immigration Rules. The FtT failed to articulate reasons why the circumstances warranted consideration beyond this, **Singh v SSHD [2015] EWCA Civ 74** at paragraph 64:

> "There is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

Permission to Appeal

12. Permission to appeal was granted by First-tier Tribunal Judge McDade. In granting permission Judge McDade found that the FtT lacked focus on these particular matters before finding that it would be disproportionate to remove the claimant from the UK, which amounted to an arguable error of law.

Error of Law Hearing

Submissions

13. Mr Sowerby for the claimant produced a skeleton argument which I read at the start of the hearing.

14. Ms Isherwood relied on the grounds of the application. She drew attention to the fact that the Claimant's bundle produced for this hearing contained evidence that was not before the First-tier Tribunal.

15. As to the substance of the application Ms Isherwood argued that this was a case where the claimant simply had failed to meet the Immigration Rules. The fact that she was a good artist did not render the decision disproportionate. She failed to meet the Rules and did not meet EX1. The fact the claimant was working for an artist was not sufficient to establish private life and/or outweigh the public interest, as in **Chen** at paragraph 39. The essence of the application was founded on the claimant's private life. There were no insurmountable obstacles to the claimant's family life continuing outside of the UK. The FtT failed to consider why any temporary separation or exit from the UK would amount to a disproportionate interference with private or family life. Ms Isherwood also highlighted the Immigration Rules applicable for exceptionally talented persons. There had been no consideration of the length of time it would take for a fresh application for entry clearance to be made from Serbia and too great a weight was placed on the claimant's employment in establishing private life. **SS (Congo)** confirmed the need to identify compelling circumstances for consideration outwith the rules, and **Forman** decided that economic factors and employment did not dilute public interest considerations.

16. Mr Sowerby submitted that the FtT was perfectly entitled to go on to consider Article 8. The FtT had effectively allowed the appeal on private and family life. The FtT considered the issue of entry clearance outside of the UK at [16] referring to **Chikwamba** and **Hayat**. Ms Isherwood was mistaken in her submission that family life of the claimant had been established whilst in a precarious position. The claimant was in the UK lawfully and this was not covered by Section 117B. The claimant could satisfy the Rules at present. None of the findings made by the FtT were challenged. The fact that it was a "near miss" was a relevant issue following **SS (Congo)** at paragraph 56.

17. The FtT found exceptional circumstances. It was not simply a question of employment but contribution to the art culture in the UK. This was a factor that the FtT considered in assessing the public interest and identified as compelling factors consistent with the guidance in **SS (Congo)** at [33]. No public interest factors weighed against the claimant and there was nothing to be served by her removal from the UK. The parties were in an established relationship of over three and a half years lawful residence in the UK.

18. Mr Sowerby submitted that **Chen** allowed for a decision to be made having regard to the individual facts of a case and any temporary separation

would be unreasonable given the current engagement with exhibitions within the art world.

19. Ms Isherwood submitted that the main error was the FtT's failure to consider the issue of temporary separation.

20. At the end of the hearing I reserved my decision. Mr Sowerby submitted that in the event of finding an error of law he would wish to have a further opportunity to be able to call additional oral evidence as the claimant's circumstances had changed and were relevant to Article 8 considerations.

Discussion and Decision

21. The substance of this appeal focuses on Article 8 private life outside of the rules. The FtT found that private life consisted of the life and work of the claimant and her partner as artists and their contribution individually and collectively to the art world in the UK. Family life was relevant to the extent that the parties are in a genuine and subsisting relationship. However, it is accepted that there are no insurmountable obstacles to the parties continuing family life outside of the UK, whether that be in Serbia or Slovakia. There was no evidence before the FtT to show that there would be any immediate hardship in terms of their relationship in the event of a temporary separation for the claimant to return to Serbia to make an application for entry clearance.

22. In assessing proportionality the FtT took into account that the claimant was lawfully resident in the UK at the time she established her relationship with her partner. However, contrary to the position taken by Mr Sowerby her immigration status was precarious to the extent that she had leave to remain until 20 October 2014 as a student when she built up her private life and this would come under the scope of section 117B(5) in carrying little weight, (**AM (S117B) Malawi [2015] UKUT 260 (IAC)**).

23. The main consideration in this error of law appeal is temporary separation, which the FtT failed to deal with. Since Appendix FM generally requires an applicant to have applied in a particular capacity in order to be entitled to entry in that capacity, the practical effect of enforcing the Rules, when a person seeks to remain in one capacity having applied in another, may in some cases be that the person may need to return home simply to reapply. As held in **Chen**:

    (1) 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 application for entry clearance to rejoin family members in the UK. 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. In all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely

solely on the case law concerning **Chikwamba v SSHD [2008] UKHL 40**.

(2) Lord Brown was not laying down a legal test when he suggested in **Chikwamba** that requiring a claimant to make an application for entry clearance would only be "comparatively rarely", be proportionate in a case involving children.

24. The question that the FtT ought to have considered was whether or not there was evidence to show that temporary separation would interfere disproportionately with protected rights under Article 8. I am satisfied that there was no consideration by the FtT as to the possibility of the claimant returning to Serbia on a temporary basis and/or how long it would take in order for her to apply for entry clearance. Given that the FtT was satisfied that the claimant would indeed meet the relevant Rules, any interference with her private life would be temporary. On the findings as set out above in paragraph 4, there was no evidence before the FtT to conclude that there would be any lengthy disruption to the claimant's private life which essentially was her work as an artistic manager in the studio of a well-known British artist. There was therefore no evidence to show why in the short term the claimant could not be expected to return to Serbia to make an application under the Rules.

25. The public interest is in the maintenance of a fair and firm immigration policy and to deter those who do not have entry clearance from coming and jumping the queue. However, that does not mean that the policy remains to be utterly inflexible, rigid and pays no regard to individual circumstances. The courts have more recently altered their view as regards private life as incorporated in statutory form in Section 117B. Section 117B(5) specifically states that little weight should be given to private life established by a person at a time when their immigration status is precarious. In **Nasim and Others (Article 8) [2014] UKUT 25 (IAC)** it was held that the judgments of the Supreme Court in **Patel and Others v SSHD [2013] UKSC 72** served to refocus attention on the nature and purpose of Article 8 ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. It is suggested that public value can be of relevance but only in a relatively few instances where the positive contribution to this country is very significant. On the evidence before the FtT it cannot be said that the contribution made by this claimant falls into that category. I conclude that the FtT materially erred in law by placing too much weight on the claimant's in fact limited private life, insufficient weight on the claimant's failure to meet the Rules, the short term nature of separation in order to apply for entry clearance and the establishment of private life during precarious circumstances. The Secretary of State's appeal is allowed following the approach in **SS (Congo)** and **Chen** (cited above).

Notice of Decision

26. There is a material error of law in the decision and reasons which shall be set aside. I decided that there was no need for a further hearing. I remake the decision having regard to the findings made by the FtT and by substituting a decision to dismiss the appeal on human rights grounds.

No anonymity direction is made.

Signed Date 16.2.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 16.2.2016

GA Black
Deputy Upper Tribunal Judge G A Black