Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30000/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1st September 2017	**On 5th September 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mrs Sayuri Hatada
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Mr P Nath, Home Office Presenting Officer.
For the Respondent: Mr R Roberts, instructed by Cromwell Wilkes

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First Tier Tribunal, that is Mrs Hatada as the appellant and the Secretary of State as the respondent.

2. The appeal was pursuant to a decision dated 18th August 2015 to refuse to grant the appellant leave to remain in the United Kingdom based upon

her family life with her spouse. The appellant brought the appeal on the basis of the new appeal provisions under Section 82(1) of the Nationality Immigration and Asylum Act 2002, namely that it violated her rights to family and private life under the ECHR.

3. The appeal was heard on 13th September 2016 before First-tier Tribunal Judge Hembrough who in the body of the decision dismissed the appeal under the Immigration Rules (the Rules) but allowed the appeal under Article 8. At the end of the decision he allowed the appeal on both grounds.

Application for Permission to Appeal

4. The Secretary of State maintained that the judge erred in allowing the appeal on both the Rules and under the ECHR.

5. It was conceded that the appellant could not meet the language requirements of the Rules and thus the appeal turned on the sole issue of Article 8.

6. As the permission application pointed out, both representatives were in agreement that the outcome of the appeal turned on whether there were insurmountable obstacles to family life continuing outside of the UK, [12]. The judge found at [25] that he was not satisfied that there were insurmountable obstacles to the appellant's family life continuing in Japan for the plethora of reasons given.

7. Nonetheless he immediately proceeded to consider the position under Article 8 and outside the Rules. First, the judge was obliged to consider whether there were 'compelling circumstances' to go outwith the Rules and any resulting considerations under Article 8 of the ECHR failed to be considered through the lens of the Immigration Rules. There are none.

8. The judge failed to afford sufficient weight to the expression of the 'public interest' as expressed by the Rules. Reliance was placed, in the permission application, on paragraphs 48 and 33 of **SS Congo v SSHD** [2015] EWCA Civ 317. It was important to identify the degree of weight to be attached to the public interest and although the test of exceptionality did not apply, compelling circumstances needed to be identified. There was an absence of these findings. The judge identified nothing further than the terms of EX.1 of Appendix FM. There were no features of the relationship requiring consideration outwith the Rules. Secondly, reliance was placed on **Rhuppiah v Secretary of State** [2016] EWCA Civ 803; being able to speak English and being financially independent were only neutral factors further to Section 117 of the Nationality Immigration and Asylum Act 2002 and could not enhance the claim.

9. Permission was granted on the basis that it was arguable that the judge had failed to consider the compelling circumstances and further that the

ratio of **Chen (Appendix Fm –Chikwamba- temporary separation – proportionality)** IJR [2015] UKUT 00189 was relevant.

The Hearing

10. At the hearing, Mr Nath submitted that the consideration of the public interest was absent and he expanded on the grounds within the application supplying me with copies of **Rhuppiah** and **SS Congo v SSHD [2015] EWCA Civ 317**.

11. Mr Roberts submitted a Rule 24 response and he referred me to that document.

Conclusions

12. The Supreme Court in **Agyarko & Ors v SSHD** [2017] UKSC 11, reiterated the approach the courts should take regarding article 8, observing that the boundary between cases where there are positive or negative obligations on the state to respect a persons' right to respect for private and family life is difficult to draw, but the ultimate question is whether a fair balance has been struck and the question is determined by the structured approach to proportionality which has been followed since **Huang v SSHD** [2007] UKHL 11. At paragraph [46] the court found that the Rules are statements of the practice to be followed which are approved by Parliament and are based on the Secretary of State's policy as to how individual rights under Article 8 should be balanced against the competing public interest. Importantly, the courts must bear in mind the Rules but it is for the courts to consider how the balance is struck [47]. The test of insurmountable obstacles set down by the Secretary of State was not considered to be incapable of compatibility with article 8 and further that if the applicant or his partner would face very significant difficulties in continuing their family life together outside the UK which could not be overcome then the test would be met. The Supreme Court noted however at [48],

> *'if that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, the leave will be granted outside the Rules on the basis that there are 'exceptional circumstances'.*

13. The Court added at [56] that cases are not to be approached by a search for a unique or unusual feature and, in its absence, rejecting the application without further examination. '*Rather... the test is one of proportionality'* and the court must decide whether the refusal is proportionate on the particular case before it and 'the ultimate question is how a fair balance should be struck.

14. In this case there were a number of issues which were raised before the judge. The applicant, a Japanese national entered the UK lawfully and within the terms of her leave made an application for variation for leave as

a spouse on 23rd May 2014. It would appear at that point that the Secretary of State took control of her passport. Her first application was refused because she failed to meet the financial requirements and failed the language test (the speaking part). Her appeal was allowed, however, before the First-tier Tribunal, and at which the appellant was not represented, and the matter was returned to the Secretary of State for a lawful decision.

15. The application was again refused on 18th August 2015 (after further information was provided) whereupon the Secretary of State was satisfied that she met the financial requirements but this time failed to provide the relevant English language test (she passed all elements of the test save for the speaking). Her test, however, dated from July 2014 (prior to the first refusal).

16. Submissions were made at the First-tier Tribunal by the appellant's representative that she was unable to provide an up to date test with the further evidence provided for reconsideration because the Respondent had retained her passport. There was no issue as to the finance and no issue as to the genuineness of the relationship. The test she had provided was not from an approved provider.

