**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/21234/2014**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 December 2015** | **On 5 January 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**
**MR CLAUDIUS JOSEPH WAYLAND**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr A Fouladvand of counsel
For the Respondent: Mr K Norton, a Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against a decision of the Secretary of State taken on 29 April 2014 to refuse his application for leave to remain on the basis of his private and family life in the UK and a decision of 31 March 2014 to remove him under section 10 of the Immigration and Asylum Act 1999.

**Background Facts**

2. The appellant is a citizen of Dominica who was born on 1 April 1972. He entered the UK on 29 May 2005 with leave for 6 months as a visitor. In 2011 he married Sharon Denise Moore, a British citizen. On 16 September 2011 he applied for leave to remain as a spouse under the Immigration Rules HC395 (as amended) ('the Immigration Rules'). That application was rejected on 25 October 2011. On 1 November 2011 a further application for leave to remain as a spouse was made by the appellant. On 9 December 2011 that application was also rejected. A letter dated 9 December 2011 was submitted requesting reconsideration. On 24 March 2014 a further letter was sent on the appellant's behalf asking for the appellant's case to be considered under Article 8 of the European Convention on Human Rights. The Secretary of State refused the application on the basis that the appellant did not meet the financial and language requirements under the Immigration Rules and that there were no insurmountable obstacles to family life continuing outside the UK.

**The Appeal to the First-tier Tribunal**

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 6 May 2015, First-tier Tribunal Judge Holder ('the judge') dismissed the appellant's appeal. The First-tier Tribunal found that the appellant did not meet the financial requirements of the Immigration Rules. The First-tier Tribunal also found that the appellant had not shown that there would be very significant difficulties faced by him or his partner in continuing family life together outside the UK which could not be overcome. In considering Article 8 outside the Immigration Rules the First-tier Tribunal found that the respondent's decision to remove the appellant was proportionate, the balance falling on the side of the public interest in maintaining effective immigration control.

**The Appeal to the Upper Tribunal**

4. The appellant sought permission to appeal to the Upper Tribunal. On 14 July 2015 First-tier Tribunal Judge Molloy refused permission to appeal. The appellant made an application to the Upper Tribunal. On 1 September 2015 Upper Tribunal Judge Canavan granted permission to appeal. In granting permission Judge Canavan considered that it was arguable that the First-tier Tribunal had not given sufficient consideration to the reasons why the appellant's wife said she would not leave the UK. Thus, the appeal came before me.

**Summary of the Submissions**

5. The grounds of appeal which are lengthy assert in essence:

Ground 1

- The judge applied the wrong test ( he failed to take into account the recent case of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) which was drawn to his attention) when considering the appellant's ties to Dominica and that

there was no objective basis on which the Judge could make a decision that his removal would not lead to serious hardship.

Ground 2

- The judge erred when making findings that there are no significant difficulties which would be faced by the appellant or his partner in integrating into Dominica when the reality is the appellant's family are in the UK. The judge erred in law by failing to consider that the UK has a positive obligation to ensure family life flourishes. The judge failed to take into account the effect of forcing the appellant, his wife, her children and grandchild and her father to leave the UK would breach the Zambrano principle and the principles set out in Harrison (Jamaica) v SSHD (2012) EWCA 1710. The judge failed to take account of the important roles the appellant played in the lives of his wife's family.

Ground 3

- The judge erred by effectively allowing immigration control to trump family life without considering the effects on the appellant's family (Beoku-Betts (FC) v SSHD [2008] UKHL 39) and that the judge failed to carry to a proper balancing exercise.

Ground 4

- The judge made an error of law when he failed to consider that the Respondent's decision was unreasonable. – MF (Nigeria) v SSHD (2013) EWCA Civ 1192.

Ground 5

- The judge made an error of law in finding that the appellant can continue the relationship by visiting and the usual methods of communicating until such time as the appellant is able to satisfy the Immigration Rules.

Ground 6

- The judge failed to take into account the best interests of the child as the primary consideration and failed to take into account the pivotal role the appellant played in the child's life.

Ground 7

- The judge erred by failing to take into account that the appellant's wife supports him, that he speaks English and is not a burden in British taxpayers, is fully integrated unto British society and it is not in the public interest to remove him.

