



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18028/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 30 March 2021

Decision & Reasons Promulgated
On 10 May 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ADEGOKE EMMANUEL ALABI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Semega-Janneh, counsel, instructed by Farani Taylor Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Raikes (“the judge”) promulgated on 21 January 2020 in which she dismissed the human rights appeal of Mr Adegoke Emmanuel Alabi (“the appellant”) against a decision of the Secretary of State for the Home Department (“the respondent”) dated 24 October 2019 refusing the appellant’s human rights claim.
2. The appellant is a national of Nigeria who was born on 9 July 1975. He entered the UK as a visitor on 15 July 2004. He overstayed. On 24 April 2008 he applied for an EEA Residence Card but this was refused on 29 April 2009. On 26 March 2012 he again applied for an EEA Residence Card but this was refused on 4 September 2012. On 15 November 2012 he applied for an EEA Residence Permit but this was refused on 20 July 2013.
3. The appellant’s next application was a human rights claim made on 24 October 2019 and based on his length of residence in the UK and his relationship with Olubunmi Racheal Mokuolu (“the sponsor”), a Nigerian national with an EU right of permanent residence in the UK.
4. In her decision refusing the human rights claim the respondent accepted:
 - (i) That the appellant did not fall for refusal under the Suitability requirements of Appendix FM;
 - (ii) That the appellant met the Eligibility Relationship requirements of paragraphs E-LTRP.1.1. to 1.12. of Appendix FM;
 - (iii) That the appellant met the Eligibility Financial requirements of Appendix FM;
 - (iv) That the appellant met the Eligibility English Language requirements of Appendix FM;
 - (v) That the appellant did NOT meet the Eligibility Immigration Status Requirements at paragraphs E-LTRP.2.1. to 2.2. of Appendix FM because his previous leave as a visitor in 2004 was only valid for 6 months and he had therefore been without lawful leave for over 14 years.
5. The respondent was not satisfied that the appellant met the requirements of EX.1 of Appendix FM as there were considered to be no ‘insurmountable obstacles’, as understood with reference to EX.2, preventing the couple continuing their relationship in Nigeria. Nor was the respondent satisfied that there were ‘very significant obstacles’ to the appellant integrating in Nigeria, as required by paragraph 276ADE(1)(vi) of the Immigration Rules. The

respondent was not satisfied there were any exceptional circumstances such that a refusal of the human rights claim would result in a disproportionate interference with Article 8 ECHR.

6. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

7. The judge had before her a 401-page bundle of documents prepared on the appellant's behalf and which contained, *inter alia*, statements from the appellant and his sponsor, and a letter from the Trent Vale Medical Practice dated 17 December 2019. The judge heard oral evidence from the appellant and his sponsor.
8. At [4] of her decision the judge summarised the Reasons for Refusal Letter with reference to the points contained in paragraph 4 (i) to (v) above. At [13] to [21] the judge set out the relevant legal framework and applicable legal principles derived from caselaw.
9. The judge set out her 'Findings of Facts on the Evidence' at [26] to [40]. The judge found that the appellant had been inconsistent in his evidence relating to his family in Nigeria and that he had a mother and brother in Nigeria with whom he remained in contact [28]. The judge rejected the appellant's claim that, if removed to Nigeria, he would be left on his own with no help or support and no-one he could rely on [29]. The judge found that the appellant had obtained a senior school certificate in Nigeria and that he worked in the Nigerian construction industry for 4 to 5 years before he left the country, and that there was no independent evidence that, as a result of his age, the appellant would struggle to find employment [30]. The judge found that the appellant could speak Yoruba and English [31]. The judge found that the sponsor had family in Nigeria with whom she maintained contact [34]. The judge noted the absence of any evidence that, as a Christian, the appellant would face any difficulties as a result of the political situation in Nigeria [35]. No challenge has been made to any of these findings.
10. At [32] the judge stated:

"In addition to this and when considering the Appellant's claim, I note that much has been made of the fact that the Respondent accepted that he is in a genuine and subsisting relationship with his partner, a Nigerian citizen who has permanent residence in the UK, as well as the fact that he also satisfies the financial and English language requirements of the Rules. It has been stated that were the Appellant to be making an application from outside of the UK he would be granted one. However, I am satisfied that notwithstanding the fact that he has met some of the Rules by fulfilling some of the requirements, I also note that this

is an Appellant who entered the UK on a six-month visit visa and did not return to Nigeria when he should have done so.”

