IAC-TH-WYL-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/09914/2014
OA/10184/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19 November 2015

Decision & Reasons Promulgated
On 2 December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MARY JOY ANCHETA – FIRST APPELLANT
MASTER R A – SECOND APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Slatter of Counsel
For the Respondent: Ms Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are both nationals of the Philippines. They are mother and son whose dates of birth respectively are 31 January 1989 and 29 January 2010.

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2. They appealed against the respondent's decision to refuse them entry clearance as the spouse and child of Mr Remigo Ancheta, which appeal was allowed by Judge Lal (the judge) in a decision promulgated on 24 June 2015.

3. The grounds submit that the judge materially erred in law by misapplying the case law. He recorded at [14] of the decision the representatives' submissions with regard to **SS (Congo) [2015] EWCA Civ 387** but misapplied the same. The case law stated the positive obligation under Article 8 at [38] of **SS** but at [39] it discussed leave to enter the UK and reaffirmed that *"Article 8 imposes no general obligation on a State to facilitate the choice made by a married couple to reside in it"*. [39](ii) continued with:

> "In deciding whether to grant LTE to a family member outside the United Kingdom, the State authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interests identified in Article 8(2) of 'the economic wellbeing of the country' and 'the protection of the rights and freedoms of others' (tax payers and members of society generally). A court will be slow to find an implied positive obligation which would involve imposing on the State significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the State in the public interest, a matter which usually calls for consideration under democratic procedures".

4. **SS Congo** also took into account a child applicant at [39](iv) in acknowledging that a child was not a trump card but was a relevant factor in assessing the fair balance between the individual and the community. The paragraph continues:

> "The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind."

5. At [44] the case law reaffirmed that the starting point in the Immigration Rules was:

> "The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of public interest given expression in those Rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provision of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (see **Nagre**, para. [30]), then in considering that case the individual interest of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8".

6. The respondent submitted that in not applying the case law correctly the judge failed to have regard to material matters, namely the public interest. In **Agyarko [2015] EWCA Civ 440** it was stated at [35]:

> "... Under Appendix FM, detailed and demanding requirements have to be satisfied where an application for leave to enter is made by the foreign spouse of a British citizen, including demonstrating that the person sponsoring the application has current gross annual income of at least £18,600 p.a. supported by specified forms of evidence as set out in Appendix FM-SE: for discussion, see **SS Congo** ..."

7. Also, at [25] the judgment reads:

> "The mere fact that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to continue their family life there – could not constitute insurmountable obstacles to his doing so."

8. The respondent further submitted that the judge did not have due regard to the respondent's position and the public interest which the case law confirmed, that weight needed to be attached to it.

9. At [4] of the decision it was accepted that the sponsor could not meet the required level of income by his own income or cash savings. Applying the case law correctly, the judge materially erred in law in his findings at [20] that the appellant had potential for making up the shortfall in future earnings.

10. It was submitted that applying the case law, the sponsor being 72 years of age and in employment, were not compelling factors. The judge was required to consider whether the sponsor could relocate to the Philippines with the appellants. Only limited weight should be given to the sponsor's desire to re-establish himself with his family in the United Kingdom. It was the sponsor's own evidence that he chose to visit the appellants for periods of three months at a time. It was submitted that this showed that family life with a minor child could be enjoyed in the Philippines. It was not open to the appellants and sponsor to simply choose where they wanted to enjoy their family life without the public interest being considered.

11. Judge Astle granted permission to appeal on 14 September 2005. She recited that the grounds argued that the judge misapplied **SS Congo** in that Article 8 did not impose a general obligation on a State to facilitate the choice made by a married couple to reside in it. Further, that the judge failed to have proper regard to the public interest. The sponsor's age and employment were not compelling factors. Possible relocation of the sponsor was a relevant factor. Judge Astle considered it was arguable that the judge erred in law by not giving sufficient regard to the public interest and the inability of the appellants to satisfy the Rules.

12. The Rule 24 response submitted that no arguable error of law was disclosed in the permission application. The response relied upon **MR (Permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC)**, **SS**, **R (Daly) [2001] UKHL 26** at [27] and **Agyarko**.