Ground 8 – ground (a) in the application to the Upper Tribunal for permission to appeal

- The judge's approach to proportionality is flawed. The judge misconstrued section 117B and erred in law in attaching weight to considerations stipulated in those provisions in assessing the Article 8 appeal. The judge

erred in considering that the appellant's failure to meet the requirements in Appendix FM means he could not succeed under Article 8. There has been no proper assessment of Article 8 as set out in the case of Razgar. No proper consideration was given to Article 8. The judge ought to have considered whether there were exceptional circumstances meriting consideration of Article 8 outside the Rules. The judge failed to consider the Human Rights of the appellant's wife.

6. Mr Fouladvand submitted that the core issue is that the appellant's wife cannot relocate because of her ties to the UK. She has children and grandchildren in the UK. She is working and has a close bond with her family. It would be unreasonable to expect the appellant's spouse, a British citizen to relocate. As the documents demonstrated the appellant's wife's mother was seriously ill and she now has responsibility for administering the estate. He submitted that the First-tier Tribunal did not consider the various factors that ought to have been taken into account and therefore the decision was flawed and the conclusions were flawed.

7. Although not making an application to amend the grounds of appeal Mr Fouladvand submitted that there was ample evidence that the appellant's spouse was earning more than £18,600 and in view of that fact the appellant did meet the financial requirements of appendix FM.

8. Mr Fouladvand submitted that in relation to the Immigration Rules the provision says family and social ties then as the wording says and, if one of them is absent then it must be unreasonable to expect the person to relocate. Both family and social ties must be present. This is a loophole of the Immigration Rules. I asked Mr Fouladvand if he had any authority for this proposition. He could not refer me to any.

9. Mr Fouladvand also submitted that the judge did not find that the letter from the employer was false. As long as the judge could find that the payslips etc. were genuine the judge should have given due weight to the fact that there was no negative effect on the economic well-being of the country. In the absence of negative findings the judge's conclusions at paragraph 46 of the decision are flawed.

10. Mr Fouldavand argued that there was a fundamental error by the judge. In essence his argument was that the judge having noted that the maintenance of effective immigration control is an aspect of the well-being of the country then there was a major problem as the presence of the appellant is not a burden on the economic well-being of the country. Article 8(2) does not have immigration control as an aim so it can only be considered as part of the economic well-being category. It is clear in this case that the judge erred by concluding that the economic well-being of the country allows the couple to be separated when there is no negative affect on the economic well-being.

11. Mr Fouldavand also referred to the 10 year and 5 year partner route to settlement arguing that the appellant can meet all the other requirements but was penalised – the appellant can meet the financial requirements. He also argued that Chikwamba v SSHD [2008] UKHL applied. The appellant otherwise meets all the requirements of the Immigration Rules.

12. Mr Norton submitted the central issue, as identified in the grounds of appeal, was whether the judge had paid sufficient regard to the position of the appellant's wife. The judge at paragraph 14 set out the evidence. This is not a case where the judge failed to pay attention to the evidence. Whilst the test under the rules is not restricted to the appellant but is primarily considered on the appellant's ability to meet the rules. In paragraph 20 the judge has identified what need to be provided and found the appellant does not meet the requirements of the rules as the required evidence was not provided.

13. At paragraph 25 the judge assesses the appellant and his wife's position in relation to the obstacles they might face and found that there was no evidence that there are any significant difficulties. The judge considered the relationship with the appellant's wife's grandchild and found there was no evidence that the appellant has a parental relationship. The judge considered private life. The judge then considered the claim outside of the Immigration rules. The judge set out the correct approach. At paragraph 45 the judge acknowledged that the appellant's wife stated she would not go with the appellant to Dominica but considered that this was a matter of choice. The judge has applied the correct tests and taken all relevant factors into account. The judge was entitled to come to the findings.

**Legislative Provisions**

14. As from 28 July 2014 statutory provisions in a new Part 5A of the 2002 Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

15. Section 117A sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

16. The considerations listed in s.117B are applicable to all cases and are:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

17. Section 117D provides the definition of a number of terms used in Part 5A. A "qualifying child" means a person under the age of 18 who is either a British citizen or who has lived in the UK for a continuous period of seven years or more. The definition of "qualifying partner" is also included. The court or Tribunal is required to give the new Rules (see Dube (ss.117A – 117D) [2015] UKUT 90 (IAC) at [47]): "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (see also SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

18. Relevant Immigration Rules

**EX.1. This paragraph applies if**

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

**Paragraph 276ADE (in force from 9 July 2012 to 27 July 2014)**

The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

…

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

## Discussion

19. A large number of cases were cited in the grounds of appeal. I have not referred to each case cited but I have taken into consideration the general principles to be derived in relation to the issues raised.

