IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33940/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 28th April 2015	**On 28th May 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OML
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Diwncyz, Home Office Presenting Officer
For the Respondent: Dr Mynott, Alpha Shindara Legal

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Ince made following a hearing at Bradford on 3rd November 2014.

Background

2. The claimant is a citizen of Nigeria born on 12th November 1970. She came to the UK with a Tier 4 student visa on 17th February 2010 and was subsequently granted leave

to remain on a Tier 1 Post-Study visa until 17th June 2014. The claimant and sponsor married in October 2014.

3. On 11th June 2014 she applied for leave to remain in the UK on the basis of her relationship. She was refused because she did not satisfy the requirements of the partner route of Appendix FM since she had only been cohabiting with her partner since 10th May 2014 and not for the period of two years as required by paragraph GEN.1.2. EX.1 did not apply because the application fell to be refused under the mandatory eligibility requirements of the Rules. The Secretary of State noted that the sponsor himself was only in the UK with discretionary leave to remain and not settled. Moreover, the claimed parental relationship with the sponsor's son did not fall within the definition of parental relationship under the Rules as the child's biological mother was still alive and in the UK. She concluded that there were no exceptional circumstances which would justify granting leave outside the Rules.

4. The sponsor had married his first wife in June 2003 and their son D, now aged 10, came to the UK more than 7 years ago. Following the divorce in November 2009 it was ordered that D reside with the sponsor. There is a prohibited steps order preventing D's removal from the UK without the permission of the court as well as a contact order in favour of his mother.

The Judge's Determination

5. The judge recorded that he was satisfied that this was a genuine relationship and marriage. The claimant could not satisfy the provisions of Appendix FM because the sponsor has only limited leave to remain, nor does she meet the requirements of paragraph 276ADE. Furthermore, the Secretary of State was correct to say that the claimant does not fall within the definition of parent in the Rules.

6. The judge took into account the requirements of Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. He said that, to the extent that she had always had limited leave to remain, it could be argued that the claimant's immigration status was precarious although at all times she did have leave, albeit not permanent. For the purposes of Section 117B, he did not consider that a parental relationship included that of stepparent but it was clear that the claimant had a relationship akin to that of a parent with D and in effect she was standing in the shoes of D's biological mother on a day-to-day basis. So far as the sponsor's discretionary leave was concerned, he said that this did not prevent the claimant being allowed to remain in the UK as his spouse for the same length of time as he and his son had been granted.

7. If she returned to Nigeria and made an application to return she would be exempt from the English language certificate and all the necessary documents in relation to the financial requirements of the Rules had been supplied. It appeared to him probable that she would meet the relevant requirements if she returned to Nigeria to make the application. He rejected the argument that the whole family could return to Nigeria together because of the prohibited steps order and said that the only arguable proposal was that the claimant returned to Nigeria by herself and make an application for a spouse visa there. He considered that the separation of the claimant from D would have a detrimental effect upon him. In any event it was clear that the

Secretary of State had not taken into account Section 55 when making her decision. Accordingly the decision was not in accordance with the law.

8. He concluded:

> "Taken together I consider that these factors cumulatively amount to exceptional circumstances that justify the Appellant's case being considered under the residual Article 8 provisions. I consider that it would be unjustifiably harsh for her to have to return to Nigeria just to make an application to return as the spouse of the Sponsor. It would be equally harsh on the Sponsor and particularly D to be deprived of her presence here in the UK."

9. In addressing the question of proportionality he said:

> "There is no factor really against the Appellant. Whilst it was the case that at the time of the application and of the decision she did not come within the Rules applicable to her case it is now arguable as she is the Sponsor's spouse that she does come within the Rules."

The Grounds of Application

10. The Secretary of State sought permission to appeal.

11. First, she argued that the judge had failed to adopt the correct approach in considering the sponsor's immigration status and had erred in concluding that the only arguable proposal was that the claimant return to Nigeria. The Secretary of State was effectively precluding from arguing that they should all return. Appendix FM clearly allows arguments to be made in respect of return notwithstanding a grant of discretionary leave to a family member which is reflected in jurisprudence (Osawemwenze, R (On the Application Of) v SSHD [2014] EWHC 1564 Admin).

12. Second, the judge had failed to take into account the immigration status and nationalities of both parties to the appeal and that cohabitation started a short time before the application was made. He had failed to properly consider the precarious nature of the relationship which was established when neither had any expectation that they would be allowed to remain in the UK, and had failed to take into account Section 117B(1).

13. Finally, in finding that the decision was not in accordance with the law there was no need to go any further - SC (Article 8 - in accordance with the law) Zimbabwe [2012] UKUT 56.

14. Permission to appeal was granted by Judge Pirotta on 23rd February 2015 for the reasons stated in the grounds.

Submissions

15. Mr Diwncyz relied on his grounds. He produced the very recent decision of SSHD v SS (Congo) & Ors [2015] EWCA Civ 387 although he was not in a position to make representations on it.

16. Dr Mynott submitted that it was wrong to say that the Secretary of State was precluded from requiring the sponsor to leave. The judge had explained why he could not reasonably be expected to do so because of the prohibited steps order and

had specifically addressed the argument put forward by the Presenting Officer at the hearing. Osawemwenze was a decision on its own facts when both parties had no leave at the time that the decision was mades and in any event was not a decision giving in-depth guidance to the proper application of Article 8.