11. At [33] the judge noted that the appellant had resided in the UK for 11 years without valid leave when he entered his relationship with his sponsor and that the resultant family life had been developed in the full knowledge that the appellant had no lawful status in the UK and that his position was entirely precarious.
12. At [37] the judge found that the appellant could not meet the requirements of Appendix FM because of his immigration status, and at [38] and [39] the judge found that there were no insurmountable obstacles to the relationship continuing in Nigeria. There has been no challenge to this finding. Nor has there been any challenge to the judge’s finding that the appellant did not meet the requirements of paragraph 276ADE(1)(vi). The judge noted that the appellant had spent the formative years of his life in Nigeria, that he speaks the language, and that he has close family members who would be able to assist in providing him with emotional and moral support [40].
13. The judge then considered whether the decision to refuse the human rights claim was proportionate under Article 8 outside of the Immigration Rules. The judge satisfied herself, by reference to the appellant’s length of residence and his relationship with his partner and extended family in the UK, that his proposed removal would constitute an interference with Article 8, both in respect of his private and family life [44]. Having found that the proposed interference was in accordance with the law and necessary in a democratic society, the judge then considered whether the decision was proportionate. At [50] the judge reiterated that there were no significant obstacles to the appellant’s integration in Nigeria and that his sponsor would be able to return to Nigeria with him, should she choose to do so, and re-establish herself with him in that country. The judge stated:

“The Appellant and his partner are well qualified and whilst they are seeking medical assistance with their wish to start a family, there is nothing to suggest that this could not continue in Nigeria were they to choose to live together there. I am therefore not satisfied that in the particular circumstances of this case, there are compelling reasons as to why family and private life as is cannot continue outside the United Kingdom.”
14. At [51] the judge indicated that she had taken into account the factors in s.117B of the Nationality, Immigration and Asylum Act 2002, and in particular s.117B(6), and concluded that, on the evidence before her, it would not be unreasonable for the appellant to leave the UK and return to Nigeria.
15. At [52] the judge stated:

“I am satisfied that he [the appellant] was unable to meet the eligibility immigration status rules and given his partner’s status has not been able to meet the exceptions within the Rules. Further, in my view, he has provided no credible or plausible reason as to why he remained in the UK for the length of time he did. Whilst he appears to have taken steps to regularise his status on 3 previous occasions, he has been unsuccessful and has not, in my view, provided a credible reason as to why he remained either following the expiry of his visit visa at the outset or indeed following the unsuccessful outcomes of previous applications all of which were several years prior to moving in with his partner. I consider these points did not put the Appellant in a strong position in terms of proportionality when in particular considering the statutory factors in the maintenance of effective immigration controls.”

16. At [53] the judge concluded that the respondent’s decision was proportionate.

“Given the circumstances of the matter, I am satisfied that if the Appellant was required to leave the United Kingdom and in fact either remain in Nigeria or regularise his immigration status from there, this would be a proportionate approach to his right to a private or family life. For the reasons set out above I find that the removal of the Appellant from the United Kingdom would be proportionate in respect of both his Article 8 rights and also the Article 8 rights of his partner and other family.”