13. The judge's analysis on proportionality could not be interfered with except on a traditional public law basis. **R (Daly)**.

14. Judge Astle's grant of permission suggested that the judge made an arguable error *"... by not giving sufficient regard to the public interest and the inability of the appellants to satisfy the Rules."* Judge Astle considered that the judge misapplied **SS** because he did not have due regard to the public interest that the case law confirmed needed to be taken into account.

15. The judge directed himself with regard to **SS** at [16] of his decision and applied that approach to the facts by identifying four compelling circumstances. The judge did give sufficient weight to the public interest.

16. The grounds incorrectly cited [39](ii) rather than (iii) of **SS**, but took issue with what the judge said at [20] in finding that there would be no additional recourse to public funds. The respondent's ground did not challenge that finding of fact on the basis that it was **Wednesbury** unreasonable nor did it contend that the judge was not entitled to consider and take into account the question of whether there would be additional recourse to public funds caused by the arrival of the appellants. The question under paragraph 297(v) of the Rules, which had not been addressed by the Entry Clearance Officer, was whether the respondent child could be adequately maintained and his mother's future earning potential was relevant to that issue. Of more significance perhaps to the respondent's ground by reference to [39](iii) **SS** was the absence of any challenge to the judge's finding of an implied positive obligation on the respondent under Article 8 in terms of respect for the family life between the appellants and the sponsor.

17. The judge gave legally adequate reasons for finding that there would be severe hardship for the sponsor in relocating to the Philippines. **Agyarko** was not authority for the proposition that the judge was not entitled to find that there were insurmountable obstacles to the sponsor relocating. **Agyarko** at [24] observed that the sponsor's relocation was a factor to be taken into account in the context of making a wider Article 8 assessment outside the Rules. The fact that the respondent referred to the sponsor's evidence of spending time with the appellants in the Philippines and said that showed that family life could be enjoyed there, amounted to nothing more than a disagreement with the finding made by the judge. The judge took into account the sponsor's age, nationality, length of residence in the United Kingdom, his private/family life ties to the United Kingdom with his other children, his employment in the United Kingdom and inability to obtain meaningful employment in the Philippines.

Submissions on Error of Law

18. Ms Brocklesby-Weller relied upon the grounds. Blake J held in **MM (Lebanon) [2013] EWHC 1900 (Admin)** that proper weight should be given to the legitimate public interest considerations which underlay the formulation of the Immigration Rules. The judge's approach was not consistent with **MM** or **SS** and my attention was drawn to [39]-]40] and [44] of **SS**. The appellants could not meet the

requirements of the Immigration Rules. The only "*compelling circumstances*" the judge identified were set out at [18] of his decision.

19. Mr Slatter relied upon the Rule 24 response. He said that the judge had identified and set out compelling circumstances. He had reached his decision following **SS**. He had referred to public interest considerations.

Conclusion on Error of Law

20. The judge explained why the appellants did not meet the Immigration Rules at [4] of his decision. Income and capital were deficient. It might have been that the income shortfall could be made up from savings but the capital shortfall was still in excess of £10,000.

21. At [35] of **SS**, the Court of Appeal held that the correct legal approach in terms of "*exceptionality*" and "*very compelling reasons*" lay between those extremes because the position with regard to LTE was different from the position with regard to LTR. See the analysis at [32]–[38] of **SS**.

22. See in particular [39] with regard to Article 8 in relation to an application for LTE on the basis of family life with the person here:

> "In our judgment, the position under Article 8 in relation to an application for LTE on the basis of family life with a person already in the United Kingdom is as follows:
>
> (i) A person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue or develop existing family life: See e.g. **Gul v Switzerland [1996] 22 EHRR 93** and **Sen v Netherlands [2001] 36 EHRR 7**. Article 8 does not confer an automatic right of entry, however. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it: **R (Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621**, [42]; **Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471**, [68]; **Gul v Switzerland**, [38]. The state is entitled to control immigration: **Huang** [18].
>
> (ii) The approach to identifying positive obligations under Article 8(1) draws on Article 8(2) by analogy, but is not identical with analysis under Article 8(2): see, in the immigration context, **Abdulaziz, Cabales and Balkandali** [67]–[68]; **Gul v Switzerland**, [38]; and **Sen v Netherlands** [31]–[32]. See also the general guidance on the applicable principles given by the Grand Chamber of the ECTHR in **Draon v France [2006] 42 ERRR 40** at [105]–[108], summarising the effect of the leading authorities ...
>
> (iii) In deciding whether to grant LTE to a family member outside the United Kingdom, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interest identified in Article 8(2) of "the economic well-being of the country" and "the protection of the rights and freedoms of others" (tax payers and

members of society generally). A court will be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the state in the public interest, a matter which usually calls for consideration under democratic procedures.

(iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child [1989]: see in **Re E (Children) (Abduction: Custody appeal) [2011] UKSC 27; [2012] 1 AC 144** at [26]. However the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see in **Re E (Children)** at [12] and **ZH (Tanzania) [2011] UKSC 4; [2011] 2 AC 166** at [25] (under Article 3(1) of the UN Convention on the Rights of the Child, the interests of the child are a primary consideration – i.e. an important matter – not the primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tampering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

(v) If family life can 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 (**Draon** [106]; **Botta v Italy [1998] 26 EHRR 241**, [35]), so as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also **Gul v Switzerland**, [42].

23. I drew the advocates' attention to **Sunassee [2005] EWHC 1604 (Admin)** which gave a helpful analysis of **SS** and sought to simplify the complex requirements under the Rules by suggesting that whether circumstances were "*compelling*" or "*exceptional*" was not a matter of substance. Rather, they must be relevant, weighty and not fully provided for within the Rules. That is, there must be a "*gap*", not covered by the Rules. Whilst in practice, those gap issues were likely to be both compelling and exceptional, that was not a legal requirement.

24. The judge referred to the public interest but in my view, he erred because he failed to carry out any analysis in that regard. The judge said at [18] that he had considered the matter "*... with some care*", however, I find that his analysis that compelling circumstances existed, was inadequate. The compelling circumstances identified by the judge were:

- Age of the sponsor – 72 years of age.
- The sponsor's nationality – he is British.

- The duration of the sponsor's life in the United Kingdom – he has lived here for over 40 years.
- The sponsor has five adult children in the United Kingdom and a number of grandchildren. They are all currently estranged from the sponsor because of the sponsor's marriage to the first appellant, however, the sponsor hopes for a reconciliation.
- The sponsor still continues to work, albeit part-time in the United Kingdom and would be unable to obtain any meaningful employment in the Philippines.
- The arrival of the appellants would not cause any additional recourse to public funds and they could and would be adequately maintained and accommodated here. Further, the first appellant has a tailoring qualification such that she has future earning potential in the United Kingdom which could make up the shortfall between income and capital and the requirements of the Rules.
- It would be in the best interests of the second appellant to be with both parents.

25. In reaching those findings, the judge carried out either no analysis, or an inadequate analysis, of the public interest considerations. His finding as compelling circumstances that the appellants would not cause any additional recourse to public funds, they would be adequately maintained and accommodated and the first appellant had future earning potential, ignored the fact that they could not meet the requirements of the Rules.

26. The judge failed to explain why it was that the sponsor could not relocate to the Philippines. The evidence was that he had been returning there annually for three months of each year.

27. There was no explanation as to why the sponsor would be unable to obtain any meaningful employment on return to the Philippines because of his age, when he had been able to obtain employment in the United Kingdom, such skills which he might well be able to exploit on return to the Philippines. In any event, **Agyarko** was authority for the proposition that merely because the sponsor had lived in the United Kingdom for a considerable time and had a part-time job here such that he might find it difficult and might be reluctant to relocate to the Philippines to continue family life there, could not constitute insurmountable obstacles to his doing so. I do accept that **Agyarko** referred to leave to remain and not leave to enter, however, in these particular circumstances, I do not accept that anything turns on the difference in wording in the Immigration Rules. The circumstances are slightly different. In **Agyarko**, the sponsor had lived in the United Kingdom all his life, whereas this particular sponsor, whilst living here a considerable time, has not lived here all his life and is only working on a part-time basis.

