



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/00979/2014**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 October 2015**

**Decision & Reasons  
Promulgated  
On 5 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**Ms RITA ISMENIA VENEGAS  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer  
For the Respondent: Ms C Callinan (counsel) instructed by SLA, Solicitors

**DECISION AND REASONS**

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

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the

First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Higgins, promulgated on 27 May 2015, which allowed the Appellant's appeal on article 8 ECHR grounds.

### **Background**

3. The Appellant was born on 22 May 1963 and is a national of Ecuador.

4. On 05 June 2009 the Appellant applied for leave to remain in the UK on the basis that she had established both family and private life with the meaning of article 8 ECHR in the UK.

5. On 09 December 2013 the Secretary of State refused the Appellant's application and decided to remove her.

### **The Judge's Decision**

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Higgins ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR grounds.

7. Grounds of appeal were lodged and on 27 August 2015 Judge JM Holmes gave permission to appeal stating inter alia

*".....the judge's approach to the issue of proportionality is arguably misconceived and displays a freewheeling approach to the requirements of the immigration rules and the issue of proportionality"*

### **The Hearing**

8. Ms Everett for the respondent adopted the terms of the grounds of appeal and told me that she relied on the cases of Agyarko v SSHD [2015] EWCA Civ 440 and AM (s.117B) Malawi [2015] UKUT 0260 (IAC). She argued that the decision had been made relying on the case of Chikwamba, and that the facts and circumstances of this case are distinguishable. At [32] the Judge finds that there are no insurmountable obstacles to family life continuing elsewhere, and at [33] the Judge made findings which indicate the appellant could make a successful application for entry clearance from abroad. Ms Everett told me that the Judge's findings amount to "*a blatant error of law*". She invited me to set aside the decision and remake the decision by dismissing the appellant's appeal.

9. Ms Callinan, counsel for the appellant told me that the decision does not contain any material errors of law. She drew my attention to paragraphs [28] to [32] and told me that the Judge considered the public interest factors, taking careful account of section 117A-D of the 2002 act before considering the case of R(on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR

[2015] UKUT 00189. She reminded me that at [28] the Judge found that the appellant's British citizen husband could not reasonably be expected to relocate to Ecuador. She told me that the Judge had manifestly carried out an adequate and appropriate proportionality balancing exercise. She urged me to dismiss the appeal and allow the decision to stand. In the alternative, if I were to find an error of law, she asked me to remit the case back to the First-tier Tribunal to be determined afresh.

## **Analysis**

10. In Chikwamba (FC) v SSHD 2008 UKHL 40, the House of Lords said that in deciding whether a general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "comparatively rarely, certainly in family cases involving children" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

11. In R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) 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. However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

12. Between [24] and [26] the Judge considers the appellant's application in terms of both appendix FM and paragraph 276 ADE of the immigration rules. He concludes that the appellant cannot fulfil the requirements of the immigration rules. At [25] he finds "*she has not satisfied me that there are insurmountable obstacles to family life with Mr Sarabia-Torres continuing outside the UK.*" At [27] the Judge considers whether or not the appellant would be able to make a successful application for entry clearance from Ecuador, and concludes that the appellant is likely to fulfil the requirements for a grant of entry clearance as a partner in terms of E-ECP.4.1 of the immigration rules.

13. Between [28] and [33] the Judge considered the appellant's article 8 ECHR rights out-with the immigration rules. At [28] the Judge concludes that the appellant's partner cannot reasonably be expected to relocate to Ecuador because he is likely to lose his employment in the UK if he does, and that will mean the appellant cannot satisfy the financial requirements any longer and so will not make a successful application for entry clearance. At [31] the Judge considers the factors set out in section 117B of the 2002 Act.

14. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that 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.

15. Having considered all of those matters the Judge found that the case of Chen was determinative of the appeal because at [28] the Judge found that the appellant's partner could not realistically join her in Ecuador while she awaited the outcome of an application for entry clearance. The Judge found that the period of separation between the appellant and the partner amounted to a disproportionate interference with the right to respect for family life. The findings set out at [28] do not contradict the finding at [25] that there are no insurmountable obstacles to family life continuing outside the UK; the Judge acknowledges that at [32] by reference to the case of Chen.

16. The appellant's partner is a British citizen of Ecuadorian origin. The Judge specifically finds at [28] that the prospect of loss of the appellant's partner's employment is the factor which prevents the appellant's partner from leaving the UK.

17. In R(on the application of Agyarko) [2015] EWCA Civ 440 considered the phrase "*insurmountable obstacles*" as used in paragraph EX.1 of the Rules. "*...The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the European Court of Human Rights 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).*"

18. At paragraph 26 of that decision "*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.*"

19. A fair reading of the decision indicates that the Judge made careful findings of fact and examined the appellant's case under the immigration rules before correctly moving on to consider whether or not article 8 was engaged out-with the immigration rules. The Judge correctly directed himself in law and at [32] found that the guidance given in the case of Chen should be applied to the facts and circumstances of this case. The Judge specifically found that there are no insurmountable obstacles to family life being enjoyed outside the UK but that the effect of temporary separation on the appellant and her partner amounts to a disproportionate interference with family life. The Judge clearly distinguished the test for article 8 consideration within the rules, from the broader proportionality exercise to be conducted out-with the rules.

20. In **Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC)** the Tribunal held (inter alia) that although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

21. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Disagreement with a Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless a Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law.

22. The decision made by the Judge is one that the respondent does not like. It may be that another Judge considering the same facts and circumstances might reach a different conclusion. But in this case the Judge has not misdirected himself in law and has quite clearly considered the facts and circumstances particular to the appellant's case. It is at least implicit that the Judge distinguishes the facts and circumstances in this appellant's case from the facts and circumstances applicable in the case of Agyarko.

## **CONCLUSION**

**23. I therefore find that no errors of law have been established and that the Judge's determination should stand.**

## **DECISION**

**24. The appeal is dismissed.**

Signed

Date 22 October 2015

Deputy Upper Tribunal Judge Doyle

