Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45885/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 April 2015	**On 27 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMAD REZAH KHODABOCUS
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms N Bustani, Counsel

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were

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known before the First-tier Tribunal with the Secretary of State referred to as "the respondent" and Mr Khodabocus as "the appellant".

2. No application for anonymity has been made in these proceedings and no grounds for such an order were put before me today.

3. The appellant is a citizen of Mauritius born on 6 January 1978.

4. The appellant arrived in the United Kingdom on 7 August 2006 as a visitor for six months sponsored by his current wife with whom he has lived since his arrival into the United Kingdom. His wife is a naturalised British citizen and the appellant and his wife underwent a "Nikah" marriage on 14 September 2006 at the Central Mosque of Brent. They were subsequently married in a civil marriage at Haringey Registry Office on 14 May 2012.

5. On 17 May 2012 the appellant's solicitors applied on his behalf for leave to remain in the United Kingdom as a dependent spouse. The application was refused on 28 January 2013 with no right of appeal. Thereafter judicial review proceedings were issued and subsequently withdrawn on the basis that the respondent had agreed to reconsider the application and make an immigration decision which would attract a right of appeal. Accordingly a further decision dated 24 October 2013 was made by the respondent which again refused the appellant's application for leave to remain in the United Kingdom. The refusal letter of 24 October 2013 stated that the application was reconsidered under Article 8 of the European Convention on Human Rights taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009 and the Immigration Rules put in place on 9 July 2012 under Appendix FM. The appellant appealed against the respondent's decision and following a hearing on 27 June 2014 in a decision promulgated on 3 November 2014 Judge of the First-tier Tribunal I Ross allowed the appellant's appeal.

6. At that hearing it was accepted by both parties that the application ought to have been considered only under the Immigration Rules in force as at 8 July 2012 and under Article 8 of the European Convention on Human Rights without reference to Appendix FM, given that the application was made on 17 May 2012 prior to the introduction of the new Immigration Rules on 9 July 2012. It was accepted that the appellant could not succeed under the Immigration Rules then in force as he had no leave to remain in the United Kingdom at the time of the application. His wife gave evidence in support of his appeal and her undisputed evidence was to the effect that she is a naturalised British citizen who has lived in the United Kingdom since 2002 and works as an assistant management accountant earning £31,000 per year. She was, at the date of hearing, undergoing fertility treatment to have children. The nub of the judge's findings and reasoning can be gleaned from paragraphs 14, 15 and 16 of his decision which state:-

> "14. In deciding whether the interference is proportionate, I take into account the authority of Beoku-Betts v SSHD [2008] UKHL 39 and conclude that the direct impact on other family members can be considered in an appeal

under Article 8 against an immigration decision. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others with whom that family life is enjoyed. In considering the impact on the appellant's wife, I accept that the decision will result in her living apart from the appellant whilst her application is progressed from Mauritius since I find that there to be compelling reasons why she could not join the appellant in Mauritius, those being her life as British Citizen and her job and her fertility treatment. I find that the effect on her of the appellant having to return to Mauritius is sufficiently serious to outweigh the public interest to maintain effective immigration control.

15. I have also taken into account Chikwamba v SSHD [2008] UKHL 40 and appreciate that it is not necessarily unlawful to require an Appellant who relied on a human rights ground to return to their country of origin to make an application for entry clearance. The rationale behind the Home Office policy of routinely requiring Appellants to apply from abroad was to deter others from entering without entry clearance. This could be a legitimate objective and in certain cases could be the right course of action, but only when relevant considerations in the particular case made it so. In an Article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be a highly relevant factor in the assessment of proportionality. Only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad. Whilst there are no children involved in this appeal, I take into account that the appellant and his wife have been together for some 8 years.

16. I have carefully considered the Upper Tribunal Judgment of: Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC).

"The significance of Chikwamba, however, is to make plain that, where the only matter weighing on the respondent's side of the balance is the public policy of requiring a person to apply under the rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance".

I find that the factors present on the side of the appellant and his wife as set out above, outweigh the only matter on the respondent's side which is the requirement to apply for leave from abroad."

7. Permission to appeal was granted by Judge of the First-tier Tribunal P J M Hollingworth on 17 December 2014. His ground for so doing was:-

"An arguable error of law has arisen in relation to the extent of the application of the criteria set out in Section 117."

8. Thus the appeal came before me.

9. Mr Tufan relied on the two grounds seeking permission to appeal. The first asserts that the judge materially misdirected himself in carrying out the balancing exercise following the authority of **<u>Hayat</u> (Nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)**. The appellant was an overstayer and unable to comply with the relevant provisions of the Immigration Rules but moreover Part 5A of the Nationality, Immigration and Asylum Act 2002 should have been considered by the judge and had regard to. Secondly Mr Tufan submitted that the decision to refuse the appellant's application and the requirement for him to make a proper application for entry clearance does not represent, as found by the judge, a disproportionate breach with rights protected by Article 8.

10. Ms Bustani argued that permission to appeal had only have been granted in respect of the first of the first of the two grounds and that from 28 July 2014 Section 19 of the Immigration Act 2014 is brought into force amending the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains Section 117. As the decision had been written by Judge Ross on 30 June 2014 there is a question mark as to whether he had in any event erred in relation to Section 117. The authority of **<u>Chikwamba v SSHD</u> [2008] UKHL 40** was in itself fact sensitive. There is no error of law within Judge Ross's decision as he has looked at all competing factors on either side of the balance when giving consideration to Article 8. The fact that the appellant is an overstayer is but one factor alone. The respondent is effectively endeavouring to secure a "second bite of the cherry" and there is within the decision no error.

11. The first thing to note is the applicable dates here. The hearing took place at Taylor House on 27 June 2014 and the judge dated his decision 30 June 2014. However, for reasons that the Tribunal file does not disclose it was not until 3 November of that year that the decision was promulgated.

12. The statutory provisions inserted by Section 19 of the Immigration Act 2014 applied to all appeals heard on or after 28 July 2014 irrespective of when the application or immigration decision was made.

13. As this appeal was heard on 27 June 2014 and prior to 28 July 2014 the judge can hardly be criticised for giving no weight to the issues referred to within Part 5A and particularly Section 117B(1).

14. Whilst the second ground was not subject to permission being granted it was nonetheless put forward by the respondent and not overtly refused in the grant of permission of Judge P J M Hollingworth. I have therefore considered it. In short I find this amounts to a dispute with the judge's reasoning and findings which are legally adequate and which take proper account of the material that fell to be considered. There certainly appears to be no omission in relation to any of the factors requiring weighing in the balance when looking at the proportionality test within Article 8. I appreciate that it can be argued the judge's decision was a generous one but that in itself does not mean that he has materially erred.

15. The judge was entitled to find that the appellant's Article 8 rights would be breached by being returned to his country of origin and having weighed everything in the balance I conclude the second of the respondent's appeal grounds amounts to a disagreement with findings and reasonings which, as I say, are legally adequate and which take proper account of the material which fell to be considered.

Conclusions

16. The making of the decision by the First-tier Tribunal did not involve the making of an error on a point of law.

17. I do not set aside the decision.

Signed   Date 24 April 2015.

Deputy Upper Tribunal Judge Appleyard