IAC-AH-LEM-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09592/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 7 March 2016	**On 18 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FEVEN YEMANE HAILE
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Secretary of State:	Mr A McVeety, Home Office Presenting Officer
For the Respondent/Claimant:	Mr M Moksud, Legal Representative, International Immigration Advisors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Pooler sitting at Bennett House on 4 August 2015) allowing on Article 8 grounds outside the Rules the claimant's appeal against the decision of the

Secretary of State to refuse to vary her leave to remain in the United Kingdom on **Zambrano** grounds, and against her concomitant decision to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 29 December 2015 Judge Adio granted the Secretary of State permission to appeal for the following reasons:

> 1. The Respondent seeks permission to appeal, in time, against a Decision of the First-tier Tribunal (Judge Pooler) promulgated on 27 August 2015 whereby he allowed the Appellant's appeal under article 8 outside the rules against the Respondent's decision to refuse leave to remain under Appendix FM of the immigration rules on grounds of family and private life. The Respondent's application argues that the judge erred in failing to consider whether there were any compelling circumstances for considering the appeal under article 8 outside the immigration rules.
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> 2. At paragraph 19 of his decision the judge considered 2 reported decisions of the Upper Tribunal and rightly notes these were not to be read as imposing a threshold requirement for exceptional circumstances to be shown before the Tribunal considers whether an appellant can benefit from the provisions of Article 8. However, the judge failed to apply the decision of SS (Congo) and Others [2015] EWCA Civ 387 which requires that if the requirements of the rules are not met compelling circumstances justifying an assessment outside the rules need to be identified. The judge omitted to do this before applying the approach in Razgar 2004 UKHL 27. There is an arguable error of law identified and permission to appeal is granted.

Relevant Background

3. The claimant is a national of Ethiopia, whose date of birth is 25 March 1973. In March 2005 she met her future husband, Mr David Graham, who was working in the UAE, and they subsequently married on 10 January 2007. Mr Graham is a British citizen. On 9 May 2007 the claimant gave birth to their first child, and on 11 September 2008 she gave birth to their second child. Both children are British nationals, and at the date of the hearing before Judge Pooler they were aged 8 and 6 respectively.

4. In November 2012 the claimant moved from the UAE with the rest of the family to live in Portugal where they owned a farm property. Her husband then obtained employment in Qatar and the family moved there in November 2013. In June 2014 the family travelled to the UK for a two-week vacation. Although they had plans to settle in the UK in the future, the intention of the claimant and her husband was to return to Qatar in June 2014 for her husband to resume his employment there.

5. A few days after they arrived in the United Kingdom, the husband was offered employment in the UK, commencing on 1 August 2014. He decided to take up this offer of employment, and thus the plan to return to Qatar was abandoned.

6. The claimant had entered on a visit visa which had been issued to her on 14 May 2014. On 12 December 2014, shortly before its expiry, she applied to remain in the UK on a permanent basis as the partner of her British national husband, and the parent of her British national children.

7. The Secretary of State refused the application on 20 February 2015 as the claimant did not meet the eligibility requirements of Appendix FM. She was currently in the UK with leave as a visitor. So she failed to meet the requirement of E-LTRP.2.1. Although she had a genuine and subsisting relationship with her partner, and that she also had a genuine and subsisting parental relationship with her children, her application failed to comply with the mandatory eligibility requirement. So she could not benefit from the criteria set out at EX.1.

8. A decision had also been made on exceptional circumstances. She had entered the UK as a visitor, claiming on her visa application that her visit was for 30 days, for the purposes of tourism, with her husband and children staying in a hotel. But on 25 June 2014 she had entered into a rental agreement on a property in Crewe for a term of six months. It was not accepted that her intention to enter the UK was solely for the purposes of tourism as stated in the application. It was thus not unreasonable to expect her to leave the United Kingdom to make arrangements to return with the correct entry clearance.

The Decision of the First-tier Tribunal

9. Both parties were legally represented before Judge Pooler. Judge Pooler received oral evidence from the claimant and her husband, and took into account the documents which she provided in support of her appeal.

