



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

Appeal Number: HU/08461/2015

THE IMMIGRATION ACTS

Heard at Field House

On 30 June 2017

**Decision & Reasons
Promulgated
On 18 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**MISS JENNIFER BAUTISTA MANUEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Olphert of Counsel instructed by Malik & Malik
Solicitors

For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having

considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The appellant is a citizen of the Philippines who was born on 6 May 1976. She entered the United Kingdom as a visitor on 1 January 2013. Her visa expired on 21 October 2013. The appellant thereafter remained in the United Kingdom unlawfully. On 6 August 2015 she applied for leave to remain in the United Kingdom based on her marriage to the sponsor, Mr Haxhi Rama. In a decision dated 5 October 2015 the respondent refused the appellant's application.

The appeal to the First-tier Tribunal

3. The appellant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 22 December 2016 First-tier Tribunal Judge O'Malley dismissed the appellant's appeal. The judge did not consider that there were any insurmountable obstacles to the appellant and the sponsor relocating to the Philippines. The judge found that there were no exceptional circumstances in their family life that were not otherwise considered under the Rules and that therefore there was no good reason to consider the claim outside the Immigration Rules. The judge also considered that the facts of the appellant's case did not come within the discretion set out in the case of **Chikwamba v SSHD [2008] UKHL 40** and that requiring the appellant to make an application when overseas would not be disproportionate when considered against the proper aim of immigration control.
4. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 17 May 2017 First-tier Tribunal Judge McCarthy granted the appellant permission to appeal.

The Hearing before the Upper Tribunal

5. At the commencement of the hearing Mr Bramble raised a preliminary issue. He indicated that the sponsor is not a British citizen and that therefore the judge had made a factual mistake. The sponsor has leave to remain in the United Kingdom as a refugee. He did not submit that this was material to the outcome of the appeal.
6. The grounds of appeal set out two grounds. Ground 1 asserts that the First-tier Tribunal Judge made a mistake of fact which resulted in unfairness. At paragraph 46 of the First-tier Tribunal decision the judge mistakenly considered Kosovo to be a part of the European Economic Area when considering whether the appellant and her husband could relocate there. Ground 2 submits that the judge failed to provide adequate reasons as to why this case does not fall within the **Chikwamba** principle. It is submitted that the **Chikwamba** principle essentially allows an individual to bypass the Immigration Rules requirement to submit an out of country application.

7. Mr Olphert relied on the grounds of appeal and submitted that the proportionality assessment was flawed. He referred to the Supreme Court case of **R (on the application of Agyarko) v SSHD [2017] UKSC 11** at paragraph 51. He submitted that the Supreme Court found that if an appellant was required to leave the United Kingdom purely to make an application that was bound to succeed, there would be no public interest in requiring the appellant to leave the United Kingdom to make that application where there were no countervailing factors. He submitted that the appellant is not a foreign criminal and although he accepted that the appellant had overstayed at the end of her visa he submitted that the temporary separation to make an application for entry clearance is disproportionate. He referred to HS74 of the respondent's bundle and submitted that it was clear that the appellant would succeed in an application for entry clearance. It was simply a paper exercise and was therefore not in the public interest to require the appellant to leave the United Kingdom.
8. The Rule 24 response asserts that the grounds fail to identify why the appellant should be given preferential treatment and why the judge should find in her favour in contradiction to **R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) [2015] UKUT 00189** and **SS (Congo) & Ors [2015] EWCA Civ 387**. Mr Bramble relied on the Rule 24 response. He submitted that although the judge had erred in paragraph 46 but that was not a material error of law. The judge had already considered that the sponsor and the appellant would not face insurmountable obstacles in relocating to the Philippines as set out in paragraphs 36 to 45 of the First-tier Tribunal's decision. Further, at paragraphs 47 to 49, with regard to the claim under paragraph 276ADE the judge found that there would not be very significant obstacles to the appellant's integration in the Philippines if she were required to leave the United Kingdom. Therefore, the judge had made findings on insurmountable obstacles and very significant obstacles upon which no appeal has been made. The appellant had not challenged the judge's finding. Therefore, the mistake in paragraph 46 cannot affect the outcome of this appeal. With regard to the second ground of appeal he submitted that the judge had taken into consideration, at paragraph 30, that the appellant is in the United Kingdom unlawfully as an overstayer. In this case the appellant has overstayed illegally and was in the UK unlawfully when she entered into the relationship and subsequent marriage with the sponsor. He submitted that these factors therefore take this case outside **Chikwamba**. He submitted the appellant has two choices, either they can both go to the Philippines, that is the appellant and the sponsor, and continue family life there, or the appellant can return to the Philippines and make an application.

Decision and Reasons

9. On the first ground of appeal it is clear that the judge is mistaken with regard to return to Kosovo - at paragraph 46:

“46. For the avoidance of doubt, I can see no reason to suggest that the appellant and her husband return to Kosovo and indeed as the appellant’s husband is now a UK national such return would be on the basis that he was exercising treaty rights rather than returning to his own country.”

10. Clearly the sponsor (who in any event is not a UK national) would not be expected to return to Kosovo having been granted refugee status in the United Kingdom. It is also evident that even if the sponsor were to return to Kosovo he would not be exercising treaty rights. The judge was clearly in error. However, this is not a material error of law. At the beginning of that paragraph it is clear that the judge only considered this issue as an alternative as the paragraph commences with “*For the avoidance of doubt*”. The judge made clear findings that the appellant and sponsor would not face insurmountable obstacles to their family life continuing in the Philippines. Also, when considering private life under paragraph 276ADE the judge found that there was no evidence before her that there were any very significant obstacles to the appellant’s reintegration into the Philippines.
11. The appellant did not appeal against or challenge the First-tier Tribunal Judge’s findings on the ‘insurmountable obstacles’ or ‘very significant obstacles’ tests.
12. With regard to the second ground of appeal the appellant relies on **Agyarko** in the Supreme Court at paragraph 51. The Supreme Court set out:

“51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there **might** be no public interest in his or her removal. The point is illustrated by the decision in **Chikwamba v Secretary of State for the Home Department.**”[emphasis added]
13. This paragraph should be considered in light of the Supreme Court’s considerations overall. The court did not conclude that there **will** be no public interest in removal.
14. The weight of the public interest in removal will depend on the individual circumstances. It is always fact specific. In **Chen** the Upper Tribunal explained that the proportionality assessment is fact specific and ultimately it is for the appellant to demonstrate that temporary removal would be a disproportionate interference with protected rights. In the headnote and at paragraph 39:

(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. It will not be enough to rely solely upon the case-law concerning *Chikwamba v SSHD* [2008] UKHL 40.

“39. In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in *Huang* or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts.”

15. In this case the appellant was in the United Kingdom unlawfully, not even precariously, when her relationship with the sponsor commenced. She clearly had no expectation that she would be entitled to remain in the United Kingdom. There are no children involved. The First-tier Tribunal did not err in finding that this case does not fall within “*the discretion set out in Chikwamba...*”. The grounds of appeal assert that the **Chikwamba** principle essentially allows an individual to bypass the immigration rules' requirement to submit an out-of-country application. The grounds do not provide any specific reasons as to why in this case the judge erred in finding that it was not disproportionate for her to make an out of country application. As set out above it is for the appellant to demonstrate that it would be disproportionate for her to be removed. It was not incumbent upon the judge to give any further reasons.

16. There was no material error of law in the First-tier Tribunal decision.

Notice of Decision

The appeal is dismissed. The decision of the Secretary of State stands.

Signed P M Ramshaw

Date 16 July 2017

Deputy Upper Tribunal Judge Ramshaw