20. The grounds of appeal contain overlapping issues, I propose to deal with the judge's findings under the Immigration Rules and then consider the findings under Article 8 outside the Rules referring to the relevant parts of the grounds of appeal and submissions as appropriate. I will then consider the remaining grounds of appeal.

### The Immigration Rules

Paragraph EX.1(b) of the Immigration Rules

21. Ground 2 asserts that the judge erred when making findings that there are no significant difficulties which would be faced by the appellant or his partner in integrating into Dominica when the reality is that the appellant's family are in the UK.

22. The issue that the judge had to consider is whether or not there would be insurmountable obstacles to family life continuing outside the UK. In R (on the application of Agyarko and others) v Secretary of State for the Home Department [2015] EWCA Civ 440, (2015) ('Agyarko') the Court of appeal held:

> "[21] The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an Applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
>
> [22] This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under art 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see eg Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, para 39 ("... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ..."). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para 117: there were no insurmountable obstacles to the family settling in Suriname, even though the Applicant and her family would experience hardship if forced to do so).
>
> [23] For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way …

> [25] …The mere facts 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 Ghana to continue their family life there- could not constitute insurmountable obstacles to his doing so.'

23. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) it was held that the term 'insurmountable obstacles' in provisions such as Section EX.1 are not obstacles which are impossible to surmount: they concern the practical possibilities of relocation.

24. The judge set out at paragraph 25 a number of factors that were taken into consideration when deciding if there would be very significant difficulties to the appellant or his partner in continuing family life outside the UK. The only references to the appellant's wife is that there was no evidence that the appellant would not be able to support her (sub-paragraph (a), there is no language barrier (sub-paragraph (c)) and that the appellant will be able to assist his wife with integration (sub-paragraph (d)). There is no specific reference to the appellant's wife's responsibilities and relationships in the UK or to the fact that she is in full time employment here. Although a judge does not have to set out every specific piece of information considered, it is not clear that the judge took all the relevant factors into account when considering whether or not there would be insurmountable obstacles to the appellant and his wife continuing family life outside the UK.

25. However, as held in Agyrako the test of insurmountable obstacles imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is **not** whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. It is a much more stringent test. The factors in this case are that the appellant's wife has a job in the UK, has extended family and friends, has never lived outside the UK, that she is administering her mother's estate and that her father is ill with prostate cancer. Whilst there may be considerable hardship for the appellant's wife in re-locating as she would leave her family and job behind, there was no evidence before the judge that amounts to insurmountable obstacles to either her or her husband continuing family life outside the UK. The appellant's wife indicated that she would not re-locate. That is a matter of choice and is not a factor when considering what obstacles there might be.

26. Set out in ground 1 is an assertion that the judge failed to take into account the explanation of the appellant that deep sea diving was unsuitable and dangerous. The judge considered that the evidence was that fishing would be difficult because his lung capacity/tolerance will not be as good as it was when he was younger. The judge found that the appellant had not shown evidentially that he would be unable to find work. There is no error of law in these findings which were entirely open to the judge having heard and considered the evidence in the case. The judge does not find that the appellant can resume deep sea diving his findings are that

the appellant has not satisfied him on the evidence that he would be unable to find work.

27. I find that there was an error of law in the judge's failure to consider the appellant's wife's position when considering the insurmountable obstacles test but that it was not a material error for the reasons given above.

Paragraph EX.1(a)

28. Ground 6 asserts that the judge failed to take into account the best interests of the child as the primary consideration and failed to take into account the pivotal role the appellant played in the child's life and in Ground 2 it is asserted that the judge failed to take into account the effect of forcing the appellant, his wife, her children and grandchild and her father to leave the UK would breach the Zambrano principle and the principles set out in Harrison (Jamaica) v SSHD (2012) EWCA

29. The judge found at paragraph 29 that there is no evidence that the appellant has a parental relationship with his wife's grandchild. Further, the judge found that step-grandparent is not included in the definition of parent in the Immigration Rules.

30. There is no challenge to these specific findings. The appellant cannot succeed under Paragraph EX.1(a) of the Immigration Rules. The grounds are relevant however to the consideration of Article 8 outside of the Immigration Rules.

Paragraph 276ADE

31. It is asserted in ground 1 that the judge applied the wrong test (he failed to take into account the recent case of Dube which was drawn to his attention) when considering the appellant's ties to Dominica and that there was no objective basis on which the Judge could make a decision that his removal would not lead to serious hardship.