10. In his subsequent decision, Judge Pooler accepted that the claimant had entered the United Kingdom as a genuine visitor. Although it had been suggested in the course of cross-examination that this was not the case, he was satisfied that there was no ulterior motive at the time of her entry into the UK. He accepted that the husband had been offered employment within a few days of their arrival in the United Kingdom. The oral evidence on this issue was consistent with documentary evidence, including a letter from Mr Sebastian Fisher of Ground Water Engineering. He said he had met the claimant's husband on 20 June 2014 following which he had made the offer of employment. The reason for the delayed start date was to allow time for Mr Graham to find suitable accommodation. The children had begun attending primary school on 3 July 2014, as confirmed by a letter from the school. The judge accepted the unchallenged evidence of the claimant and her husband that Mr Graham was able on occasions to work at home but he was required to attend his employer's office in Wakefield on two or three days each week and that he was also required to work at sites across the United Kingdom. So his employment sometimes entailed him staying away from home overnight, if he had travelled a long distance.

Accordingly, he accepted the claimant's evidence that she had thus been the main carer of the two children, taking them to and collecting them from school and attending to their needs both before and after school and during the school holidays. He also accepted the unchallenged evidence that no member of Mr Graham's family in the UK was in a position to assist significantly with child care in substitution for the claimant.

11. Having made his findings on the primary facts, Judge Pooler turned to consider whether the claimant qualified for a derivative right of residence under Regulation 15A of the 2006 Regulations. He accepted that the claimant was the primary carer of two British citizen children, who were both residing in the UK. He was not persuaded that either child would be unable to reside in the UK or in another EEA state if the claimant was required to leave. Although there would be financial consequences, Mr Graham frankly accepted that he would have to give up work in order to care for the children. His presence in the UK and his ability to care for the children if the claimant was required to leave was such that the claimant had failed to prove that she met all the necessary requirements to qualify for a derivative right of residence.

12. The judge turned to consider Article 8 outside the Immigration Rules. He was satisfied that the children's best interests lay in them remaining in the United Kingdom. They were British nationals entitled to the benefits of their nationality, including education and health care. Theirs was a settled family unit and their best interests lay in them remaining in the care of both parents. If their mother was removed to Ethiopia, they would be separated from one or other of their parents which would impact negatively on their best interests. At paragraph [28] the judge observed that little weight was to be placed on the private life established by the claimant in the UK because she had always had no more than limited leave and her immigration status was therefore to be regarded as precarious. It was however her family life which weighed heavily in the appeal. At paragraph [29] the judge observed that subsection (1) of Section 117B of the 2002 Act required the Tribunal to regard the maintenance of effective immigration controls as being in the public interest. It was therefore in the public interest for the claimant to return to Ethiopia and apply for entry clearance. The judge continued:

> 30. There are, however, factors which weigh against the public interest in maintaining immigration control. I note the appellant's good immigration history; she entered the UK with leave as a genuine visitor. The only significant issue is her failure to have obtained entry clearance as a partner rather than as a visitor. The appellant is entitled to rely on **Chikwamba v SSHD [2008] UKHL 40** and the principle that a requirement that the appellant leave the UK in order to apply for entry clearance may be disproportionate.
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> 31. I am satisfied in the circumstances outlined above that the decision is not proportionate and that the public interest in removal is outweighed by the other factors and principally by the best interests of the appellant's children. I am fortified in this conclusion by the provisions of section 117B(6). I am satisfied that the appellant has a genuine and subsisting parental relationship with both of

> her children who are, as British citizens, qualifying children as defined in section 117D. I find that, having regard to the children's nationality, which gives then a right to education in the United Kingdom in which they have been settled for more than twelve months, it would not be reasonable to expect either child to leave the UK. The public interest therefore does not require the appellant's removal; and her appeal in reliance upon Article 8 must succeed.

Discussion

13. Ground 1 is that the judge failed to engage with the requirement that *compelling* circumstances need to be identified to support a claim for a grant of leave to remain outside the new Rules in Appendix FM. In support of this proposition, the pleader cites the following extract from the judgment of Richards LJ in **SSHD v SS (Congo) and Others [2015] EWCA Civ 387** at paragraph [33]:

> In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say the general position outside the sorts of special context referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM.

14. In the same judgment, Richards LJ considered at some length the Court of Appeal decision in **MM (Lebanon) [2014] EWCA Civ 985**, and noted at paragraph [26] that the Court of Appeal in **MM (Lebanon)** did not say there could never be cases falling outside the LTE rules where, on the particular facts of a specific case, Article 8 might required that LTE be granted by the Secretary of State outside the Rules, in the exercise of her residual discretion.

