IAC-BH-JLS-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47702/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 1st February 2016

Decision & Reasons Promulgated
On 13th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

S K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Singh of Counsel instructed by Malik Law Chambers
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance and confusion and to be consistent, I shall continue to refer to the parties as they were before the First-tier Tribunal.

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2. As this appeal involves the interests of a child, I make the following direction.

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

3. On 6 November 2015 Judge of the First-tier Tribunal M Davies gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal Gurung-Thapa in which she allowed the appeal under the Immigration Rules and on human rights grounds against the decision of the respondent to refuse leave to remain as a spouse in accordance with the provisions of Appendix FM of the Immigration Rules.

4. In summary, the grounds contend that the Judge was wrong to allow the appeal under the Immigration Rules, particularly the terms of EX.2. of Appendix FM on the basis that the appellant had a genuine and subsisting relationship with her sponsor and there were insurmountable obstacles to family life with the sponsor continuing outside the UK. That was because the Judge was wrong to conclude that appellant met the requirements of Section S-LTR (Suitability – leave to remain) because her failure, without reasonable excuse, to attend an interview (S-LTR.1.7.(a)) was a “historic interview” having no bearing on her current claim for leave to remain as a spouse. In the previous Judge’s decision covering that interview it had been found that there was no such reasonable excuse and the present Judge had not given reasons for departing from that finding. Further, the grounds contended that the Judge’s consideration of Article 8 outside the Rules failed to take into consideration the test set out in *Nagre [2013] EWHC 720* and also temporary separation relying upon the decision in *R (on the application of Chen) (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)*. Further, it was contended that the Judge did not give adequate consideration to the application of Section 117B in relation to the appellant’s English language ability having regard to *AM (S117B) Malawi [2015] UKUT 0260 (IAC)*.

5. The Judge granting permission thought all the grounds were arguable.

Error on a Point of Law

6. Mr McVeety confirmed that the respondent relied upon the grounds. He emphasised that the Judge had not given adequate reasons for concluding that she could benefit from the provisions of Section S-LTR when the previous Judge dismissing her earlier appeal had found that the appellant had no reasonable excuse for failing to attend an interview. He also contended that the Judge had failed to approach Article 8 having regard to the more recent decision of the Court of Appeal in *SS (Congo) [2015] EWCA Civ 387* and in the application of *Chikwamba* principles.

7. Mr Singh expressed the view that the Judge was right to disregard the earlier decision in relation to the alleged failure to attend for interview and thus was entitled to apply the provisions of Section EX2. In relation to the Judge's consideration of Article 8 outside the Rules, the Judge properly found that there were exceptional circumstances enabling her to do so and had correctly adopted the *Razgar* five stage approach.

8. I conclude that the Judge was wrong to allow the appeal under the Immigration Rules by application of Section EX.1.(b). That is because the Judge was in error in finding that paragraph S-LTR.1.7(a) could not apply to the appellant because her failure to attend an interview in relation to a past application was an historic event that had no relevance to the present application for leave to remain. Section S-LTR of Appendix FM contains no suggestion, nor can it be implied, that its requirements only relate to events immediately connected to the application which forms the subject of the appeal. Indeed each of the sub-paragraphs preceding S-LTR.1.7. clearly relate to conduct which is historic. For example, the existence of a deportation order, conviction of criminal offences for persistent offending and bad conduct, character and associations. Further, my attention was not drawn to any policy which might suggest that behaviour referred to in S-LTR.1.7 would not be applied to a later, second, application. Additionally, in this respect, the Judge was unable to depart from the earlier finding of the First-tier Tribunal that the appellant had failed to attend an interview without reasonable excuse unless there were good reasons for doing so. The Judge did not consider the application of *Deveseelan* principles in that respect although that is evidently because she wrongly believed that the past failure could be ignored. Thus, as the appellant could not meet the suitability provisions of the Rules it was not possible to apply the provisions of EX.

9. The Judge's alternative consideration of Article 8 issues outside the Immigration Rules also shows a material error on a point of law. Although the Judge considered that there were exceptional circumstances enabling her to consider Article 8 issues on a free standing basis it is not entirely evident what she thought those exceptional circumstances were, save for reliance upon the factors which the Judge referred to in her erroneous consideration of Section EX.1. and the insurmountable obstacles test defined in EX.2.. Clarification was required particularly when the Judge had noted that the sponsor's sixteen year old son maintained a close relationship with his birth mother yet was prepared to find (paragraph 49) that the appellant also had a genuine and subsisting parental relationship with that child. The Judge's consideration of Section 117B (vi) of the 2002 Act in this respect suggests that she believed the Appellant could obtain a positive advantage from the parental relationship when *AM* makes it clear that the section cannot bestow such a benefit nor can an ability to speak English. Further, the Judge's consideration of the appellant's English language ability (paragraph 48) suffers from the same error and, additionally, the Judge gives inadequate reasons for concluding that the appellant could speak and understand English when she needed to use a Punjabi interpreter at the hearing.

10. Finally, in relation to the Judge's consideration of Article 8, consideration is given to the possibility of temporary separation whilst the appellant applies for leave from abroad. In *Chen* the Upper Tribunal made it clear that it is misconceived to suggest, in reliance upon *Chikwamba*, that is only rarely that it would be proportionate to expect a claimant to make an application for entry clearance from abroad irrespective

of his or her individual circumstances. The issue was not considered by the judge on that basis or at all.

11. The errors to which I have referred above mean that the appeals should be heard afresh involving the hearing of oral evidence. Having regard to the Practice Statement of the Senior President of Tribunal's dated 25 September 2012 at paragraph 7.2 it is appropriate that this appeal should be remitted to the First-tier Tribunal to be heard again.

Directions

12. The appeal is remitted to the First-tier Tribunal for hearing afresh.

13. The hearing will take place at the Nottingham or Stoke Hearing Centres on a date to be specified by the Resident Judge.

14. A Punjabi interpreter will be required for the hearing.

15. The hearing should not be before Judge of the First-tier Tribunal Gurung-Thapa.

16. The time estimate for the hearing is 2 hours.

Signed Date

Deputy Upper Tribunal Judge Garratt