17. The appellant gave evidence at the hearing before First-tier Tribunal Judge Hembrough and was cross examined in English. The judge also recorded within his findings that the appellant and her sponsor, who had been granted refugee status from Iran, had a child born in June 2016. The father could not speak Japanese. The evidence given was that the sponsor had undergone an upheaval four years previously and had settled and established a thriving business in the UK since that time.

18. The judge accepted that owing to the family in Japan there would not be insurmountable obstacles to 'her' integration in Japan and that the sponsor could also integrate into Japan.

19. The judge then proceeded to consider the factors in relation to Article 8. He was aware that **Chikwamba v SSHD** [2008] UKHL 40 did not apply (the appellant had not in fact obtained the English language test). Albeit that the judge did not *spell out* the words of 'compelling circumstances', they were implicit in his findings. He did take into account all the relevant factors, in accordance with **Singh v SSHD [2015] EWCA Civ 74** and at paragraph 32, in effect, he outlined the substance of the compelling circumstances, not least the existence of the very young baby, by stating

> *'The decisions in Chikwamba v SSHD [2008] UKHL 40 and Beoku-Betts v SSHD [2008] UKHL 39 are of limited utility since the coming into force of Section 117B but I take account of the fact at even if the appellant had to return to Japan for a limited time to retake an English test before being sponsored to return to Japan by her husband this is likely to involve a significant disruption to family life and in practice would man that she would have to take her son*

> *with her. This would involve a long flight both ways and exposure to a different environment which may be prejudicial to his welfare at least in the short term. There would also be some disruption to her domestic and business arrangement in the UK'*.

20. The judge also added at paragraph [33]

> *'I also take into account the fact that she has effectively been prevented from taking a further test in the Uk because of the respondent refusal to release her passport. I note that her solicitors made such a request on 4th September 2015 which was refused on 11th May 2016'.*

21. It was evident as the judge recorded that the guidance issued by IELTS was that an 'original and current passport' must be presented. Clearly the passport had been retained by the Secretary of State since she first applied in May 2014. The judge recorded that the production of the original passport is required by all test 'providers'. The policy is only applicable 'prior to refusal' and it would appear that the applicant in this instance had her case returned to the Secretary of State for further consideration of the *same* application. She had had a previous refusal.

22. From an overall reading of the decision, I do not accept that the judge was unaware of the public interest and failed to acknowledge its importance. He addressed the issue of the Immigration Rules and then cited in full, the relevant sections of Section 117 of the Nationality Immigration and Asylum Act 2002, which are specifically concerned with the public interest. Mr Nath rightly referred to **Rhuppiah v Secretary of State** [2016] EWCA Civ 803 such that being able to speak English and being financially independent are only neutral factors but, in my view, the judge addressed the issue of funds and English not as factors in the appellant's favour but rather to show that they were *not* countervailing factors. The reference to the public interest was not just in passing by the judge who assessed the weight of the family life, through the lens of the Rules and factored in the circumstances of the family on *temporary* separation. There is no issue that the appellant has ever been in breach of immigration law and she was found to be credible.

23. The existence of no insurmountable obstacles to integration on return, as found here, is not, however, necessarily fatal to a claim as found in the head note 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)

> *'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.*

24. The paradox here is that it is temporary separation rather than long term separation which is to be considered but the judge appeared to accept that the fundamentals of the Rules would be met on application from abroad but the key issue is proportionality to the particular decision, as I have highlighted above, and as set out in **Chen** at [39]

> *'In my judgement, if it is show 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'*.

25. Had the parties been without a very small child the Secretary of State's decision may be proportionate but the judge is obliged to take into account the facts as they were at the date of the hearing. Against the background as outlined, the key factor in the judge's reasoning was that the appellant was caring for a three month old baby and the appellant would have to make the flight with that very young child back and forth to Japan. The judge found that

> *'in practice would mean that she would have to take her son with her. This would involve a long flight both ways and exposure to a different environment which may be prejudicial to his [the son's] welfare at least in the short term'.*

The judge was obliged to take into account the best interests of the child under Section 55 of the Borders Citizenship and Immigration Act 2009 and that is what he did.

26. The judge also clearly took into account the fact that

> '*she has effectively been prevented from taking a further test in the UK because of the Respondent's refusal to release her passport. I note that her solicitors made such a request on 4th September 2015 which was refused on 11th May 2016'.*

27. That was a finding which was open to the judge. Finally, at [36] he viewed the matters in the round and considered that this was one of the rare cases where the refusal was not proportionate. The judge was entitled on these facts to make that finding.

28. Whilst compelling circumstances may not have been mentioned in terms there are clearly factors outlined by the judge which fulfil that requirement

and it is not evident from reading the decision as a whole that he has ignored the public interest. Rather the interests of the child weigh heavily in the overall decision as against the public interest and when considering the Secretary of State's retention of the passport.

29. The judge made an error when appearing to allow the appeal under the Immigration Rules at the close of his decision but it is clear from the face of the decision that this part of the appeal was dismissed and the reference declaring the opposite is a typographical error. To that extent I correct and remake the decision only and the decision will read 'The appeal is dismissed under the Immigration Rules'.

30. The decision of First-tier Tribunal Judge Hembrough, however, discloses no material error of law in respect of Article 8 and shall stand.

Signed Helen Rimington Date 1st September 2017
Upper Tribunal Judge Rimington