



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09709/2017
HU/09710/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2019

Decision & Reasons Promulgated
On 20 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SRMB (FIRST APPELLANT)
SFBMB (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondents: Mr R Solomon, Counsel instructed by Jein Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The first appellant was born on 1 March 1973. She is the mother of the second appellant, who was born on 24 August 1999. Both appellants are citizens of India.

3. The first appellant married a British Citizen (“the Sponsor”) in December 2012. She entered the UK with a spouse visa valid from 3 December 2013 to 3 September 2016. The second appellant entered with a dependant visa valid for the same period.
4. On 29 August 2016 the appellants applied for leave to remain in the UK under Appendix FM of the Immigration Rules on the basis of their family life with the Sponsor. The application was refused on 23 August 2017 on the basis that the financial eligibility requirements were not met and there were not insurmountable obstacles to the relationship continuing in India.
5. The appellants appealed to the First-tier Tribunal where their appeal was heard on 21 June 2018 by Judge of the First-tier Tribunal Clarke. In a decision promulgated on 20 August 2018 their appeal was allowed. The Secretary of State is now appealing against that decision.
6. Judge Clarke found that, although the financial requirements of Appendix FM were not satisfied when the application for leave under Appendix FM was made, at the date of the hearing they were met because the sponsor had earned £19,025 between 3 September 2017 and 21 June 2018. The judge found that because the appellants could now satisfy the Immigration Rules (and the failure to satisfy the financial requirements had been the only reason their application had been refused) there was no public interest in refusing leave to remain.
7. The judge also considered whether the appellants should be required to leave the UK to apply leave to enter from India. At paragraph 59 the judge stated:

“I also find that there is no public interest in the appellants being required to return to India to make an entry clearance application when the first named appellant meets the Rules as of the date of the hearing. In so finding, I remind myself of the application of the *Chikwamba* principles. I find that the second named appellant will be unable to meet the Adult Dependant Relative Rules for entry clearance and therefore it is unlikely that she would obtain entry clearance but the consequence would be that there would be a fracturing of the Article 8 family life between the appellants. The second named appellant is a dependant on her mother’s claim and I find that her removal would be a disproportionate interference with family life”.
8. The Secretary of State appealed against the decision on the basis that the judge failed to take into consideration that the financial requirements of the Rules were not satisfied when the application was made and failed to consider the insurmountable obstacles test under EX.1 of Appendix FM.
9. The grounds also contend that the judge has not explained or made clear how the requirements of Appendix FM-SE were satisfied as it is not sufficient to simply find that the Sponsor is earning an income that puts him above the financial threshold in Appendix FM.

10. The grounds also argue that the consideration of the second appellant's case was "manifestly perverse" because no consideration was given to why the family could not live together in India.
11. The issue before the First-tier Tribunal was whether removing the appellants from the UK would constitute a disproportionate interference with their right to respect for their private and family life. This required a balancing exercise, with consideration being given, on the one side of the scales, to the public interest in their removal from the UK; and, on the other, to their individual interests. A necessary part of this assessment was to assess the force of the public interest in their removal.
12. In *Agyarko* [2017] UKSC 11 the Supreme Court stated (at para 51):

"[If] an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be **no public interest in his or her removal**. This is the point illustrated by the decision in *Chikwamba v Secretary of State*." (Emphasis added).
13. The judge considered evidence before him concerning the Sponsor's employment and made the finding of fact (which, having reviewed the bundle that was before the First-tier Tribunal, I am satisfied is consistent with the evidence) that the Sponsor's income was at a level where, if an application had been made at the time of the hearing, the financial eligibility requirements under Application FM would have been satisfied. The judge considered the implications of this - finding, at paragraph 53, that the appellants would not be a burden on the British taxpayer - and concluded that there is no public interest in maintaining the refusal of leave to remain. The judge's conclusion as to the force of the public interest in the appellants' removal is not inconsistent with paragraph 51 of *Agyarko* and was open to him.
14. Having found that there was no public interest in removing the appellants because of the financial circumstances of the Sponsor which meant that the requirements of Appendix FM were met, it followed that the balancing exercise under Article 8 ECHR fell in favour of the appellants. Accordingly, I am satisfied that the decision does not contain a material error of law. The Secretary of State's appeal is therefore dismissed.

Notice of Decision

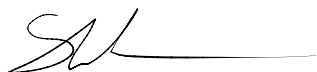
The appeal is dismissed and the decision of the First-tier Tribunal stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the

respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

A handwritten signature in black ink, appearing to be 'SH', followed by a horizontal line extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated:19 February 2019