15. The test propounded by Richards LJ at paragraph [33] was in the context of giving guidance as to the weight to be given to the LTE rules when the Secretary of State's officials or a court or Tribunal are invited to balance individual interests and the public interests in a case where an application for LTE outside the Rules is made.

16. Accordingly, the Court of Appeal in **SS (Congo)** was not laying down an intermediate or threshold test that has to be addressed *before* a decision maker embarks on a proportionality assessment outside the Rules.

17. At paragraph [19] of his decision, Judge Pooler said that it was clear from **MM (Lebanon)** that the test propounded by the Upper Tribunal in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** was not to be read as imposing a threshold requirement for *exceptional* circumstances to be shown before the Tribunal considers whether an applicant can benefit from the provisions of Article 8. Similarly, **SS (Congo)** does not impose a threshold requirement for *compelling* circumstances to be shown before the Tribunal considers whether an appellant can benefit from the provisions of Article 8. The essential requirement is that, in the course of the Tribunal's consideration of the five-point **Razgar** test, compelling circumstances need to be identified in order for the Tribunal to reach a conclusion on proportionality which favours the claimant.

18. The Secretary of State continues to refer to "exceptional circumstances" in decision letters when, following **SS (Congo)**, she really means "compelling circumstances". So I do not consider that the judge has misdirected himself in paragraph [19] by referring to *exceptional* rather than *compelling* circumstances.

19. The real issue is whether the judge in the course of his **Razgar** analysis has identified compelling circumstances not sufficiently recognised by the Rules which justify the claimant being granted Article 8 relief outside the Rules.

20. I answer this question in the affirmative. Firstly, the only justification given in the refusal decision for requiring the claimant to go back to Ethiopia to seek the correct entry clearance was that she had not entered the UK as a genuine visitor. The judge found that she had entered the UK as a genuine visitor, and so the sole justification given for requiring her to go back to Ethiopia to seek the correct entry clearance fell away. Secondly, it was plainly contrary to the children's best interests to be separated from their primary carer, even if the separation was a temporary one, measured in weeks or months. Thirdly, the judge found that Section 117B(6) applied, and there is no appeal against this finding. Since the claimant cannot be removed in consequence of the finding under Section 117B(6), she has to be granted leave to remain under the Rules.

21. Ground 2 is that the judge erred in not giving consideration to the fact that *exceptional* circumstances must be shown when considering a grant of leave outside the Rules in cases concerning precarious family life, citing **Agyarko and Others v SSHD [2015] EWCA Civ 440**.

22. Ground 2 contradicts Ground 1. The complaint in Ground 1 is that the judge did not postulate a threshold requirement of *compelling* circumstances. The judge did not err in law in that regard for the reasons which I have given above.

23. Ground 3 is that the judge failed to consider whether or not an application from abroad would be successful, and that there was also no consideration as to whether there would be a significant interference in the family life by temporary removal, citing **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00198** at paragraph [39] where the Tribunal said as follows:

> "If it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of attaining entry clearance is reduced."

24. At paragraph [10] of his decision, Judge Pooler said the Tribunal had been provided with a copy of the husband's P60 for the year to 5 April 2015, and with pay slips and bank statements. He found that all of these documents were consistent with the husband's employment having started in August 2014 on an annual salary of £42,000.

25. The judge did not direct himself in terms of the guidance given in **Chen**. But it was implicit in his findings on where the best interests of the children lay that requiring the mother to return to Ethiopia to seek entry clearance, leaving behind her two children who are in full-time education here, would constitute a significant interference with family life. Moreover, consistent with **Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054**, there was no good reason to require the claimant to return to Ethiopia to obtain the correct entry clearance, and thus the public interest in requiring her to do so was reduced.

26. I consider that the judge gave adequate reasons for allowing the claimant's appeal on **Chikwamba** grounds, taking account of all the relevant considerations arising under Section 117B of the 2002 Act. Indeed, the judge's finding on Section 117B(6), which has not been challenged by way of appeal, was sufficient by itself to lead ineluctably to a decision in the claimant's favour.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal by the Secretary of State to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Monson