32. There was no reference to any specific paragraph in the case of Dube to indicate what the appellant asserts the correct test in respect of ties is. It is asserted that the issue is no longer about ties but the presumption of family life in the appellant's original country of origin unless this can be rebutted. At the time of the application and decision the wording of the provision was whether the appellant has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK. The judge set out, at paragraph 32, the incorrect wording of 276ADE which contains a test of 'very significant obstacles to the appellant's integration'. This is a more stringent test than the 'ties' test. However, it is clear that the judge applied the correct test. Despite referring to 'very significant obstacles to his integration' at Paragraph 33(c) at paragraph 34 the judge cites the interpretation of the word 'ties' court in Ogundimu (Article 8 – new rules) (Nigeria) v SSHD [2013] UKUT 00060 (IAC) ('Ogundimu') and at paragraph 35 clearly applies the 'ties' test.

33. The test is whether or not the claimant has lost his ties to Dominica. In YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 the court of appeal approved the construction of the concept set out by the Upper Tribunal in the case of Ogundimu. In that case the Upper Tribunal stated, at paragraph , that:

> "The natural and ordinary meaning of the words 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless".

34. The Upper Tribunal decision in Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC) makes reference both to the earlier Tribunal decision of Ogundimu (Article 8- new rules) [2013] UKUT 00060 (IAC) and the Court of Appeal judgments in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 which approved what was said in Ogundimu. This was that the natural and ordinary meaning of the word 'ties' imports a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country.

35. In R (on the application of Msiza) v Secretary of State for the Home Department [2015] UKUT 00483 (IAC) it was set out that:

> "25. The Upper Tribunal in Ogundimu also stated that the test of ties was an exacting one that requires a rounded assessment of all the relevant circumstances and is not confined to social, cultural and family issues. That statement was approved by the Court of Appeal in YM and has been reiterated in Bossadi.
>
> 26. What we take from this is that the asserted absence of family members in the country of nationality of proposed return is in no sense always determinative. In the present case, even if the applicant has lost touch with her stepmother following the death of her father, there is no reason to suppose that she could not re-establish contact once returned to South Africa. But, even if she could not, she is relatively young, has received a good education and in all the circumstances is quite manifestly capable of living independently in South Africa."

36. The judge noted that the appellant was born in Dominica and has spent the vast majority of his life there. He was 43 so had spent 33 years in Dominica and nearly 10 years in the UK. It is asserted that the appellant's only ties to Dominica are that he is a National of that country (paragraph 16 of the grounds of appeal to the First-tier Tribunal). In his witness statement he merely states that he has strong roots in the UK 'which outweighs those ties I had in the Commonwealth of Dominica' (paragraph 22)

37. There has been no evidence submitted as to why the claimant, who has lived in Dominica for 33 years and in the UK for just over 10 years, has lost his links to Dominica. No evidence as to what has happened to his family, friends or relations in Dominica has been provided. Further there was no evidence as to why such relationships could not be re-established if the appellant had lost touch with his family and friends.

38. The findings of the judge and the conclusion reached were reasonable. The judge applied the correct legal test. There is no material error of law in the decision on this issue.

39. This is a convenient point to consider Mr Fouladvand's argument that in relation to the Immigration Rules if the provision says family and social ties then, as the wording says and, if one of the requirements is absent then it must be unreasonable to expect the person to re-locate. Both must be present. It is not clear what specific provisions of the Immigration Rules that Mr Fouladvand referred to. The two relevant provisions contain the following tests. In Paragraph EX.1(b) the test is '*there are insurmountable obstacles to family life with that partner continuing outside the UK'*. In Paragraph 276ADE the test (at the relevant time) was '*but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK*'. Neither of these provisions have 'and' as a conjunction.

**Article 8 outside the Rules**

40. The grounds can be summarised into 3 strands. Firstly, the judge failed to take into account the best interests of the child as the primary consideration, failed to take into account the pivotal role the appellant played in the child's life and failed to take into account the effect of forcing the appellant, his wife, her children and grandchild and her father to leave the UK would breach the Zambrano (C-34/09 Ruiz Zambrano v Office National de l'emploi [2011] ECR I-1177) principle.

41. Secondly the judge erred in law by failing to consider that the UK has a positive obligation to ensure family life flourishes and in not considering the effects on the appellant's family and in finding that the appellant can continue the relationship by visiting and the usual methods of communicating.

