



IAC-AH-SC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/09180/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27th January 2016**

**Decision & Reasons Promulgated
On 11th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - KINGSTON

Appellant

and

**YOLAND KAYDIAN ARMSTRONG
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer

For the Respondent: Mrs S Panagiotopoulou of Counsel instructed by Edwin Coe, Solicitors

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (the ECO) appeals against the decision of Judge Beg of the First-tier Tribunal (the FTT) promulgated on 3rd August 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to her as the Claimant.

3. The Claimant is a female Jamaican citizen born 11th November 1988 who applied for entry clearance to enable her to settle in the United Kingdom with her husband Andrew George Armstrong (the Sponsor) who is a British citizen. When the application was made it was conceded that the Appellant could not satisfy the financial requirements of Appendix FM, and entry clearance was requested outside the Immigration Rules, and the Appellant relied upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
4. The application was refused on 4th July 2014. It was not accepted that the Sponsor and Appellant were in a genuine and subsisting relationship, although this decision was reversed by an Entry Clearance Manager on review. It was not accepted that the financial requirements of the Immigration Rules could be satisfied, and this aspect of the decision was upheld on review.
5. The subsequent appeal was heard by the FTT on 9th July 2015. The FTT found that compelling circumstances existed, and after hearing evidence from the Sponsor, dismissed the appeal under the Immigration Rules, but allowed it with reference to Article 8 outside the Immigration Rules.
6. This caused the ECO to apply for permission to appeal to the Upper Tribunal. In summary it was contended that the FTT had made a material misdirection of law as it was difficult to see how the FTT could find compelling circumstances in order to allow the appeal outside the Immigration Rules, when it was conceded that the appeal could not succeed with reference to the rules.
7. It was contended that Article 8 does not confer a choice of domicile and is not a general dispensing power. The Appellant could have made a further application for entry clearance.
8. It was contended that the FTT had referred to Hayat v SSHD [2012] EWCA Civ 1054, and Chikwamba v SSHD [2008] UKHL. The ECO contended that these cases concerned Appellants already in the United Kingdom and a further application for entry clearance would have been particularly onerous given the specific circumstances involved, but there were no such barriers present in this case which would prevent a further application for entry clearance.
9. It was contended that the FTT had erred by failing to consider the weight to be afforded to the public interest in the maintenance of effective immigration control, as expressed by section 117B(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).
10. It was submitted that consideration by the FTT of SS (Congo) [2015] EWCA Civ 387 was selective in that the FTT had placed reliance upon paragraph 33, but should have considered paragraphs 40, 51 and 82, which confirm that a departure from the Immigration Rules is necessary only in compelling circumstances. It was submitted that had the FTT applied SS

(Congo) appropriately, it would have reached a different conclusion in relation to this appeal. Permission to appeal was granted by Judge J M Holmes who found that arguably the FTT had failed to find exceptional compassionate circumstances, and had adopted “a freewheeling approach to the content of the Immigration Rules.”

11. Following the grant of permission the claimant lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FTT had applied the relevant case law and had made findings open to it on the evidence. There was no material misdirection in law and the FTT had considered the rights of the Claimant’s child in Jamaica, and the Sponsor’s two children in the United Kingdom. It was not accepted that the FTT had been selective in considering SS (Congo).
12. The Tribunal issued directions making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT decision contained an error of law such that it should be set aside.

Submissions

13. At the hearing before me, Mr Kandola relied upon the grounds contained within the application for permission to appeal. I was asked to note that in SS (Congo) the Court of Appeal had indicated that there was a wider margin of appreciation when considering whether to grant leave to enter, as opposed to leave to remain.
14. Mr Kandola submitted that the public interest in effective immigration control had not been given sufficient weight by the FTT, and the appropriate remedy was for the Appellant to make a further application for entry clearance.
15. Mr Kandola pointed out that the Sponsor’s mother had given evidence that she would be able to offer support, and it was contended that the FTT had not taken this into account. With the benefit of this support, the Sponsor may be able to work full-time, which would mean that it may be possible for the financial requirements of the Immigration Rules to be satisfied. It was clarified that it was not suggested that the Sponsor’s two British children should leave the United Kingdom and relocate to Jamaica. The case made by the ECO, was that there were no compelling circumstances to justify granting the appeal under Article 8 outside the Immigration Rules, as a further application for entry clearance could be made.
16. Mrs Panagiotopoulou relied upon her rule 24 response. She pointed out that there was no mention in the grounds seeking permission to appeal, of the FTT failing to take into account the evidence of the Sponsor’s mother. It was submitted that the grounds amounted to a disagreement with findings which had been made by the FTT, and that those findings were open to the FTT to make on the evidence. The compelling circumstances

were set out by the FTT in paragraphs 16 - 18 and the case law had been correctly considered.

