Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05361/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 December 2014	**On 6 January 2015**

Before

THE HONOURABLE MRS JUSTICE CARR DBE
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MADHOORANI GONOWRY
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms N Ahmad, Counsel

DECISION AND REASONS

1. The respondent to this appeal, Mrs Gonowry, is a citizen of Mauritius born on 24 February 1967. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal M J Gillespie, who allowed Mrs Gonowry's appeal against the decision, dated 9 January 2014, to refuse to vary her leave to enter on article 8 grounds.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. We shall therefore refer to Mrs Gonowry from now on as "the appellant" and the Secretary of State as "the respondent".

3. We were not asked and saw no reason to make an anonymity direction.

4. On 12 November 2012 the appellant married Mr Gawtun Unuth, a British citizen born on 10 September 1946 ("the sponsor"). After the wedding the appellant returned to Mauritius but, having failed the English test and realising she could not obtain a spouse visa, she took advice to the effect she should return to the UK as a visitor, which she did on 1 June 2013. She submitted form FLR(O) on 27 November 2013. The respondent gave reasons for refusal in a letter dated 9 January 2014. In short, the appellant could not meet the requirements of Appendix FM of the Immigration Rules ("the Rules") or paragraph 276ADE(1) of the Rules. There were no exceptional circumstances which might warrant consideration of a grant of leave.

5. Judge Gillespie allowed the appeal after a hearing on 27 August 2014. He found that the Rules were not met with respect to the immigration status requirement, the financial requirement or the English language requirement, although he found there were insurmountable obstacles to family life continuing abroad. He then looked at the proportionality of the decision and found, applying *Chikwamba v SSHD* [2008] UKHL 40, that there was little public interest in insisting the appellant return to Mauritius to apply for entry clearance.

6. The grounds seeking permission to appeal make three points: (1) the judge erred by treating paragraph EX.1 as a freestanding provision; (2) the judge failed to give sufficient weight to the public interest as revealed by section 117C of the 2002 Act; and (3) the judge misdirected himself by applying *Chikwamba* (supra).

7. Permission to appeal was granted by Judge P M J Hollingworth on all grounds.

8. The appellant has not filed a response opposing the appeal.

9. We heard submissions as to whether the judge had made a material error of law in his decision. Ms Isherwood said it was clear that paragraph EX.1 was not a freestanding provision, following *Sabir (Appendix FM – EX.1 not free standing)* [2014] UKUT 00063 (IAC). Rather, it is "parasitic" on the main rules in Appendix FM. The judge had erred in applying paragraph EX.1 and this error infected the remainder of his decision. The judge had made further reference to paragraph EX.1 when he found there were arguably good grounds for making further investigation of the appellant's potential rights under article 8 in paragraph 15 of his decision. Ms Isherwood then argued the judge had failed to give sufficient attention to the public interest as defined in section 117B of the Nationality, Immigration and Asylum Act 2002 ("the Act"). In particular, his findings on maintenance and language were not based on proper evidence. She argued that the evidence was lacking. The judge had

given too much importance to his view that paragraph EX.1 was met. Ms Isherwood's arguments in respect of the third ground were that, since *Chikwamba* (supra)had been decided, there had been a change in that the rules now contained provisions which were designed to apply article 8. The judge had erred by identifying the major public interest consideration as being the formal requirement to make a fresh application. All the public interest factors set out in section 117B of the Act had to be taken into account.

10. In reply Ms Ahmad argued the judge's decision did not contain an error of law. She made her points essentially by reference to the judge's factual findings, which she argued were sound. Ms Isherwood replied, highlighting what she regarded as a paucity of evidence supporting the judge's findings on such matters as maintenance and the sponsor's medical conditions.

11. We reserved our decision as to whether the judge's decision contained a material error of law. Having carefully considered the submissions made by the representatives, we find no material error of law in the judge's decision. Our reasons are as follows.

12. The judge structured his decision correctly. In paragraphs 9 and 10 of his decision the judge set out his approach to Appendix FM and gave reasons for finding the appellant could not meet the eligibility requirements of the rules. He found (1) she could not meet the immigration requirement because she was a visitor when she made her application; (2) she could not meet the maintenance requirement because of the lack of specified evidence; and (3) she could not meet the English language requirement because she had failed the test.

13. The judge then turned to the "exception" provided by paragraph EX.1. He set out the rule and, in paragraph 12, set out his findings and reasons which led him to find that there "insurmountable obstacles" to family life continuing outside the UK. He concluded that paragraph EX.1 applied. However, the judge did not allow the appeal on that basis. He would clearly have erred if he had done so, for the reasons set out in *Sabir* (supra). In paragraph 13 the judge reiterated that the appellant could not meet the immigration requirement of the Rules. There was no error of the kind identified in *Sabir* (supra).

14. The respondent considers the judge erred in what he did next. In identifying the public interest in maintaining refusal under these circumstances, the judge noted that the Rules exempted those in the UK unlawfully but not those, like the appellant, who were in the UK lawfully but with less than six months' leave. The judge set out at length his understanding of the correct approach to article 8 appeals where it was found the Rules could not be met. We see nothing in paragraph 14 which contains any error in the judge's self-direction.

