Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19341/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 September 2015	**On 29 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HICHEM SAIDANI

Respondent

Representation:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr P Ward, James & Co Solicitors

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.

2. The appellant, a citizen of Algeria, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 10 April 2014 to refuse his application for leave to remain in the UK on the basis of his private and family life. First-tier Tribunal Judge Carroll allowed the appeal. The Secretary of State appeals with permission to this Tribunal.

3. The background to this appeal is that the appellant entered the UK as a visitor in November 2008. Following expiry of his visa in February 2009 he remained in the UK as an overstayer. On 21 June 2012 he submitted an application for leave to remain on

the basis of his private and family life. His case is that he began living with a British national in September 2011 and they married in June 2012. This application was refused on 5 November 2012 with no right of appeal. On 21 March 2014 he was served with a One Stop Notice and a Statement of Additional Grounds. The appellant and his wife have a child who was born in the UK on 23 July 2014.

4. The Secretary of State refused the application on 10 April 2014 on the basis that the appellant could not meet the eligibility requirements set out in E-LTRP.1.1 of Appendix FM because he had no valid leave to remain at the time of his application and he remained in the UK in breach of the immigration laws.

5. The First-tier Tribunal Judge took into account that the appellant and his wife have had a son who is a British citizen and found that the appellant satisfied the requirements of EX1 of Appendix FM in that he has a genuine and subsisting parental relationship with a British citizen child.

6. The Secretary of State appealed against that decision on the grounds that the Judge misdirected herself in relation to the provisions of Ex 1 in that she failed to engage with the second limb of the test which asks whether it would be reasonable to expect the child to leave the UK.

Error of Law

7. Section Ex of Appendix FM provides as follows;

> EX.1. This paragraph applies if
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> (bb) is in the UK;
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ; and
> (ii) it would not be reasonable to expect the child to leave the UK; or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

8. In considering Ex 1 at paragraph 8 of her determination the First-tier Tribunal Judge failed to consider Ex 1 (a) (ii). This is clearly an error of law. Mr Ward submitted that it is not a material error because the Secretary of State's policy in relation to this matter was before the First-tier Tribunal Judge and the policy would indicate that this appellant's British child should not be required to leave the UK. He submitted

that any Judge having proper regard to the policy would have reached the same decision as this Judge. However I do not accept that it is in any way obvious that the Judge had in mind the second part of Ex 1 in reaching her decision. The Judge has not given any consideration as to whether it would be reasonable for the child to leave the UK or for the appellant to return to Algeria with or without his wife and child for a temporary or permanent period. I therefore find that the Judge made a material error of law. As there is no challenge to the findings of fact they are preserved.

Remaking the decision

9. Mr Ward submitted no further evidence. The representatives agreed that there was no issue in terms of the suitability or other requirements of Appendix FM. The sole issue is the application of Ex 1 and whether consideration of this case outside the Immigration Rules is appropriate.

10. Mr Clarke submitted that the evidence before the Judge was that there was no problem in the appellant returning to Algeria and that the policy guidance covers temporary separation as there is no compulsion on the child to leave the UK whilst the appellant applies for entry clearance to return. He accepted that section 55 of the Borders, Citizenship and Immigration Act 2009 may require consideration of this appeal outside the Immigration Rules. He relied on the decision in EV Philippines & Others v SSHD [2014] EWCA Civ 874 and submitted that it is necessary to look at the situation on the ground. The child will be temporarily separated from the appellant and there is nothing to suggest that the application for entry clearance will not be successful. He submitted that the appellant conceded in oral evidence that there is no reason he cannot return to make an application. He submitted that section 1177B of the Nationality, Immigration and Asylum Act 2002 must be considered if looking at the case outside the Immigration Rules and the appellant's poor immigration history is clearly relevant. He relied on the case of R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) and submitted that the case indicates that an appellant would need to show that temporary removal would cause a 'significant' interference with family life.

11. Mr Ward submitted that at paragraph 8 of the decision the First-tier Tribunal Judge does not make a finding that the appellant can go back to Algeria, she simply noted his response to a question. He submitted that the appellant and his wife gave a number of reasons as to why they do not want to return to Algeria in their witness statements. These include the appellant's wife's employment responsibilities and the fact that the appellant cares for the child when his wife works and their relationships with other family members. He relied on the IDIs on Family migration which state that a British child should not be made to leave the EU save in cases involving criminality. He submitted that the appeal can be allowed within the Immigration Rules as Ex 1 has been met. He said that the Secretary of State has not given any undertaking in relation to entry clearance and it could not be assumed that entry clearance would be granted or that it would be granted quickly. He submitted that

the appellant has no criminal record, there is no evidence of fraud, the appellant made a proper application under the Immigration Rules. He submitted that the appeal can be allowed under the Immigration Rules or under Article 8 as it is not one of the rare cases where entry clearance is required.

