



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/40179/2014

THE IMMIGRATION ACTS

Heard at: Field House  
On: 11<sup>th</sup> May 2015

Determination Promulgated  
On: 28<sup>th</sup> May 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE BRUCE  
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Mrs King Wan Lam  
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

**Representation:**

For the Appellant: Mr Mackenzie, Counsel instructed by Just Immigration Solicitors  
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of China, from the Hong Kong SAR, born on 15 October 1971. She appeals with permission<sup>1</sup> the decision of First-tier Tribunal Judge Robertson<sup>2</sup> to dismiss her appeal against a decision to remove her from the United Kingdom pursuant to s 47 of the Immigration, Asylum and Nationality Act

<sup>1</sup> Permission granted by First-tier Tribunal Judge Frankish on the 9<sup>th</sup> March 2015

<sup>2</sup> Determination promulgated 23<sup>rd</sup> January 2015

2006. That decision followed from the Respondent's rejection on 14 October 2014 of the Appellant's in-time application for leave to remain in the United Kingdom on the basis of her family and private life.

## Background

2. The basis of the Appellant's application made on 29 August 2014 is that she is married to a British national, Daniel Chafen, who she met whilst he was working in Hong Kong between 2008 and 2013. Their daughter, Scarlett Beatrix Chafen was born on 14 February 2011 and is a dual British and Chinese national. In September 2013, Mr Chafen was made redundant by his employer and the family came to the United Kingdom on 26 December 2013. They decided to come to the United Kingdom as a family and that the Appellant would come as a visitor first and then apply to change her status to a spouse when her husband found a job. They said that they did not know that they would be unable to do this.
3. The basis of the Respondent's refusal was that the Appellant did not meet the requirements of paragraph E-LTRP 3.1 of Appendix FM as she was a visitor; the financial requirements at E-LTRP 3.1.-3.3. were not met as some of the payslips and bank statements were not originals or verified and thus she could not benefit from the criteria set out in EX.1 and EX.2 of Appendix FM of the Immigration Rules. The Respondent also considered whether exceptional circumstances had been raised and asserted that the Appellant would have been expected to apply for a spouse visa with the correct entry clearance and it would not be unreasonable for her to do so either alone or accompanied by her Sponsor and child.
4. At the hearing before the First Tier Tribunal it was argued that in light of section 117B(6) of the NIAA 2002 it was not reasonable to expect a British citizen child to leave the United Kingdom and this was supported by case law and the Respondent's policy as set out in the Immigration Directorates' Instruction *Family Migration: Appendix FM Section 1.0b Family Life as a Partner or Parent and Private Life: 10 year routes* at 11.2.3. In a determination promulgated on 23 January 2015, based on the visa processing times submitted by the Respondent, the Judge found that an out of country application made by the Appellant is more likely than not to be processed within 10 days; that the decision in Chikwamba [2008] UKHL 40 was decided on the particular facts of the case and well before the changes in the Immigration Rules and the current emphasis on the need for immigration control; it would be in the best interests of Scarlett to remain with her parents in the UK because she is used to a family life in which both parents are present on a daily basis and it was not disproportionate for the Appellant to make an out of country application. Consequently he dismissed the appeal.
5. Permission to appeal to the Upper Tribunal was sought on the basis that the First Tier Tribunal reached a conclusion which was contrary to Chikwamba; misunderstood and misapplied the law governing the relevance of a parental relationship with a British child and made no findings on the proportionality of

refusing the Appellant's application because she had not overstayed. This ground referred to the arguably anomalous provisions of E-LTRP.2.1 which preclude 'partner' applications being made by visitors, but not by overstayers. Permission to appeal was granted on 9 March 2015