17. The judge had set out all of the facts carefully and discussed the reasonableness of return. There was no real challenge in the grounds to the nature of the relationship and it was open to the judge to place weight upon it, given that neither party was here unlawfully. It was crystal-clear that the claimant could not succeed under the rules and obvious that the reference to meeting their requirements referred solely to the marriage rules. The judge was entitled to state that the refusal letter was not consistent with the IDI which envisages circumstances such as these where the claimant is performing a genuine parental role.

18. Finally the reference to SC Zimbabwe was a misreading of the case.

Findings and Conclusions

19. As Dr Mynott frankly acknowledged, the claimant does not meet the requirements of the rules.

20. She cannot succeed under the partner route both because she has not been living with the sponsor in a relationship akin to a marriage for the relevant period of time and, although the she has now married him, she cannot meet the eligibility requirements because he is neither a British citizen nor settled in the UK. She did not make an application for limited leave to remain as a parent, which is no doubt the reason for a lack of reference to Section 55 in the refusal letter.

21. As the judge said, the case could only ever succeed under the exceptional circumstances provisions, as he put it, and/or Article 8.

22. So far as the grounds are concerned there is no merit in the contention that the Secretary of State was precluded from arguing that the family should return as a unit. The judge considered that submission specifically in paragraph 47 and rejected it because it could not be assumed that the biological mother would give permission for the child to go to Nigeria nor that the family court would necessarily make a decision in his favour.

23. Nor is it arguable that the judge failed to take into account the fact that the sponsor's status was precarious. The claimant does not satisfy the requirements of Section 117B(1) of the 2002 Act as amended because the sponsor is not a qualifying partner. However it is quite clear that the basis for the decision was not the relationship with the sponsor but that the claimant's relationship with D was akin to that of a parent.

24. In the relevant IDI to Appendix FM 1.0 Family Life (as a Partner or Parent) at 11.2 it states that the decision-maker must consider the following factors where relevant.

25. At paragraph 11.2.1. Is there a genuine and subsisting parental relationship?:

> "Where the application is being considered under paragraph EX.1.(a) in respect of the ten year partner or parent routes, the decision-maker must decide whether the applicant has a genuine and subsisting parental relationship with the child. This will

> be particularly relevant to cases where the child is the child of the applicant's partner, or where the parent is not living with the child.
>
> The phrase goes beyond the strict legal definition of parent, reflected in the definition of parent in paragraph 6 of the Immigration Rules, to encompass situations in which the applicant is playing a genuinely parental role in a child's life, whether that is recognised as a matter of law or not.
>
> This means that an applicant living with a child of their partner and taking a stepparent role in the child's life could have a genuine and subsisting parental relationship with them, even if they had not formally adopted the child, but only if the other biological parent played no part in the child's life, or there was extremely limited contact between the child and the other biological parent. But in a case where the other biological parent continued to maintain a close relationship with the child, even if they were not living with them, a new partner of the other biological parent could not normally have a role equating to a genuine and subsisting parental relationship with the child."

26. The judge recorded that D last saw his mother in 2012 although she was supposed to have fortnightly access to him when he spent weekends with her. They now just spoke to each other on the telephone whenever D liked, varying from weekly to every three to four months.

27. A situation in which a child has not seen his mother for two and a half years as at the date of the hearing, and had irregular telephone contact with her could rationally amount to extremely limited contact within the meaning of the IDIs. There is nothing perverse in the judge placing D's welfare at the heart of his conclusions, and little force in any of the specific challenges to this determination.

28. The real challenge behind these grounds is to the rationality of the judge's decision and whether he was entitled to allow the appeal outside the Immigration Rules at all.

29. In SSHD v SS the Court of Appeal considered the basic legal framework to both the leave to enter and leave to remain Rules as set out in Appendix FM and the circumstances in which leave to remain outside the Immigration Rules should be granted. It rejected the general proposition that leave outside the Rules should only be granted in exceptional cases but stated:

> "However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for granting LTR or LTE outside the Rules should indeed be a test of exceptionality."

30. If family life could be carried on elsewhere

> "… it is unlikely that a direct and immediate link will exist between the measures requested by an applicant and his family … such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant leave to enter; see also Gül v Switzerland, [42]."

31. The Court concluded that, so far as leave to enter was concerned, the appropriate general formulation would be that the applicant had to show that "compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave." The formulation, they said, was a fairly demanding test but not as demanding as the exceptionality or very compelling circumstances test

applicable in the special contexts explained in MF (Nigeria) (precariousness of family relationship and deportation of foreigners convicted of serious crimes).

32. Although the judge did not have the benefit of the decision in SS, his decision is not inconsistent with what the Court of Appeal said in that case. Given the finding that family life could not be conducted elsewhere because of the prohibited steps order, it is not a decision which it was not open to the judge to reach.

33. The last reference in the grounds to SC is misconceived. In that case the Upper Tribunal said:

> "We recognise that there are cases where a decision to refuse an extension of stay or remove a person may be so contrary to a requirement contained in an established policy or practice as to be not in accordance with the law. In such a case the analysis does not move on to justification for Article 8 purposes and the decision must be remade in accordance with the law, either by the Secretary of State or the judge. However, in our judgment this was not such a case."

34. That is exactly the situation here.

Notice of Decision

The decision of the original judge stands. The claimant's appeal is allowed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Taylor