JUST IMMIGRATION SOLICITORS

Note: 24th June 2020

Mother of a British Citizen child being require to leave the UK and return abroad to apply for a partner visa

Younas (Section 117 B (6) (b) Chikwamba: Zambrano) (2020) UKUT 00129

Facts:

The Appellant, whilst pregnant, travelled to the UK as a visitor. Whilst in the UK, she gave birth to her daughter who is a British Citizen. She then made an application for leave to remain on the basis of her family life with her partner and child who are both British Citizens. This was refused because she was in the UK as a visitor, and therefore did not fulfil the immigration status requirement under Appendix FM.

Issues:

The Appellant appealed on Article 8 grounds, arguing that the refusal of leave was disproportionate:

a) There is no public interest in requiring her to leave the UK merely in order to make a successful application for entry clearance. In **Chikwamba***,* the Supreme Court said only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.

b) In **Agyarko** the Supreme Court said, if an applicant would otherwise be automatically deported as a foreign criminal then the weight of public interest in his or her removal will generally be very considerable. If on the other hand, an applicant was certain to be granted leave to enter, at least if an applicant were made from outside the UK, then there might be no public interest in his or her removal. This point is illustrated by the decision in **Chikwamba.**

The Secretary of State (Respondent) argument:

The Respondent argued that neither **Chikwamba** nor **Agyarko** support the contention that there cannot be a public interest in removal of a person from the UK who would succeed in an entry clearance application. **Agyarko** only said that there might be no public interest in the removal of such a person. The question of whether there would be a public interest in removing will be dependent on individual circumstances. A fact specific assessment is required.

Chikwamba did not lay down a legal test that requiring the claimant to make an application from abroad would only comparatively rarely be proportionate in a case involving children. In all cases it will be for the individual to demonstrate, through evidence, that based on their individual circumstances, removal would be disproportionate.

Further, Chikwamba pre-dates Part 5A of the Nationality Immigration and Asylum Act 2002, inserted by the Immigration Act 2014. An appellant in an Article 8 human rights appeal who argues there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must in all cases address Part 5A of the 2002 Act including Section 117B (1), which stipulates that the maintenance of effective immigration control is in the public interests, and the considerations under Section 117B (2) to (6).

The Tribunal agreed with the Respondent.

Tribunal's Determination:

Chikwamba Principle:

The Tribunal found on the balance of probability that the Appellant will be granted entry clearance if she makes an application from Pakistan to join her partner in the UK. Therefore, the Chikwamba principle is applicable.

The Tribunal found however that the Appellant entered the UK as a visitor even though her real intention was to remain in the UK with her partner, despite stating that she would leave after 6 months. In light of this immigration history, the public interest in the Appellant's removal from the UK is strong and the strength of the public interest is not diminished because she will be able to re-enter the UK. The integrity of the public confidence in the UK's immigration

system is undermined if a person is able to circumvent it, as the Appellant has attempted to do by entering the UK as a visitor with the intention of remaining permanently. Requiring the Appellant to leave the UK in order to make a valid entry clearance application as a partner, far from being merely a disruptive formality, serves the important public interest of maintenance of effective immigration controls.

Section 117B (6) of the NIAA 2002:

Section 117B (6) of the Nationality Immigration and Asylum Act 2002 provides that 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 personal relationship with a qualifying child who is a British Citizen and

b) It would not be reasonable to expect the child to leave the UK. On this point, the Appellant relied on the Respondent's policy as set out in the document titled Family Policy Family Life as Partner and Parent Private Life and Exceptional Circumstances which states that the Respondent would not normally expect a qualifying child to leave the UK.

Section 117B (6) requires a court or tribunal to assume that the child in question will leave the UK. However, once the assumption has been made the court or tribunal must move from hypothetical to the real. The length of time a child is likely to be outside the UK is part of the real world factual circumstances in which a child will find herself and is relevant to deciding for the purpose of section 117B (6) whether it would be unreasonable to expect the child to leave the UK. Accordingly, whether it would be reasonable to expect the Appellant's daughter to leave the UK is to be assessed on the basis of the finding of fact that she will be outside the UK with the Appellant for 4-9 months.

Whilst it would be in the best interests of the Appellant's daughter not to have to relocate to Pakistan without her father, she will not suffer any detriment by doing so given her young age and the temporary nature of the separation. Taking all factors into consideration, it would not be unreasonable to expect the Appellant's daughter to leave the UK for a temporary period whilst her mother applies for entry clearance.

The Principle in Ruiz Zambrano:

Neither the Respondent nor the Appellant put forward this argument. However, the Tribunal took this into consideration as part of the overall assessment of proportionality under Article 8.

Article 20 of the Treaty on the Functioning of the European Union (TFEU) precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.

This was applied in **Zambrano** to mean that a parent of a child who is a British citizen (and therefore also a European Union citizen) is entitled to a derivative right of residence to avoid the child being compelled to leave the territory of the European Union as a result of his or her parent being required to leave.

The scope of the concept of being compelled to leave the European Union was recently considered by the Supreme Court in **Patel v Secretary of State for the Home Department**. The overarching question is whether the child would be compelled to leave by reason of their relationship of dependency with the parent. The test of compulsion is a practical test to be applied to the actual facts and not to a theoretical set of facts. This includes how long a child is likely to be outside the territory of the Union rather than theoretical possibilities.

The Tribunal found that the Appellant's daughter will be compelled to leave the UK with the Appellant. However, it is not contrary to the principles in Zambrano because she and the Appellant will re-enter the UK several months later. Any loss of enjoyment of the substance of her Union citizen rights will only be theoretical.

Comments:

There is often an assumption that if a person has a British Citizen child in the UK, an application for leave to remain would almost certainly succeed. This is correct to a large extent in view of the Home Office policy approach [to the interpretation of Section 117B (6) and EX 1 (a)] that a British Citizen child would not normally be expected to leave the

UK, and that the parent or parents or primary carer of the child will also not be expected to leave. However, the vague wording of the policy leaves room for the Home Office to refuse an application where a view is taken that there is public interest in doing so.

The Home Office has often taken a very strong approach to visitors who apply to switch into the partner route in the UK, which is prohibited by Appendix FM. When undertaking such an application, it is important to identify any compelling reasons and take detailed instructions on whether there was any misrepresentation of intention to leave the UK when seeking entry as a visitor. Further, instructions should be taken on whether there were any reasons which led to a change of intention subsequent to entry.

Chikwamba is still alive. However, a cautious approach must be adopted when seeking to rely on its principles in any Article 8 claim.

As to **Zambrano,** the right is not protected by the Withdrawal Agreement. Therefore, its relevance and significance will gradually fade after the end of the transitional period on 31 December 2020.

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If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

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