### Submissions

6. At the hearing on 11 May 2015, Mr Mackenzie submitted that there was no dispute about the relationship or the existence of family life. The application had been refused because the Appellant came to the United Kingdom as a visitor and so could not rely on EX.1 of Appendix FM, which she would have been able to if she had been an overstayer: this was perverse. In respect of the First Tier Tribunal's finding that the Appellant can go back to Hong Kong and apply for entry clearance this was clearly contrary to the judgment of the House of Lords in Chikwamba. He further noted that there was extensive case law post Chikwamba eg. MA (Pakistan) [2009] EWCA Civ 953 and it was clear that there needs to be a good reason to expect applicants to return home. The only argument advanced by the Respondent at the First-tier Tribunal hearing was that the Appellant could return to obtain entry clearance but the key point is that it is for the Respondent to identify why the Appellant should go back and it is for her to justify the interference. A mere failure to comply with immigration control, which was not the case here, was not enough of a reason *cf* Lord Brown in Chikwamba. In respect of the Judge's finding that an application would likely be processed within 10 days Mr Mackenzie submitted that it doesn't matter how long it takes, the Respondent has not discharged the burden of showing that it would be reasonable for the Appellant to have to return to Hong Kong. He further disputed the finding at paragraph 22 that Chikwamba was decided on its particular facts: the House of Lords were making a point on the law. There was nothing in the Rules that purports to reverse Chikwamba. The whole premise of Chikwamba was that the Respondent was simply trying to rely on the formal process of immigration control to defeat a substantively well-founded claim: this was found not to be sufficient. As Lord Justice Sedley makes clear in VW (Uganda) & AB (Somalia) [2009] EWCA Civ 5, it is a false logic and is unsustainable.
7. In respect of the application of section 117B of the NIAA 2002(6) to the Appellant's British child, Mr Mackenzie submitted that the public interest does not require removal when a child is a British citizen and it is not reasonable to expect the child to leave the UK. He submitted that the policy at 11.2.3 of the IDI reflects the decision in Sanade (British children - Zambrano - Dereci) [2011] UKUT 48 (IAC) albeit it is slightly narrower as the exceptions introduced there are not present in Sanade. However, there is nothing ambiguous about the law: it is not reasonable to expect a British citizen child to leave the United Kingdom. It had not been suggested that any of the exceptions mentioned in the IDI apply in this case. In respect of section 117B(4) of the NIAA 2002 this does not refer to family life only private life, it does not refer to children and the Appellant was not in the United Kingdom unlawfully and therefore, it was not a precarious case. He further submitted that ZH (Tanzania) [2011] UKSC 4 was not distinguishable because

Scarlett was a dual national: you do not become less British just because you have another nationality.

8. In response to a question from the Tribunal, Mr Mackenzie confirmed that Mr Chafen's current salary was in excess of £68,000 per annum and he had previously been unable to meet the requirements of Appendix FM as copy, instead of original, bank statements had been submitted with the application. However, he had his original bank statements at the hearing before the First Tier Tribunal which demonstrated that and had already earned over £18,600 that year, despite only having worked for 4 months.
9. In response, Ms Isherwood submitted that there was no material error of law in the decision of the First Tier Tribunal Judge. It had been accepted that the Appellant did not meet the Rules. She submitted that this was not simply a Chikwamba case. What was being ignored was the case law from the Court of Appeal which says that the starting point is the Immigration Rules. She relied on paragraphs 29-31 of. Agyarko & others v SSHD (2015) EWCA Civ 440. It was necessary to look at the Immigration Rules first and then, in a 'precarious' family life case, consider whether there are exceptional circumstances. This was also the test set out in the policy document. She further submitted that the refusal letter clearly raises consideration of the policy and the issue of insurmountable obstacles and that the case law has moved on since the Sanade concession. The Appellant had options as her child has more than one citizenship: the refusal stated that both could go back or the Appellant could go back herself. The Home Office Presenting Officer provided the information regarding visa processing time limits. She further submitted that this was a case where there was precarious family life: Y v Russia [2010] 51 EHRR 21. The Appellant came to the United Kingdom in a temporary capacity and there was an avenue available to her to get appropriate entry clearance as a spouse. As the Court of Appeal made clear in Huang (2007) UKHL 11 you cannot choose where to live with your spouse. In respect of section 117B (6) she pointed out that Dube [2015] UKUT 90 (IAC) says it is necessary to have to look at the whole Act in respect of the public interest.
10. The Tribunal then asked Mr Mackenzie whether it might be thought that paragraph 11.2.3 of the policy and the Sanade concession only apply if you are expecting the British citizen or EEA national to go and *live* in the third country, whereas the First Tier Tribunal Judge found that the Appellant (and Scarlett) would only be going for 10 days: given that limited interference, was the policy still applicable? Mr Mackenzie submitted that there still has to be a justification for the interference and if there was no justification it was not necessary to go on to consider proportionality. No public interest had been identified in why they should return. If one was identified then the Appellant may have had to give reasons why she shouldn't return. The word used is "leave" not "live outside" or "leave for a substantial period". The fact that there were no insurmountable obstacles was not a reason justifying why the Appellant and Scarlett should leave the United Kingdom and the Respondent has not said what the public interest is. In respect of the decision in Agyarko he submitted that it was not on point:

Agyarko was a decision taken before section 117B came into force and there were no children. It was clear from 38 that this covered both situations where a relationship has been built up by someone who is here unlawfully and does not have children, hence the emphasis on precariousness, which was not the facts of this case. He submitted that it is clear from the second sentence of paragraph 31 that Sales LJ was not suggesting a departure from the principle in Chikwamba. He further submitted that SS Congo [2015] EWCA Civ 387 was also dealing with the pre section 117B situation; the statute clearly takes precedence over the case law and would have to be read down if inconsistent.

### **Our Findings**

11. At the end of the hearing we announced our decision that, having heard from both representatives, we were satisfied that the decision contains errors of law such that it must be set aside and that we would re-make the decision by allowing it.
12. Our reasons for so doing are as follows. By the time of the appeal hearing in the First Tier Tribunal the Appellant met the substantive requirements of the Rules in respect of her relationship and suitability; her sponsor's earnings were such that she did not need to show "insurmountable obstacles" or that her daughter's departure from the United Kingdom would not be reasonable. Her only difficulty was that she did not have the appropriate entry clearance. Consequently, she had submitted that the House of Lords judgment in Chikwamba applied. The First-tier Tribunal rejected that argument at paragraph 22 of the determination in the following terms:
 

"Chikwamba was decided on the particular facts of the case and well before the changes in the Immigration Rules and the current emphasis on the need for immigration control. There is a strong public policy consideration behind the policy requirement for an application for a spousal visa to be made from abroad, firstly because resources are concentrated overseas for the processing of such applications and secondly because it discourages applications from entering as visitors and then seeking to remain on a more permanent basis, which undermines the robustness of the visitor route."
13. Mr Mackenzie invited us to re-read the judgment in Chikwamba and we have done so. Lord Scott held at 6 that government policy requiring return in order to make an entry clearance application amounted to dogma and at 4 that "*policies that involve people cannot be and should not be allowed to become rigid, inflexible rules.*" At 44, Lord Brown considered the Respondent's policy at that time and its underlying rationale and found that "*only comparatively rarely, certainly in family cases involving children*" would it be proportionate and more appropriate for the Appellant to apply for leave from abroad. There had to be good reason for enforcing the policy and there was none in that case.
14. The judgment in Chikwamba has been followed in a number of cases: in MA (Pakistan) [2009] EWCA Civ 953, Lord Justice Sullivan [at 7] held that the principle was not confined to cases where children were involved and [at 9] that: "*the real*

question was not whether there were “insurmountable obstacles: to the applicant returning to Pakistan in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so”; in VW (Uganda) & AB (Somalia) [2009] EWCA Civ 5, Lord Justice Sedley referred to the Home Office policy prior to Chikwamba as “false logic” and in Secretary of State for the Home Department v Treebhowan; Hayat v Secretary of State for the Home Department [2012] EWCA 1054, Lord Justice Elias noted at 17 that: “it is true that enforcement of the policy is likely to be particularly futile where entry clearance will ultimately be granted because it is requiring a temporary disruption of family life for no good purpose.” His Lordship then proceeded to summarise the principles distilled from the post Chikwamba jurisprudence and concluded at 30(g) that: “if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise”. The principle was then a clear one: in cases where the substantive requirements of the Rules are met the Secretary of State must have a sensible reason for requiring family members to separate in order to go through the motions of applying for entry clearance.

15. However, since the coming into force of the changes to the Immigration Rules on 9 July 2012, the Respondent has reverted to her previous policy position of asserting that an applicant needs to show insurmountable obstacles to return in order to apply for entry clearance. The recent decision of Agyarko was an appeal to the Court of Appeal against the refusal by the Upper Tribunal to grant permission to apply for judicial review in a number of linked cases concerning overstayers who had formed relationships with British citizens. At 31, Lord Justice Sales held that it was possible to envisage a Chikwamba type case arising in which Article 8 might require that leave to remain be granted outside the Rules even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas, but in a “precarious” family life case it would be necessary to establish that there were “exceptional circumstances” to warrant such a conclusion. Upper Tribunal Judge Gill reached the same conclusion in R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). However, these were cases that did not involve children and where family life had been formed at the time when the applicants had overstayed and could therefore be considered “precarious”. We do not consider that the decisions in Agyarko or Chen materially impinge on the Chikwamba principle nor could have been intended to do so. Whilst the Immigration Rules as they currently stand impose mandatory requirements and were intended to represent a “complete code”, we do not consider that the imposition of an “exceptional circumstances” requirement for an application to succeed outside the Rules on Article 8 grounds is a freestanding provision but must be read and interpreted alongside both the pre-existing and developing jurisprudence of the higher Courts. Even if these decisions are to be given the reading for which Ms Isherwood contends, we note that in this case the family life – between mother, father and child – was established when the family were living in Hong Kong and was therefore in no way “precarious” at its inception. We

doubt that such a bond can become “precarious”, and so de-valued in Article 8 terms, because the mother has been granted a visitors visa. Furthermore the fact that there is a child involved has itself been identified as an “exceptional” factor: see Jeunesse v Netherlands [at 118-119], acknowledged in Agyarko [at 33].

16. Whilst “insurmountable obstacles” is the test set out in EX1(b) of Appendix FM of the Rules, the Upper Tribunal have reiterated that this is not a conclusive test in respect of an Article 8 consideration outside the Rules: see Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC) [at 58] and Agyarko [at 31]. Consequently, we are satisfied that the Respondent erred in stopping at this test and so did the First Tier Tribunal. Chikwamba is a judgment from the House of Lords and has been followed and applied on a number of occasions by the Court of Appeal, as set out above. As such the Appellant was entitled to rely upon it.
17. We also find that the First Tier Tribunal Judge materially erred at 24 and 27 of his determination in respect of his analysis of the relevance of Scarlett’s British nationality to the proportionality of the Respondent’s decision. As the policy “*Appendix FM Section 1.0b Family Life as a Partner or Parent and Private Life: 10 year route*” at 11.2.3 makes clear, it is only where the conduct of a parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent in the United Kingdom or European Union, that it may be appropriate to refuse to grant leave. Examples of the conduct envisaged include criminality or a very poor immigration history, neither of which are applicable in this case. It is also incumbent on the decision maker to consider the impact on the child of any separation. In this case, the First Tier Tribunal Judge expressly accepted at paragraph 23 that it would be in Scarlett’s best interests to remain with her parents in the United Kingdom but then at 24 found that her parents would have to choose whether Scarlett would remain in the United Kingdom with her father or return to Hong Kong with her mother, apparently in contradiction of his finding in respect of Scarlett’s best interests. He further found at 24 that because Scarlett is a dual national there was nothing in the Respondent’s decision which offends the principles set out in Sanade. We remind ourselves that the Secretary of State’s concession in that case was based on the fact that the child was a British, and therefore European, citizen. The fact that Scarlett also holds Chinese nationality cannot properly detract from the requirement to consider her best interests as a British child residing in the United Kingdom, and EEA: Sanade and ZH (Tanzania) [2011] UKSC 4. The question pursuant to section 117B(6)(b) of the NIAA 2002 was whether it was reasonable to expect Scarlett to leave the United Kingdom. In our view, it was not reasonable to expect her to leave the United Kingdom nor, given her young age (she is 4 years old) would it be reasonable for her to remain in the United Kingdom without her mother, who is her primary carer. We endorse the First Tier Tribunal Judge’s finding at 23 that it would be in her best interests to remain in the United Kingdom with both her parents.
18. For those reasons we find that the decision of the First-tier Tribunal contains errors of law such that it must be set aside, and we re-make the decision by allowing it.

**Decisions**

19. The decision of the First-tier Tribunal contains errors of law and it is set aside.
20. We re-make the decision in the appeal by allowing it on human rights grounds.
21. We were not asked to make a direction for anonymity and on the facts see no reason to do so.

Deputy Upper Tribunal Judge Chapman  
21st May 2015