



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

Appeal Number: IA/12325/2014

**THE IMMIGRATION ACTS**

**Heard at FIELD HOUSE  
On 13 JANUARY 2015**

**Decision & Reasons  
Promulgated  
On 27 JANUARY 2015**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL GA BLACK**

**Between**

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

**APPELLANT**

**and**

**MS A Z K  
(ANONYMITY DIRECTION MADE)**

**CLAIMANT**

**Representation:**

For the Appellant: Mr C Avery (Home Office presenting officer)  
For the Claimant: In person

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision and reasons by the First-tier Tribunal (Judge Sweet) who allowed the appeal under the Immigration Rules EX 1 and in the alternative under Article 8 ECHR. The decision was promulgated on 17<sup>th</sup> October 2014.
2. For convenience I shall refer to the parties as “the Secretary of State” who is the appellant in this matter and to “the Claimant.”

## **Background**

3. The Claimant is a citizen of Sierra Leone and is female and was born on 4<sup>th</sup> April 1989. She married her husband on 4<sup>th</sup> April 2013 in Gambia. She entered the UK as a family visitor on 14<sup>th</sup> August 2013 and applied for further leave as a parent (D-LTRP1.1). The Claimant and her husband, who is a British citizen, have a young child born in the UK on 8.9.2014. The Secretary of State considered the application prior to the birth of the child and refused the same as the Claimant was not eligible under paragraph E-LTRP.2.1 having entered as a visitor, paragraph 276 ADE was not applicable, and there were no exceptional circumstances.

## **Tribunal**

4. The Tribunal considered the appeal and the fact of the birth of the child, under EX 1 and allowed the appeal accordingly [24]. In the alternative the Tribunal considered Article 8 ECHR and found exceptional circumstances for consideration outside of the Rules. It concluded that the decision was disproportionate having regard to the '**Chikwamba** principle' finding that the only reason for return was to make a new application for leave and that the Claimant, would if returned to Sierra Leone, be separated from her family [25].

## **Grounds & permission**

5. In grounds of application the Secretary of State argued firstly, that the Tribunal erred by applying EX 1 when it was not a freestanding provision as confirmed in **Sabir (Appendix FM-EX1 not freestanding) [2014] UKUT 00063**. The eligibility criteria under section E applied to the exceptions under EX1. The second ground was that there was a misdirection in law by the Tribunal regarding Article 8 by following the '**Chikwamba** Principle' which had now been superseded by new legislation setting out the correct approach to public interest in the Immigration Act 2014 . It was not unjustifiably harsh to expect the Claimant to return to Gambia from where she can make an application for entry clearance.
6. Permission to appeal was granted by First-tier Judge Saffer on 1<sup>st</sup> December 2014.

## **Hearing**

7. At the hearing before me the Claimant and her partner were present. They were not legally represented. I explained to the Claimant the procedure that would be followed by the Tribunal, the nature of the proceedings, and that as she was not represented I would ascertain that she understood the proceedings, that she would have an opportunity to address the Tribunal and to respond to the submissions. Mr Avery made submissions and amplified the grounds of the application. He acknowledged that the Secretary of State had not considered the best interests of the child under section 55 of the 2009 Act, as the child was born after the decision was made. The Tribunal failed to consider "**Chikwamba**" in light of the new rules regarding public interest. However

the First -tier Tribunal was able to consider the circumstances at the date of hearing.

8. At the end of the hearing I indicated that I found an error of law and that ground one was made out. I reserved my decision in so far as the second ground was concerned and explained that in any event I would prepare a full written decision and reasons, and how the matter would proceed having found the error of law; whether by way of remittal, further hearing, written submissions or by this Tribunal without further hearing. Mr Avery indicated that the appeal ought to be re heard as the error rendered the entire decision unsound.

### **Discussion and decision**

9. It was common ground that the Claimant could not meet the family or private life rules under Appendix FM or paragraph 267ADE. I am satisfied that the Tribunal made a clear error of law in treating EX1 as a free standing provision which it is not, as confirmed in **Sabir**. To be eligible under the exceptional provisions the Claimant cannot have entered as a visitor. The rules have now set the public interest in requiring an applicant to have entered into the UK in a particular capacity in order to be entitled to entry in that capacity. The Claimant was now seeking leave to remain as a spouse/parent when she entered as a visitor.
10. The Tribunal went on to make an alternative decision under Article 8 ECHR and found the interference to be disproportionate relying on the best interests of the child and that it was not reasonable in the circumstances to expect the Claimant to return to Sierra Leone to make a fresh application following the "**Chikwamba**" principle.
11. The Tribunal dealt with the issue of Article 8 in one paragraph and as such I find its approach to the legal issues to be flawed and the findings inadequately reasoned. In considering Article 8 the Tribunal failed to give any reasons for finding exceptional circumstances for consideration outside of the Rules. There after the Tribunal failed to follow the 5 stage approach in **Razgar** and did not identify how each stage was met to engage Article 8. I find that the Tribunal had no regard to public interest factors either as provided for in recent amendments to the Nationality, Immigration & Asylum Act 2002 at section 117, or generally.
12. I conclude that the Tribunal erred in its approach and consideration of Article 8 ECHR, but I do not consider that this error is material such that the decision or outcome would be different. My reasons are as follows.
13. The findings of fact are not challenged.
14. On the evidence before the Tribunal I find exceptional circumstances to the extent that the Claimant now has a young baby who is a British citizen and there was no consideration by the Secretary of State of his best interests. I find that there is family life in the UK with the child and the Claimant's husband. There would be a significant interference with the family life in the event that that Claimant was removed. If she were to return with her child, I find an interference with the father's Article 8 family life. I am satisfied that having regard to the young age of the baby,

his British citizenship and that of his father, a removal of the Claimant, even in the short term would be a significant disruption. It would not be in his best interests to be uprooted at such a young age and separated from his father. His best interests lie in remaining with both of his parents. The Claimant needs the support of her husband. I find that her husband has older British children from a previous relationship and that he would not be able to live in Sierra Leone in the long term. I find no sensible reason for why an entry clearance officer would be better placed to consider the new application. The Claimant entered the UK lawfully. The public interest lies only in the maintenance of the eligibility criteria. I have had regard to section 117 Immigration Act 2014 and there are no concerns as financial or accommodation or other relevant public interest factors. The legislation provides that there is no public interest in removal of an appellant where there would be a breach of family life with a qualifying child and it is not reasonable for the child to live outside the UK. It is for all of those reasons that having considered **R (on the application of Zhang) v SSHD [2013] EWCA 892 (Admin)**, I take the view that the Tribunal's decision under Article 8 following the "**Chikwamba** principle" is sustainable in this appeal.

### **Notice of Decision**

15. There is no material error of law. The decision is under Article 8 ECHR shall stand.
16. The appeal is allowed on human rights grounds.

### **Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

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 member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. There is a young child involved in these proceedings.

Signed

Date 23.1.2015

Judge GA Black  
Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT**  
**FEE AWARD**

I make no fee award.

Signed

Date 23.1.2015

Judge GA BLACK  
Deputy Judge of the Upper Tribunal