42. Thirdly the judge's approach to proportionality is flawed, the judge misconstrued section 117B and erred in attaching weight to considerations stipulated in those provisions, erred in considering that the appellant's failure to meet the requirements in Appendix FM means he could not succeed under Article 8. There has been no proper assessment of Article 8 as set out in the case of R v SSHD ex parte Razgar [2004] UKHL 27 ('Razgar'). The judge ought to have considered whether there were exceptional circumstances meriting consideration of Article 8 outside the Rules.

Section 55 – the best interests of the child

43. In ZH (Tanzania) v SSHD [2011] UKSC 4 the Supreme Court noted that s 55 of the Borders, Citizenship and Immigration Act 2009 was enacted to incorporate the UK's obligation under article 3(1) United Nations Convention on the Rights of the Child that, *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*

44. The court held:

> "26. This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first…
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> ...
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> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that."

45. The child in question is the 6 year old granddaughter of the appellant's wife. The First-tier Tribunal judge considered s55 very briefly in paragraph 53 of the decision. The judge, having found that the appellant does not have a parental relationship with the child, considered section 55 and found that it is in the best interests of the child for her to remain in the UK with one or other of her parents. As stated in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) it is generally in the best interests of a young child to be cared for by her parents. The judge had found (paragraph 29) that despite the appellant's assertion that he has a parental relationship with the child there was no evidence from the child's parents to assist that claim and the judge therefore rejected that assertion. The judge was entitled to reach the conclusion that he did and clearly considered the evidence of the role the appellant played in the child's life. Although consideration of the best interests of the child was very brief, on the facts of this case and given the findings made by the judge, there was no need for any further consideration.

46. The appellant's reliance on the Zambrano case is misconceived. In this case there is no suggestion that the child will be forced to leave the UK. The child's parents are both in the UK. Even if the appellant had a parental relationship with the child the Zambrano principle would not assist. The test is one of compulsion – would

the child be forced to leave the UK? In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) in the headnote the position was summarised as:

> "6. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union."

47. There is no material error of law in the First-tier Tribunal's consideration of the best interests of the child.

Failure to consider the effects on the family

48. The judge set out at paragraphs 14 and 15 the evidence of the appellant's wife and his uncle. The judge recorded the appellant's wife's evidence as to the role that the appellant plays as a father figure and grandfather and that the appellant's wife had indicated that she would not visit the appellant in Dominica because of her family responsibilities in the UK. The judge found that the appellant has a family and private life in the UK which will be interfered with (paragraph 44). At paragraph 45 the judge found that returning the appellant to Dominica amounts to a real interference with their family and private life. At paragraph 54 the judge found that it was open to the appellant's wife to travel to Dominica but that if she chose not to it is open to her to continue the relationship by visiting and the usual methods of communicating. At paragraph 55 the judge found that there was insufficient evidence to show that the appellant's uncle's illness was a significant factor.

49. It is clear that the judge has taken into account the effect on the appellant's family. The judge's finding that the relationship can continue by visiting and usual methods of communication was in the context of the appellant's wife choosing not to go with the appellant to Dominica. Although there is a duty on States to facilitate family life there is no obligation to respect the choice of residence of a married couple - see R (on the application of Mahmood) v Secretary of State for the Home Department [2001] INLR. There is no error of law in the approach taken by the judge. All relevant factors were considered.

Flawed approach to proportionality and Section 117

50. It is asserted that the judge erred in attaching weight to considerations stipulated in s117 and in his approach to proportionality. The judge was mandated by Parliament to give effect to the provisions in section 117 of the 2002 Act when undertaking the balancing exercise. The Tribunal is required to give the new Rules (see Dube (ss.117A – 117D) [2015] UKUT 90 (IAC) at [47]): "greater weight than as merely a starting point for the consideration of the proportionality of an

interference with Article 8 rights" (see also SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

51. The First-tier Tribunal judge adopted a structured approach. He considered each of the relevant sub sections of 117B in paragraph 52 of the decision. He was required to attach sufficient weight to the public interest in the maintenance of effective immigration control (paragraph 56). He was required to attach little weight to the appellant's family and private life. In the balancing exercise the scales clearly, in a case such as this, are heavily weighted against the appellant. He has been in the UK unlawfully for 9 1/2 years of the 10 years he has been here. His family and private life have been established whilst he has been in the UK unlawfully. He does not have a parental relationship with a qualifying child. There is no error of law in the judge's approach to the proportionality exercise.