12. Both representatives accepted that the respondent's guidance is silent on the issue of short term separation or removal where a British child is involved.

13. The evidence before me as to the appellant's circumstances in the UK is contained in the appellant's witness statement, his wife's witness statement and medical evidence in relation to the appellant's wife's mother. In his statement the appellant says that his wife works as a care assistant. He says that his wife is close to her mother, she is an only child, and she sees or speaks to her mother every day and helps to look after her. In her statement the appellant's wife says that she grew up as an only child with her mother and maternal grandparents. She says that her mother suffers from Chronic Obstructive Pulmonary Disease, severe asthma and depression and that she has been her mother's carer in the past and still cares for her. She says that she was born in England and has never been abroad. She says that she is close to her mother and could not leave her by herself in the UK. She also said that she attends her local Church of England Church weekly and she believes that she would be unable to practice her religion in Algeria.

14. The starting point in my assessment of this case is the Immigration Rules. The relevant provision for the purposes of this appeal is Section R-LTRP.1.1(d) of Appendix FM which provides that the requirements to be met for leave to remain as a partner are that the applicant must not fall for refusal under Section S-LTR and the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12 and ELTRP.2.1.-2.2 and paragraph EX.1 applies. No issue was taken before me in relation to the eligibility or suitability requirements of Appendix FM. I note that the appellant does not fall foul of E-LTRP.2.1 as he is not in the UK as a visitor or with leave to remain for a period of less than 6 months.

15. The only issue under the Immigration Rules is therefore whether Ex 1 applies. As set out above Ex 1 applies where there is a genuine and subsisting parental relationship with a British citizen child in the UK and it would not be reasonable to expect the child to leave the UK.

16. Mr Clarke did not submit that it would be reasonable to expect the appellant's child to leave the UK; instead he submitted that the appellant's child would not have to leave the UK because the appellant could leave the UK for a temporary period to apply for entry clearance to return to the UK. Whilst he did not concede that the appellant would be granted entry clearance he said that there was nothing to suggest that the appellant's application for entry clearance would not be successful. The Immigration Rules do not specifically address a temporary separation, nor do the IDIs produced by Mr Ward. This was considered by Upper Tribunal Judge Gill in the Judicial Review case of Chen and her assessment of this issue was summarised in the head note as follows;

"(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40."

17. Mr Clarke submitted that in the case of Chen the Tribunal set out a 2 stage test in the case of temporary removal as outlined by Upper Tribunal Judge Gill as follows;

> "39. In my judgement, 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 obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts."

18. However in the case of Chen there were no children so Upper Tribunal Judge Gill was not dealing with facts such as the facts in this case where there is a British citizen child. Also, it was accepted in Chen that the appellant could not demonstrate that Ex 1 applied for her as she could not show that there were 'insurmountable obstacles' to her family life continuing outside the UK. That is a different situation from the situation in this case where the appellant argues that Ex 1 applies.

19. Moreover, I note Mr Ward's submission that the Secretary of State has not given any undertaking that entry clearance would be granted in this case and that there is no evidence as to how long such an application would take. It must be the case that if the appellant leaves the UK to make an application for entry clearance and that application is not granted then any separation becomes longer and possibly permanent and the prospect of the child being forced to leave the UK becomes greater. There is no evidence before me as to the likely duration of any application for entry clearance or any appeal against a refusal. There is therefore uncertainty as to the potential period of separation and the extent of any potential interference with family life. In these circumstances it is difficult to draw a clear line between temporary and permanent separation and the prospects of the child being forced to leave the UK (and EU).

20. Also, in this case the decision can be resolved with reference to the Immigration Rules. It is not in dispute that the appellant meets the requirements of R-LTRP1.1 (d)

(i) and (ii). It is not in dispute that the appellant has a genuine and subsisting parental relationship with a British citizen child. Mr Clarke did not submit that it is reasonable to expect the child to leave the UK. The child is a British citizen and his mother is a British citizen. I note the IDIs which say that where a decision to refuse the application would require a parent to return to a country outside the EU 'the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent'. I accept that it is not reasonable to expect the child to leave the UK and the EU. As has been acknowledged above the Immigration Rules do not contemplate a temporary separation. In these circumstances the appellant meets the requirements of the Immigration Rules. There is therefore no need to go on to look at whether the case should be considered outside the Immigration Rules (as in Chen) and whether any temporary separation would be a disproportionate breach of the appellant's family lfie.

Conclusion

21. The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

22. I set it aside and remake it by making the same decision and allowing the appellant's appeal.

Signed Date: 28 September 2015

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the same reason as that set out by the First-tier Tribunal Judge, that is that the appellant's child was born since the respondent's decision.

Signed Date: 28 September 2015

Deputy Upper Tribunal Judge Grimes