



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

Appeal Number: HU/09630/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 November 2019**

**Decision & Reasons Promulgated  
On 25 November 2019**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

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

Appellant

**and**

**SHAHNAZ KHAN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Mr A Alam, Counsel instructed by Hamlet Solicitors LLP

**DECISION AND REASONS**

1. The appellant in these proceedings is the Secretary of State. However, it is convenient to refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellant is a citizen of Bangladesh. She appealed to the First-tier Tribunal against a decision of the respondent dated 14 May 2019, being a decision to refuse a human rights claim following an application for further leave to remain. Her appeal against that decision came before First-tier Tribunal Judge Davidge at a hearing on 15 July 2019 which resulted in the appeal being allowed.

3. The Secretary of State appealed against that decision for the reasons set out in the grounds before me which were relied on by Mr Tarlow on behalf of the respondent. Essentially the issue revolves around the application of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 and associated cases. In particular, notwithstanding that Judge Davidge found that the appellant and her spouse were in a genuine and subsisting relationship and that otherwise the requirements of the Immigration Rules were met, it is argued on behalf of the respondent that her decision does not comply with the *Chikwamba* principle, in particular as set out at [44] of that decision. There it states that:

“Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.”

4. Mr Tarlow submitted that this was not a case in which children are involved and accordingly Judge Davidge fell into error by applying the *Chikwamba* principle. It was also pointed out that the period of separation pending an application for entry clearance would be temporary, as Judge Davidge acknowledged at [16] of her decision.
5. Mr Alam submitted that the grounds were misconceived and that there was no error of law, or none that was material. He relied on two decisions in particular: *Chen v Secretary of State for the Home Department* [2015] IJR UKUT 00189 (IAC) and *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, in particular at [51]. It was submitted that there was nothing in *Chikwamba* or subsequent cases that indicated that there was a need for there to be children to be involved for *Chikwamba* to apply.
6. So far as an application for entry clearance is concerned, the requirement of insurmountable obstacles which the respondent relied on in support of the appeal was not a requirement for entry clearance. In this case the appellant met the financial requirements, the English language requirements and the relationship requirements. It was accepted that the eligibility requirements were not met in terms of insurmountable obstacles and paragraph EX.2., but insurmountable obstacles are not a requirement of the Rules for entry clearance.
7. It was pointed out that Judge Davidge had referred to paragraph EX.1. of Appendix FM at [5(a)] of her decision. At [13] she identified the undisputed facts. She resolved the disputed facts, in part, against the appellant, concluding that the fact that the appellant’s husband was on licence in relation to the criminal offence that he had committed was not a matter that could avail her.
8. It was further submitted that whilst Judge Davidge did not refer to the decision in *Chen*, she in fact made her decision in line with it. She considered proportionality at [17] and made an overall assessment taking into account all matters at [22].

9. As regards the period of overstaying by the appellant, it was accepted that that was a period that started on 25 May 2018 and was for six months until the application made in November 2018 but continuing until the appellant is granted leave. Nevertheless, it was submitted that periods of overstaying do not defeat an application for entry clearance, at least not *per se*, and no such proposition was advanced on behalf of the respondent before the First-tier Tribunal. Indeed, none was advanced before me. It was accepted on behalf of the respondent before the First-tier Tribunal that the requirements of the Rules were met in terms of suitability.

#### *Assessment*

10. It is evident that Judge Davidge considered all material factors. At [17] she set out the matters that went to proportionality and fleshed those out at [22]. In the first sentence of [22] she said this:

“Before me it is accepted that all the substantive requirements have been demonstrated to the respondent’s satisfaction.”

She referred to the public interest normally associated with an in-country “rules-based” position, being reduced because the respondent’s reasoning showed that a fresh application made in Bangladesh would meet the Rules and so would be bound to succeed. She went on to state that little weight was to be attached to private life in this case and that the family life enjoyed in the UK had been built up in the context of precarious leave. She noted that the appellant has been in the UK unlawfully and she referred to s.117 of the Nationality, Immigration and Asylum Act 2002 in terms of the weight to be afforded to the appellant’s life in the UK in the context of unlawful presence.

11. She referred to other issues, such as the appellant’s English language ability, her ability to integrate, and her financial independence. She concluded that nothing adverse flowed from the financial and language situation but correctly stated that those were neutral considerations. She noted that there were no children of the relationship.

12. At [23] she said as follows:

“In my balance sheet assessment of the appellant’s article 8 position weighing against is the reduced public interest represented by removal of an appellant for a procedural requirement of making her application abroad. Removal serves no good purpose. There is no substantive immigration control benefit. On the other hand is the weight I attach to the family life. I find the positive outweighs the negative. The proportionality balance falls in favour of the appellant.”

13. In my judgement, Judge Davidge’s decision is consistent with the applicable legal framework and with authority. It is correct, as submitted on behalf of the appellant, that the issue of very significant obstacles does not, and would not, feature in an application for entry clearance. Judge Davidge correctly concluded that all the entry clearance requirements would be met in a putative application. Her assessment that no public

interest would be served by requiring the appellant to make such an application for entry clearance was one that was open to her and is free from legal error.

*Decision*

14. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek

20/11/19