28. Both with regard to the substantive appeal in terms of the Rules and with regard to S.117B, I find the judge erred in failing to take account of the public interest considerations applicable and in failing to carry out or carrying out an inadequate analysis with regard to the same.

29. I set aside the decision of the judge and proceed to re-make the decision.

30. I take into account the best interests of the second appellant who as of the date of the hearing before me is 5 years of age, his date of birth being 29 January 2010. The Supreme Court in **ZH (Tanzania) v SSHD [2011] UKSC 4**, emphasised that the best interests of a child need to be considered as a separate and distinct aspect. In **EA (Article 8 – Best interests of the child) Nigeria [2011] UKUT 315** it was said that the correct starting point in considering the welfare and best interests of a young child would be that it was in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Absent other factors, the reason why a period of substantial residence as a child might become a weighty consideration in the balance of competing considerations, is that in the course of such time, roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. It was emphasised that the degree to which elements of private life are forged and therefore the weight to be given to the passage of time would depend upon the facts of each case. It was concluded that long residence of a child likely to have formed ties outside the family, is likely to have a greater impact on his or her well-being. In **MK (Best interests of child) [2011] UKUT 00475** and in **AJ (India) [2011] EWCA Civ 1191,** it was emphasised that an overall assessment was important, keeping the best interests of the child in mind throughout as a primary consideration.

31. I do accept that the best interests of a child generally are that he be brought up by both parents in the same household. Nevertheless, family life has been established and has continued since the birth of the second appellant with the sponsor visiting for three months annually. There is contact between the appellants and the sponsor in the interim by various means. The appellants are supported by the sponsor from the United Kingdom. The second appellant aged five has known no other life than living with his mother, being supported from the United Kingdom by his father and his father visiting for three months of every year.

32. I find family life can continue as hitherto, or alternatively, the sponsor can relocate to the Philippines. I do not accept that the matters I have set out above at [24] are such as to amount to compelling circumstances preventing such relocation. I do not accept that the sponsor's age, (he is 72), British nationality or the fact that he has lived here for 40 years is such as to make the respondent's decision disproportionate. I bear in mind in that assessment that the sponsor was originally from the Philippines and returns there annually for a considerable time. The parties cannot choose where it is in the world they wish to reside. See **SS** at [39](i).

33. I do not accept that the fact that the sponsor has a family here from whom he is estranged but with whom he hopes to have a reconciliation, makes the respondent's decision disproportionate.

34. I find the sponsor can seek work if he wishes in the Philippines. See what I have said in that regard and with reference to **Agyarko** at [27] above. The sponsor has not lived

here all his life, he has had significant annual residence in the Philippines and is only working here on a part-time basis for a proportion of the year.

35. I am also required to give consideration to the aspects specified in S.117 of the 2002 Act as amended by the Immigration Act 2014. There is an overlap between the Rules and S.117. Relevant factors under S.117 are as follows:

36. S.117B(3). I am required to give consideration as a factor relevant to the public interest, whether the appellants are financially independent. It is significant in that regard that they do not meet the financial requirements of the Rules. See **SS** at [39](iii) at [22] above. I do not accept that it is any answer to claim that the arrival of the appellants would not cause any additional recourse to public funds, that they could and would be adequately maintained and accommodated and that the first appellant has the hope of future earnings.

37. I bear in mind S.117B(5) that little weight should be given to life established when immigration status was precarious. See **SS** at [37] which discusses marriage and family life to a foreign national when that person has no right to come here. I find these are issues which the sponsor and first appellant considered or should have considered at the time they entered into their relationship.

38. The appellants do not meet the requirements of the Immigration Rules such that I have considered their circumstances in terms of **SS** and **Sunassee**, described as the "*gap*" issues at [36] of **Sunassee**. I find there are no relevant, weighty matters which are not fully provided for within the Rules. If there are then I find the respondent's decision to be proportionate, for the reasons I have set out above.

39. For the reasons I have given, I set aside the judge's decision and remake the same. The appellants' appeals are dismissed under the Rules and on Human Rights grounds.

Notice of Decision

40. Appeals dismissed.

Anonymity direction not made.

Signed Dated: 24 November 2015

Deputy Upper Tribunal Judge Peart