IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50224/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 10 February 2016

Decision & Reasons Promulgated
On 8 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SHUMMUA SHILIH LYONS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented
For the Respondent: Mr. D. Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hussain promulgated on 30 April 2015 in which he dismissed the Appellant's appeal against the Respondent's decision to remove her from the United Kingdom.

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2. Permission to appeal was granted as follows:

   "I am however concerned that the First-tier Tribunal may have conflated the free-standing Article 8 test undertaken by Judge Grimmett with the "reasonableness" test contained in both Appendix FM, EX.1 and paragraph 276ADE in respect of the child (see paragraph 26 of the determination, where the First-tier Tribunal relied on the determination of Judge Grimmett when assessing the reasonableness of the child's removal). In light of the authorities of **MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)** and **Bossade (ss.117A-D- interrelationship with Rules) [2015] UKUT 00415 (IAC)** it is arguable that consideration of the reasonableness of the child leaving the United Kingdom should focus solely on the consequences on the child and not take into account more general Article 8 considerations."

3. The Appellant was not represented. I explained the procedure of the hearing to her and asked her to let me know if she did not understand anything. Mr. Mills assisted by expanding on his submissions. The Appellant stated that she wished to rely on the grounds which she had drafted to the First-tier Tribunal when seeking permission to appeal, and also those in the application for permission to appeal to the Upper Tribunal. Following Mr. Mills' submissions, she made additional submissions which I have set out below. At the end of the hearing I reserved my decision which I set out below with my reasons.

Submissions

4. The Appellant relied on the grounds of appeal. Mr. Mills submitted that the determination of Judge Grimmett promulgated in January 2012 was a decision made under Article 8, as it was prior to the commencement of Appendix FM, paragraph EX.1 and paragraph 276ADE the immigration rules. He submitted that the issue was whether the test which had been applied by Judge Grimmett in 2012 when conducting a proportionality assessment under Article 8 was the same test as that which should be applied in 2015 under the immigration rules. I was referred to the cases of MAB, KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC), and AB (para 399(a)) Algeria [2015] UKUT 00657 (IAC). He submitted that there was a difference of opinion in the Upper Tribunal. When permission was granted on 11 September 2015 the case of KMO had not yet been promulgated. The Respondent's position was that KMO should be followed.

5. He submitted that the case of MAB held that the question of undue harshness should relate only to the child and should not be a wider balancing exercise. The effect on the child and her best interests should be considered and no more. If MAB was correct then the First-tier Tribunal had to do more than rely on the decision of Judge Grimmett with reference to Devaseelan.

6. However the Respondent's position was that, following KMO, consideration under the immigration rule (in that case paragraph 399, but by analogy EX.1 and 276ADE), should be by way of a balancing exercise. What was unreasonable in all the

circumstances should be considered, including public interest issues arising from the Appellant's criminality. He submitted that the case of AB had preferred KMO, and that Bossade did not address the point. If KMO and AB were correct, the judge had done enough by looking back to the previous decision of Judge Grimmett. The question under the immigration rules was whether or not it was unreasonable, and Judge Grimmett had considered this in his determination in 2012.

7. The immigration rules had come into effect in between the decision of Judge Grimmett and the decision under appeal. He accepted that the judge needed to acknowledge the passage of time since the previous decision. However the judge had done so, and he had been entitled to find that the passage of time did not tip the balance in favour of the Appellant and her daughter. I was referred to paragraphs [23] and [24] of the decision.

8. In response the Appellant submitted that the decision of Judge Grimmett had been made before the new rules came into force in July 2012. At the date of the decision of Judge Grimmett the Appellant's daughter was only 5 ½ years old. The Appellant had never had a custodial sentence but had only done community service. She submitted that the application should be based on her daughter, who would be 10 years old in three days' time and entitled to be naturalised as a British citizen. She was in full-time education and it would be unfair to ask her to leave the United Kingdom to go to a place that she did not know. Her daughter should be the primary consideration. She submitted that the First-tier Tribunal has taken as a starting point the decision of Judge Grimmett, which was when the Appellant's daughter was only five years old. He had not considered the evidence before him but had only relied on the earlier decision.

Error of law

9. I have carefully considered the case law of MAB and KMO. As stated in AB, it is clear that it is not possible to follow both decisions given the clear conflict between MAB and KMO.