17. By way of response, Mr Kandola explained that his reference to the Sponsor's mother was made in connection with the requirement that there should be compelling circumstances if an appeal was to be allowed under Article 8 outside the rules. In this case it was submitted that the Sponsor's mother stated that she could look after the children, and therefore this would enable the Sponsor to undertake full-time employment which would mean that there is a reasonable chance of the financial requirements of Appendix FM being satisfied so that if a further application for entry clearance was made, the application may succeed under the Immigration Rules.
18. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

19. The application for entry clearance was made on the basis that the Appellant could not satisfy the financial requirements of the Immigration Rules, as set out in Appendix FM. It is clear that the FTT understood the nature of the application. I do not find that the FTT made a material misdirection of law for the following reasons.
20. The FTT made no reference to the cases of Hayat and Chikwamba and it is not clear why the ECO made reference to those cases in the grounds seeking permission.
21. There was no reference by the FTT to the Appellant making a further application. It was not the Appellant's case, as presented to the FTT, that the financial position had changed so that the financial requirements of Appendix FM could be satisfied.
22. The FTT was aware of the weight to be attached to the public interest in maintaining effective immigration control, and there is specific reference to this in paragraph 15 in which the FTT sets out in full section 117B of the 2002 Act. There is further reference to the public interest in paragraph 18, in which the FTT concludes that having considered the evidence as a whole, it would not be in the public interest to deprive the Appellant and her son from having a family life with the Sponsor and Sponsor's daughters in the United Kingdom.
23. There is clearly a typing error in paragraph 18 when the FTT refers to the Appellant and the Appellant's daughters being in the United Kingdom, (as it is clear that the reference should be to the Sponsor and Sponsor's daughters).
24. I find no material error made by the FTT, when considering SS (Congo). In my view the FTT erred in relying upon paragraph 33 which is set out in paragraph 10 of the decision, as paragraph 33 relates to leave to remain outside the Immigration Rules, rather than leave to enter. A more

appropriate paragraph to rely on in entry clearance cases is paragraph 40, which is in fact set out in the grounds seeking permission to appeal. However the principle followed by the FTT was correct. As set out in paragraph 40 of SS (Congo);

“However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the rules. In our view, the appropriate general formulation for this category is that such cases will arise where an application for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.”

25. The FTT at paragraph 11 recorded;

“In considering the family background including the vulnerability of the Sponsor’s two young daughters, I find that there are compelling reasons to consider this matter outside the rules.”

26. In the same paragraph the FTT went on to recognise that when considering proportionality, this involved striking a fair balance between the rights of the individual and the interests of the community.

27. The correct test for considering Article 8 outside the Immigration Rules, has therefore been confirmed in SS (Congo) as being that of compelling circumstances not being sufficiently recognised under the rules. This is the test applied by the FTT.

28. Those compelling circumstances set out by the FTT, are that the Sponsor is the primary carer of his two daughters who are British citizens. They were born in 2003 and 2005 and are now aged 12 and 10 respectively. Their mother, the Sponsor’s former partner, died of cancer at a young age in February 2013. It was not suggested that it would be reasonable to expect the Sponsor’s daughters, who had always lived in the United Kingdom, to relocate to Jamaica.

29. The FTT also took into account that the Sponsor is the primary carer of his two daughters, so he has been unable to take full-time employment, and therefore is unable to satisfy the financial requirements of Appendix FM.

30. The FTT also took into account the British citizenship of the Sponsor’s son in Jamaica, and placed some reliance upon MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC) and did not err in law in so doing.

31. I conclude that the grounds contained within the application for permission to appeal, do evidence a disagreement with the findings made by the FTT, but they do not disclose a material error of law.

Notice of Decision

The making of the decision of the FTT did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeal of the ECO is dismissed.

Anonymity

No anonymity direction was made by the FTT. There has been no request for anonymity made to the Upper Tribunal, and I see no need to make an anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

1st February 2016

**TO THE RESPONDENT
FEE AWARD**

As the decision of the FTT stands so does the decision to make a full fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

1st February 2016