



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/07109/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at North Shields

On 13 March 2018

**Decision &
Promulgated**

On 29 March 2018

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

B. S.

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Warren, Counsel, instructed by Alex Bell Immigration Law

For the Respondent: Mr McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Gambia, who entered the UK lawfully as a visitor on 1 July 2005. He became an overstayer on 1 January 2006.
2. The Appellant applied for a grant of discretionary leave to remain in the UK as the unmarried partner of a British citizen on 20 November 2015. That application was refused on 29 February 2016. His appeal on Article 8 grounds against that refusal came before First tier Tribunal Judge Henderson on 18 May 2017, and it was dismissed by decision promulgated on 5 June 2017.

3. The Appellant sought permission to appeal from the First tier Tribunal on three grounds; (i) that the Judge had failed to have adequate regard to the cultural barriers that would be faced by the Appellant's wife were she to seek to live with him in the Gambia, (ii) that the career of the Appellant's wife had a value to the public, and as such was something that should have been weighed in the proportionality balancing exercise as reducing the public interest in the Appellant's removal, Lama [2017] UKUT 16, and, (iii) that the Judge's approach to section 117B of the 2002 Act was flawed. Permission was granted by decision of First tier Tribunal Judge Kinnell, albeit without express reference to either of these grounds, but rather on the basis that it was arguable the Judge had reached contradictory findings in paragraphs 25, 33, and 35 of her decision.
4. Thus the matter comes before me.
5. Ms Warren placed no reliance upon the terms in which permission to appeal had been granted. She was right to do so. As she accepted there is no substance in the suggestion that the Judge made contradictory findings. Instead, as I invited her to do, Ms Warren expanded the points made in the three grounds to her application for permission on the assumption that Judge Kinnell must be taken to have intended to grant permission in relation to each.
6. It was common ground at the hearing before Judge Henderson that were the Appellant then making an application for entry clearance to the UK as a spouse he would be unable to meet the requirements of the Immigration Rules. Thus, this was never a case of the type rehearsed in Chikwamba [2008] UKHL 40. The Appellant was far from certain of obtaining entry clearance at any point in the future. The appeal was not however advanced to Judge Henderson on the basis that this necessarily meant a permanent separation of the Appellant from his spouse, since it was possible that his wife's earnings could be increased beyond the minimum threshold figure in the future, which was the primary obstacle to his gaining entry clearance; MM (Lebanon) [2017] UKSC 10. Ms Warren accepted, candidly, before me that she had not sought to explore before the Judge the hypothetical possibilities for the future. She had instead argued the appeal on the basis that it was impossible for the Appellant's wife to ever live in the Gambia with him because of the difficulties she would face in so doing; that was an argument that the Judge rejected.
7. The Judge noted that the Appellant and his spouse had chosen to marry on 22 April 2017, and thus after the refusal of his application for a grant of discretionary leave to remain. She noted that he had always been present in the UK unlawfully since 1 January 2006, and had not met his partner until 2013. She accepted that they had cohabited since July 2013, but found that the argument that they could not live together in the Gambia as an unmarried couple had now fallen away as a result of their marriage [11]. She had in mind the fact that the Appellant's wife is white and Catholic [20] and considered the argument that the couple could experience hostility to their marriage. She considered the very different cultural and religious context in which they would live together in the

Gambia [25] and considered that doing so would pose significant difficulties for the couple although she balanced the difficulties the Appellant's wife would face, with the fact that the Appellant could be expected to find employment and support the couple himself since he was qualified as a teacher in the Gambia and had previously pursued a career there as such [33]. The Judge rehearsed the difficulties the Appellant's wife would face, separately [34, 35, 39]. She concluded that there would be significant difficulties to the couple continuing their family life in the Gambia [33] but that this would not reach the level of very serious hardship required by the Immigration Rules [35].

8. Ms Warren advanced ground 1 on the basis that the decision failed to provide a reasoned analysis of where upon the scale of possible hardships the situation faced by this couple would fall. I reject that criticism. The Judge's reasons were adequate, and her conclusion was clear.
9. Ms Warren was initially unable to identify any material factor that the Judge had left out of account, or any irrelevant factor that she had taken into account, and her submissions made it clear that the reality was that this was a disagreement with the Judge's assessment of the weight that could be attached to the evidence. Pressed on this Ms Warren then asserted that the Appellant had claimed in oral evidence that his wife would face outright hostility from members of his own family, and argued that this was a matter that the Judge had left out of account. I noted that this was not a matter that the Appellant or his wife had raised in their professionally drafted witness statements, a point that Ms Warren accepted but was unable to explain. In the circumstances I am not surprised that the Judge failed to see any such claim as significant. The Judge plainly did consider the more generic claim that the marriage would face general hostility, and took that claim into account.
10. Ms Warren advanced ground 2 on the basis that whilst the Judge had taken into account the nature of the employment of the Appellant's wife, she had nevertheless failed to take into account the public benefit of that employment, or if she had, then she had failed to give it the weight that it deserved. It is however plain in my judgement that the Judge did have regard to the nature of this employment, and the dedication shown by the Appellant's wife to her clients [34]. The weight that she gave to the public interest in that service continuing to be provided was a matter for her.
11. Ms Warren advanced ground 3 on the basis that the Judge had failed to properly apply section 117B of the 2002 Act, in her approach to the Appellant's immigration status in the UK. The difficulty with this criticism is that beyond the first six months, when the Appellant's status was lawful but precarious, he had been present unlawfully. That left the Judge required to give little weight to a private life, or, to a relationship formed with a qualifying partner (as his spouse was); s117B(4). That is clearly the approach the Judge took, and the decision affords no basis for the criticism that in reality the Judge gave no weight to that relationship.

12. In conclusion then I am not satisfied that the Judge did leave any material factor out of account, or take into account any irrelevant factor. Adequate reasons were given for the findings that were made, and they were in turn quite clear enough for the reader to understand the decision, and its basis. As set out by the Supreme Court in Agyarko [2017] UKSC 11, the fact that the “family life” relied upon has been established by the applicant and his partner in the full knowledge that his presence in the UK is unlawful affects the weight to be attached to that “family life” in the balancing exercise. It is clear in my judgement that the Judge appreciated that, and did so. This was not a Chikwamba case. The focus of this appeal was always on the balance to be drawn between the difficulties that the Appellant’s wife would face if she did seek to live with him in the Gambia from time to time, or permanently (bearing in mind that this is a holiday destination from the UK enjoyed by many), and the public interest in his removal. It was open to the Judge to conclude for the reasons that she gave that the Appellant would not himself face any real difficulty in reintegrating himself, or in securing lawful employment, in the Gambia. Equally it was also open to the Judge to conclude for the reasons that she gave that the Appellant’s wife would face significant difficulties in doing so – but that these did not meet the threshold of “very serious” or amount to “exceptional circumstances” sufficient to tip the balance in favour of the grant of discretionary leave to remain.
13. In the circumstances, and notwithstanding the terms in which permission to appeal was granted, in my judgement the Judge did properly consider the competing interests and balanced them, giving adequate reasons for her conclusions. I therefore dismiss the challenge, and confirm the decision to dismiss the appeal on Article 8 grounds.
14. An anonymity direction is made.

Notice of decision

The decision promulgated on 5 June 2017 did not involve the making of an error of law sufficient to require the decision to be set aside. The decision of the First tier Tribunal to dismiss the Article 8 appeal is accordingly confirmed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any of the individuals referred to in this decision. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 28 March 2018

Deputy Upper Tribunal Judge J M Holmes