



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/08926/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 4th December 2013
Extempore Judgment**

**Determination
Promulgated**

On 16th December 2013

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MOHAMMAD AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Ifere (Kolia Solicitors)

For the Respondent: Ms S Ong (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant Mohammad Ahmed who is a citizen of Pakistan born on 5th October 1977. He appeals against the determination of First-tier Tribunal Judge Telford promulgated on 16th October 2013 following a hearing at Hatton Cross on 10th October.

In his determination Judge Telford dismissed the appeal under Article 8. This was a case that was argued on Article 8 grounds only.

2. The grounds of appeal, expanded upon before me by Mr Ifere, are in effect quite simple, and they are that the grounds of appeal before the First-tier Tribunal argued that on the basis of Chikwamba [2008] UKHL 40, EB (Kosovo) [2008] UKHL 41, VW (Uganda) [2009] EWCA Civ 5, the Appellant ought to have succeeded. That is because he has a British wife and a child in the UK. The judge failed in the determination to mention any of that case law relied upon by the Appellant and that failure, it is argued, was an error of law. Mr Ifere argued the error of law was material to the outcome because the Appellant was entitled to succeed on the basis of that case law.
3. My first task is to decide whether Judge Telford made an error of law and thereafter if he did whether and to what extent his determination should be set aside. It is plain that the Judge did not refer in terms to that case law. In the determination he set out the evidence that he had before him. He noted that he heard from the Appellant and his wife who adopted their statements, gave evidence and were cross examined. He noted some difficulties in the evidence as to whether or not they were in fact married but accepted, and it is plainly the case, that they are in a relationship. They live together, with the “wife’s” two sons and their own child born in May 2011. The Appellant has a relationship with his “wife’s” sons akin to a stepfather although they have regular contact with their own father. The Judge accepted that there was family life that engaged Article 8 and went on to consider the proportionality of the Appellant’s removal and found it proportionate.
4. In deciding whether or not he made an error of law in referring to that case law and whether that was material, I need to look at the facts of this case, and I also need to look at exactly what Chikwamba tells us. The Upper Tribunal in the case of Hyat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC) looked at Chikwamba and where it applies. The headnote states that the significance of Chikwamba 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.
5. The case of Chikwamba had quite specific facts where there was a wife who it was sought to suggest should return to Zimbabwe to make an entry clearance application. She was married to a Zimbabwean refugee and they had a very young child. It was found in those circumstances it would be wholly unreasonable to expect her to return to Zimbabwe with the harsh conditions there either with a very young child or worse to leave her very young child in the UK whilst she went to make the application. Clearly, in circumstances where the only reason for the refusal was that she was in the UK, and that was the reason she failed to meet the

Immigration Rules to insist upon her to return for that formulaic exercise was wholly unreasonable, and that seems entirely right.

6. Hyat suggests that it is not restricted to cases where there are children or where there is a refugee, but it does say in terms in the headnote that it is appeals where the only matter weighing on the Respondent's side of a proportionality exercise is the public policy of requiring the application to be made from abroad. One of the most revealing paragraphs in **Hyat** is paragraph 24 which states that:-

“Viewed correctly the Chikwamba principle does not accordingly automatically trump anything on the State's side such as poor immigration history. Conversely, the principle cannot be simply switched off on mechanistic grounds, such as because children are not involved or that as in this case the Appellant is not seeking to remain with a spouse who is settled in the United Kingdom”.

7. It is necessary in the present case to look at what factors are on the Respondent's side, and in that regard the Appellant's history is very relevant. He arrived from Pakistan as a visitor on 2 September 2004. His leave expired on 27 November 2004. He overstayed, so he was illegally in this country from November 2004. We are now in December 2013.
8. On 7th August 2009, he came to the attention of the UK authorities when he was arrested for motoring offences, and at the time he also admitted to having worked illegally using false identity documents. On 14th August 2009 he was convicted of having no insurance and driving other than in terms of a licence - I presume he did not have a driving licence. He still did not leave the country and on 3rd August 2010, a year later, he applied for leave to remain. That was refused on 23rd August and he then asked for it to be looked at again on Article 8 grounds. The Decision was delayed in no small part by the Secretary of State wishing to give consideration to whether he should be deported on account of his general behaviour after he had been arrested for an alleged assault. In the event nothing came of that, and therefore a Decision was made on 7th March 2013 to refuse him leave to remain.
9. In this case we have a foreign national who has been an overstayer since 2004, who has committed criminal offences, who only claimed a year after he had come to the attention through the commission of criminal offences, who entered a relationship with a British citizen knowing he had no right to be in the UK and that his situation was precarious, and in respect of his partner she also knew the situation was precarious. They nevertheless chose to enter into a relationship and have a child, but they did so knowing the situation. There was no evidence as far as I can see before the First-tier Tribunal Judge that the Appellant would have met the requirements of the Immigration Rules. This is certainly not a case where the only contra factor is that he is in the UK. There are a great many reasons why this gentleman's presence in the UK is against policy.
10. On his behalf it was claimed he did not have an appalling immigration history. That I find is an extraordinary submission on the facts of this case and one with which I wholly disagree.

11. Therefore it seems to me that this is a case where even if the Judge had referred to the cases relied upon by the Appellant in the grounds of appeal the Appellant would not have succeeded in the assessment of proportionality because they do not assist him. He is very far from coming within the principles of Chikwamba, EB (Kosovo), Hyat and the other cases relied upon.
12. For that reason, while it could be said the Judge erred in failing to specifically deal with those cases, it made no difference to the outcome and therefore any error of law was immaterial. The appeal is dismissed.

Signed

Date 6th December 2013

Upper Tribunal Judge Martin