10. The headnote to KMO states:

"The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children

or partner of the foreign criminal being deported is inordinately or excessively harsh."

11. When permission was granted, KMO had not been decided. The headnote to MAB, to which Upper Tribunal Judge Blum referred when granting permission, states:

"The phrase "unduly harsh" in paragraph 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned."

12. It was submitted by Mr. Mills that, by analogy with KMO, when considering whether it was "reasonable" to expect the Appellant's daughter to leave the United Kingdom, consideration was required of the broader factors under Article 8. If this was the case, the judge was entitled to rely on the previous findings of Judge Grimmett.

13. I have carefully considered the reasoning given in KMO for departing from the approach advocated in MAB. I prefer the reasoning set out in KMO to that set out in MAB, for the reasons set out in KMO.

14. I therefore find that, when considering the reasonableness of the Appellant's daughter leaving the United Kingdom for the purposes of paragraph EX.1 of Appendix FM, more general considerations should be taken into account. It should be more than an assessment of the reasonableness of the child leaving the United Kingdom by reference only to the consequences for that child. Following KMO, it is necessary to take into account wider considerations under Article 8, i.e. what is reasonable in all the circumstances, rather than what is reasonable for that child as a stand alone assessment.

15. Therefore, given that Judge Grimmett in January 2012 carried out an assessment of the proportionality factors under Article 8, the First-tier Tribunal judge was entitled, following Devaseelan, to rely on those findings for the purposes of establishing whether or not it was reasonable to expect the Appellant's daughter to leave the United Kingdom for the purposes of paragraph EX.1(a)(ii) (which considerations would be the same under paragraph 276ADE(1)(iv)).

16. It was acknowledged by Mr. Mills that the assessment of what was reasonable had to take into account the passage of time since the decision of Judge Grimmett. Paragraphs [23] and [24] state:

"Insofar as family relationships were concerned, the appellant confirmed that there had been no change since IJ Grimmett's decision. The only material change since that time was that the Appellant's daughter was now older. This was relevant to the consideration of appendix FM EX.1 of the immigration rules introduced in July 2012.

This states that an exception can be made where the applicant has a genuine and subsisting parental relationship with a child who is under the age of 18, is in the UK and has lived in the UK continuously for at least 7 years immediately preceding the date of application and that it would not be reasonable to expect the child to leave the UK.

Whilst this is a new requirement not previously before IJ Grimmett, the issues arising were nevertheless considered by him under his article 8 assessment. His analysis and assessment still applies and is not materially affected by the fact that the appellant's daughter has, since his decision, now been living in the UK continuously for at least 7 years whereas at the date of appeal, she had only been 5 years and 9 months old."

17. It is clear from these paragraphs that the judge was aware of the passage of time. He took into account that the Appellant's daughter was now over the age of seven and refers to the exception under paragraph EX.1 of Appendix FM. However, he finds that the passage of time does not materially affect the reasoning of Judge Grimmett, a finding which was open to him.

18. At paragraph [26] the judge states:

"All the issues including the appellant's daughter's education now raised by the appellant in connection with the welfare and best interests of the appellant's daughter were therefore fully considered by IJ Grimmett. In the circumstances, it would not be unreasonable to expect the appellant's daughter to leave the UK with the appellant, in line with the findings made by IJ Grimmett."

19. In paragraph [28] the judge states that he does not consider that there is anything material that alters Judge Grimmett's decision of January 2012. He has already considered the passage of time resulting in the Appellant's daughter now being over the age of seven. In paragraph [32] he again states that he finds that there has been "no material change since the decision of IJ Grimmett in January 2012".

20. Given that I have preferred the reasoning in the case of KMO to that in MAB, I find that the judge was entitled to rely on the analysis and assessment of Judge Grimmett conducted under the Article 8 proportionality assessment when assessing whether or not it was reasonable to expect the Appellant's daughter to leave the United Kingdom.

21. I therefore find that the decision of the First-tier Tribunal does not involve the making of an error of law.

Notice of decision

The decision does not involve the making of an error on a point of law, and I do not set it aside.

The decision of the First-tier Tribunal stands.

Signed Date 28 February 2016

Deputy Upper Tribunal Judge Chamberlain