15. In *R (Oludoyi & Ors) v SSHD (Article 8 – MM (Lebanon) and Nagre)* IJR [2014] UKUT 00539 (IAC), the Tribunal explained there is no 'threshold test':

> "20. There is nothing in Nagre, Gulshan or Shahzad that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the IRs and which could lead to a successful Article 8 claim. If, for example, there is some feature which has not been adequately considered under the IRs but which cannot on any view lead to the Article 8 claim succeeding (when the individual's circumstances are considered cumulatively), there is no need to go any further. This does not mean that a threshold or intermediate test is being applied. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance given must be read in context and not construed as if the judgments are pieces of legislation."

16. If the judge did apply a 'threshold test' in paragraph 15, then his error was not material. In any event, we incline to the view that all the judge was saying in that paragraph is that there were good reasons to consider article 8 outside the Rules and this was not a case in which the Rules provided a complete answer to the article 8 claim.

17. We do not agree that the judge failed to give adequate consideration to the public interest factors in section 117B of the Act. For ease of reference we set out the relevant sections here:

> "117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the

United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

18. We did not receive full submissions on the interpretation of this section which has only recently been enacted. However, it is right to note that the list of considerations contained in section 117B is not exhaustive and therefore the 'public interest' is not comprehensively defined by the section. On the other hand, by virtue of section 117A(2), it would be an error of law not to have regard (in particular) to the considerations set out in section 117B.

19. It would be a hopeless argument to suggest the judge did not have regard to subsections (1) to (4), which are applicable to this case. Paragraph 16 of his decision expressly refers to the substance of those considerations and the judge gives reasons for his assessment of the public interest. At the heart of this case lies a disagreement as to the appropriate weight to be given to the first consideration: the maintenance of effective immigration controls.

20. Ms Isherwood argued that the judge's assessment was flawed because of his application of paragraph EX.1. However, as we have already stated, we regard the judge as having dealt with the Rules correctly. He was also right to regard the outcome under the rules as his starting-point for his consideration outside the Rules.

21. We turn next to the criticisms made of the judge's factual findings. We regard the judge's findings as generous. But that does not mean they were not open to him to make on the evidence. The sponsor had made a witness statement explaining his sources of income which the judge was satisfied would bring the couple above the £18,600 threshold prescribed by Appendix FM. Implicitly the judge accepted that the requisite specified evidence would be available. Some supporting evidence was provided in the bundle. In relation to language, the judge reasoned the appellant would be able to learn it if she were allowed to live with her English-speaking husband. We note the test level is not a high one in any event. The judge appears also to have accepted that the sponsor suffers from depression even though this is not recorded in the GP's letter provided, which only confirms that he has type II diabetes.

22. An error of law has not been shown. The judge heard oral evidence from the appellant and the sponsor and he was entitled to make findings on the evidence he heard. His findings are not inconsistent with the evidence which was before him. It is an arid exercise to seek to re-open those matters now in the context of an article 8 appeal. The judge's decision, read as a whole, is replete with positive findings. In paragraph 12 he set out the matters which showed that family life could not continue in Mauritius, even though the sponsor was born there. In paragraph 16 he set out the matters which showed there was little utility in requiring the appellant to go back.

23. In terms of the judge's application of *Chikwamba* (supra), the test is plainly fact-sensitive. We regard the judge as having given adequate reasons for concluding the public interest in maintaining consistent immigration controls did not require the appellant to return to Mauritius to make an application for entry clearance. Lord Brown of Eaton-under-Heywood said that *"the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant."* The factors described in paragraph 16 of his decision show the judge had this test clearly in mind. We see no error in his approach.

24. The respondent argues that section 117B has now altered the position and the *Chikwamba* principle should not carry the same weight. We do not understand why that should be the case provided, all the considerations which had to be addressed were addressed, as happened here. The judge considered the issue of language but found the couple would be able to maintain themselves in any event. He did not give weight to a relationship formed while the appellant was in the UK unlawfully. He found the appellant had not used deception by entering as a visitor. He was entitled to find there was little utility in requiring the appellant to return given the likelihood she would be able to fulfill the entry clearance requirements in any event and given the disruption to current family life which that course would engender.

25. Ultimately, the judge was required to carry out a balancing exercise in order to ascertain whether the decision was a proportionate measure. To an extent that task has been dictated by section 117B, but we do not find the judge failed to make that

adjustment. We recall the words of Carnwath LJ, as he then was, in *Mukarkar v SSHD* [2006] EWCA Civ 1045 that,

> "40. Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

26. The judge did not make a material error of law and his decision allowing the appeal on article 8 grounds shall stand. We dismiss the appeal.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error on a point of law and his decision allowing the appeal on article 8 principles shall stand.

No anonymity direction has been made.

Signed **Date 16 December 2014**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal