



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04583/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 September 2019

Decision & Reasons Promulgated  
On 27 September 2019

Before

Upper Tribunal Judge Sheridan

Between

RICHARD [Y]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Pipi, Counsel instructed by Devine solicitors  
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellant is a citizen of Ghana who entered the UK in August 2011 as a visitor and thereafter overstayed.
2. In 2016 he married his wife, a citizen of Ghana with permanent residence in the UK as a former spouse of an EEA national exercising Treaty rights.

3. In January 2018 the appellant was convicted on 2 counts of possession of an ID card with intent and sentenced to 10 months imprisonment.
4. The appellant and his wife are undertaking IVF therapy in respect of which they have already incurred considerable expense.
5. On 10 December 2018 the appellant applied for leave to remain in the UK on the basis of his private and family life. The application was refused on suitability grounds under S-LTR 1.6 (presence in the UK not conducive to the public good) and because it was not considered that there were insurmountable obstacles to his relationship with his wife continuing in Ghana.
6. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Fitzgibbon QC. In a decision promulgated on 24 May 2019, the judge dismissed the appeal. The appellant is now appealing against that decision.

#### **Decision of the First-tier Tribunal**

7. The judge considered the circumstances surrounding the appellant's conviction in 2018 and reached the conclusion that the appellant's offence was not sufficiently serious for him to fall foul of S-LTR 1.6.
8. The judge then considered paragraph EX.1 of appendix FM and whether there would be insurmountable obstacles to family life with his wife continuing in Ghana. The judge stated at paragraph 24 of the decision that it was difficult to identify any features of the evidence that could amount to very significant obstacles. He then, at paragraphs 25 and 26, considered the implications of relocation to Ghana for the IVF treatment. The judge recognised that the treatment might be affected, and that this might cause stress and anguish to the appellant and his wife, but found that the availability and affordability of IVF treatment was not capable of generating a human rights claim.
9. The judge stated that there were not additional or exceptional features of the case that called for an assessment outside the immigration rules.
10. Under a subheading "Chickwamba", the judge stated that it was not inevitable that the appellant would succeed in a fresh application for leave to enter as a spouse made from abroad and concluded that this was not a good reason for allowing the appeal.

## Grounds of Appeal and Submissions

11. The grounds of appeal argue that the judge erred by failing to have regard to the significant expenditure the appellant and his wife have already incurred in respect of IVF treatment and that the investment would be lost if required to relocate to Ghana. It is also argued that the availability or affordability of IVF treatment is capable of engaging human rights claims and that the judge fell into error by declining to assess the claim outside the immigration rules. It is also argued that the judge applied the wrong test when he stated that it was not “inevitable” that an application from outside the UK would succeed.
12. Mr Pipi submitted that the judge failed to take into consideration the cost of IVF and that the evidence showed that the appellant and his wife would not be able to afford IVF treatment in Ghana as they would no longer be able to earn sufficient income or obtain credit. He argued that this was a clear interference with their family life.
13. He also argued that the judge fell into error by looking for exceptional features to consider a freestanding article 8 analysis. He argued that if a proper analysis had been carried out the judge would have taken into consideration factors weighing in the appellant’s favour, such as his ability to speak English and financial independence.
14. Mr Pipi drew my attention to a document that had been submitted to the First-tier Tribunal setting out how the appellant would be able to meet the financial requirements under appendix FM were he to make an application for entry clearance as a spouse from Ghana. He also took me to the numerous financial documents in the First-tier Tribunal bundle and argued that the judge erred by failing to engage with this evidence which, on the balance of probabilities, showed that the appellant would be successful when making an application from abroad.
15. Ms Everett characterised the grounds as a mere disagreement. She did not accept that the evidence before the First-tier Tribunal established that the appellant would succeed in an application from abroad. She noted that even if the evidence established he would meet the financial requirements, that did not mean all the other requirements would necessarily be satisfied.

## Analysis

16. EX.2 of appendix FM defines insurmountable obstacles as:  
‘very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and

which could not be overcome or would entail very serious hardship for the applicant or their partner.’

17. The judge was undoubtedly entitled to find that this threshold was not met. Losing the opportunity to undertake IVF treatment, however upsetting this might be to the appellant and his wife, is not an obstacle to the relationship continuing. Nor is the fact that they will have wasted a considerable amount of money. The inability to access IVF treatment, although clearly of great importance to the appellant and his wife, does not create an obstacle to the relationship continuing. It was therefore open to the judge to find that the appellant’s evidence about IVF, taken at its highest, was not sufficient to meet the test under EX.1(b) as defined in EX.2.
18. That said, I agree with Mr Pipi that the judge fell into error by failing to consider article 8 ECHR outside the immigration rules. This was an appeal under section 84(1)(c) of the Nationality Immigration and Asylum Act 2002 (the 2002 Act) and it was necessary for the judge to consider article 8 ECHR, not merely appendix FM. However, the error was not material because, on any legitimate view, this was not an appeal that could succeed under article 8.
19. The appellant’s relationship with his wife was established at a time when he was in the UK unlawfully and therefore it could only have been given little weight (section 117B (4) and (5) of the 2002 Act). Mr Pipi argued that, following *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, more than little weight could be given to the relationship. In *Rhuppiah* it was explained that where there are particularly strong features of a private life the little weight provision can be overridden. However, there are no features of the appellant’s private or family life that have been identified which could conceivably warrant a departure from the statutory provision that the relationship must be given little weight.
20. In an article 8 proportionality assessment, on the appellant’s side of the scales, weight would be given to the significance to him and his wife of the IVF treatment and the length of time he has spent in the UK. But these factors could not, on any legitimate view, outweigh the public interest in removal given that the appellant has engaged in criminal activity and his relationship with his wife (which is the cornerstone of his private and family life claim) can only be given little weight. Therefore, although I accept the judge erred by confining his analysis of article 8 to the insurmountable obstacles test in appendix FM, I am satisfied that this error was not material.
21. I now turn to consider paragraph 30 of the decision where, under the subheading *Chikwamba*, the judge stated that it was “not inevitable” that the appellant would succeed in a fresh application from abroad.

22. In order to substantiate that he would succeed in an application from outside the UK the appellant submitted multiple bank statements and a detailed table showing how the bank statements demonstrate the financial requirements under appendix FM would be satisfied. There is no consideration of this evidence in the decision. I agree with Mr Pipi that the failure to engage with this evidence amounts to an error of law.

I consider the error material because, given the disruption to the IVF treatment temporary separation would cause, I accept that if the appellant would, on the balance of probabilities, be certain to succeed in an application for entry clearance as a partner from Ghana, expecting him to leave the UK solely to make such an application would not be in the public interest. As stated in *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11 at 51:

“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)**

23. At the hearing, I stated that I intended to remake the decision in respect of whether, on the balance of probabilities, the appellant was certain to be granted leave to enter if he made an application for entry clearance as a spouse from Ghana. Both parties confirmed they had no objection to me remaking the decision on the basis of the documents before the First-tier Tribunal.
24. I have considered the evidence before the First-tier Tribunal and accept that it is likely the appellant would meet the financial requirements for entry clearance as a partner under appendix FM. However, meeting the financial requirements is not enough; an appellant must also not fall for refusal under any of the grounds in section S - EC: suitability - entry clearance. S-EC 1.4(c) provides that:

‘the exclusion of the applicant from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence’

25. Given the appellant's conviction and sentence to 10 months imprisonment in January 2018, it is likely the appellant would fall for refusal under S-EC 1.4(c). Therefore, this is not a case where it can be said the appellant would succeed in an application from outside the UK.

### **Notice of Decision**

The decision of the First-tier Tribunal stands apart from the assessment of whether the appellant would succeed in an application for entry clearance from abroad at paragraph 30 of the decision, which is set aside. I remake that part of the decision and reach the same conclusion as the First-tier Tribunal. I therefore dismiss the appeal.

Signed



Deputy Upper Tribunal Judge Sheridan      Dated: 26 September 2019