52. It is asserted that the judge erred in considering that the appellant's failure to meet the requirements in Appendix FM means he could not succeed under Article 8, that there has been no proper assessment of Article 8 as set out in the case of Razgar and that the judge ought to have considered whether there were exceptional circumstances meriting consideration of Article 8 outside the Rules.

53. There is no basis for these assertions. The judge did not consider that the appellant's failure to meet the requirements in appendix FM meant that he could not succeed under Article 8. The judge clearly considered Article outside of the Immigration Rules (paragraph 42). The requirements set out in the case of R v SSHD ex parte Razgar [2004] UKHL 27 were set out and the judge considered each requirement in detail at paragraphs 43 – 56.

Remaining Grounds of appeal

54. It is asserted at ground 4 that the judge made an error of law when he failed to consider that the Respondent's decision was unreasonable. Reference was made to the case of MF (Nigeria) v SSHD (2013) EWCA Civ 1192. This ground is unparticularised and was not referred to in oral submissions. There was no specific detail of the principle relied on in the case cited. In the absence of any detail I am unable to discern what the error is alleged to be in this ground of appeal. I cannot address this issue.

55. It is asserted that the judge erred by failing to take into account the fact that the appellant's wife supports him, that he speaks English and is not a burden on British taxpayers, is fully integrated into British society and it is not in the public interest to remove him. Mr Fouladvand also submitted that the judge, having noted that the maintenance of effective immigration control is an aspect of the economic well-being of the country, erred by concluding that the balance falls on the side of the public interest in effective immigration control because the appellant's wife supports him so there is no negative impact on the economic well-being of the country.

56. The Appellant cannot obtain a positive right to a grant of leave to remain because he can speak English and his wife supports him so he is not a financial burden on the taxpayers. In AM (S 117B) Malawi [2015] UKUT 0260 (IAC) the Upper Tribunal held:

> "14. Whilst we heard extensive argument upon the purpose and effect of s117B(2) and s117B(3), we are satisfied that ultimately the matter is quite straightforward. Upon their proper construction neither s117B(2), nor s117B(3), grants any form of immigration status to an individual who does not otherwise qualify for that status, because they have failed to meet the requirements set out in the Immigration Rules for the grant of that status. If it was the intention of Parliament that the requirements of the Immigration Rules should be over-ridden, merely because an individual could establish that they were able to speak English, or were financially independent, to some degree, then we are satisfied that Parliament would have said so in the clearest terms. In addition we consider that Parliament would have considered it necessary to set out what degree of fluency, or, level of financial independence was required of the individual, and the immigration status that the individual would be entitled to once it had been demonstrated. Plainly these statutory provisions do no such thing. One must continue to look to the Immigration Rules to discern what Parliament considers are the requirements to be met by a claimant, and the length of the period of leave to be granted to them if those requirements are met.
>
> 15. What then is their purpose? We are satisfied that s117B(2), and s117B(3), were intended by Parliament to meet, and to finally dispose of, the arguments that have from time to time been advanced to the effect that the language and/or the financial requirements of the Immigration Rules should either be ignored altogether, or, should carry little weight, when the Tribunal is weighing the proportionality of a decision to remove in the context of the consideration of an individual's Article 8 rights…"

57. The argument that, because effective immigration control is an aspect of the economic well-being of the country, where there is no negative impact on the economic well-being the balance cannot fall in favour of removal is misconceived. Maintenance of effective immigration control is in the public interest whether or not an applicant is financially independent. As set out in the headnote in Forman (s117A-C considerations) [2015] UKUT 00412 (IAC)

> "(i) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified."

58. The appellant has been in the UK unlawfully for 9 ½ years. He does not meet the requirements of the Immigration Rules. The judge did not err in finding that the balance fell on the side of the public interest in effective immigration control.

59. Reliance was also placed on the case of Chikwamba v SSHD [2008] UKHL. In Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC) the Upper Tribunal held:

> "The significance of Chikwamba v SSHD [2008] UKHL 40 is to make it plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. The Chikwamba principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom."

60. In 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), albeit a judicial review, the Upper Tribunal held:

> "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."

61. It is not clear that in this case that the appellant meets the Immigration Rules but for the need to made an application from outside of the UK. Further, no evidence that any temporary separation is disproportionate has been advanced.

**Decision**

62. There were no material errors in the decision of the First-tier Tribunal. The appeal is dismissed.

63. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Signed P M Ramshaw Date 29 December 2015

Deputy Upper Tribunal Judge Ramshaw