17. The judge dismissed the appeal.

The challenge to the judge’s decision

18. The grounds of appeal contend that the judge failed to consider the implications of a submission made to her that an application for entry clearance as a partner would be successful. The fact that the appellant entered the UK as a visitor and had not returned was “entirely irrelevant to the point being made.” The judge failed to consider paragraph 51 of **Agyarko** [2017] UKSC 11 where it was made clear that there may be no public interest in an applicant’s removal if the applicant was certain to be granted entry clearance. The judge failed to consider adequately or at all the significance of the submission that an application for entry clearance would succeed. The judge failed to consider the correct weight to be given to the public interest in requiring the appellant to make an entry clearance application and her proportionality assessment was therefore unsound. I note by way of observation that the pleaded grounds made no specific reference to fertility treatment.
19. In granting permission to appeal Upper Tribunal Judge Norton-Taylor stated:

“1. I just [*sic*] about persuaded that it is arguable that the judge erred in failing to engage with the Chikwamba [2008] UKHL 40 point which appears to have been put forward in argument at the hearing (if not in advance).

2. The grant of permission should certainly not be taken as an indication that the arguable error will ultimately be made out, or, if it is, that it will result in the judge's decision being set aside. The submission that the putative application for entry clearance "would" succeed is always to be viewed with a degree of caution. The requirement of the relevant Rules include those under Appendix FM-SE, for example. It is certainly not clear that the judge was referred to specific evidence which would have gone to support the contention that an entry clearance application would have been certain or extremely likely to succeed. Further, the appellant will need to consider the recent decision of the Upper Tribunal in Younas (section 117B(6)(b); Chikwamba [2008] UKHL 40; Zambrano) Pakistan [2020] UKUT 129 (IAC)."

20. In the skeleton argument produced on behalf of the appellant and dated 15 September 2020 the appellant's representative raised, for the 1st time in respect of the grounds of appeal (although mentioned by the sponsor in her statement), that the appellant and his partner were undergoing IVF treatment in the UK and that this was heavily dependent on the appellant being in the UK in order to achieve this. It was submitted that both the appellant and sponsor would be required for the IVF process and there would be significant hardship if they were expected to conduct IVF treatment apart from each other. The skeleton argument referred to **Chikwamba** [2008] UKHL 40 and paragraphs 51 and 52 of **Agyarko** [2017] UKSC 11 and submitted that the judge failed to consider adequately or at all the significance of the submission made by counsel that the entry clearance application would succeed. The skeleton argument then argued that the respondent's delay ("the delay point") in removing the appellant should have been taken into account by the judge in her proportionality assessment on the basis of the House of Lords decision in **EB(Kosovo) v SSHD** [2008] UKHL 41. This was the first time that this particular ground had been raised. Permission had not been granted in respect of this new argument and no application to amend the grounds had been made.
21. At the error of law hearing Mr Semega-Janneh sought to rely on the delay point and when it was pointed out that no application to amend the grounds had been made he sought to make an application. This was refused for the reasons given later in this decision. Mr Semega-Janneh relied on the pleaded grounds and submitted that, in light of the duration of the appellant's residence in the UK and the life he has established here, coupled with the fact that he met all the other requirements of the immigration rules bar that relating to his immigration status, it would be disproportionate to expect him to return to Nigeria just to make an entry clearance application. Mr Semega-Janneh accepted there was no independent evidence that the appellant and sponsor were receiving fertility treatment, and that, assuming they were undergoing fertility treatment, there was no independent evidence on the impact on such treatment were the appellant to have to return to Nigeria in order to make an entry clearance application. He submitted however that the judge failed to consider the **Chikwamba** principles, and that if she had done so she would have allowed the appeal. I was referred to paragraphs 91 to 99 of **Younas** in respect of the

questions a tribunal should ask itself when facing a **Chikwamba** situation and in respect of the section 117B factors in the Nationality, Immigration and Asylum Act 2002. Mr Semega-Janneh submitted that the judge failed to consider these factors and wrongly referred to s.117B(6) which had no application in the absence of a child. Mr Semega-Janneh argued that the decision was material because the judge failed to consider or engage at all with the **Chikwamba** principles. If the judge properly considered **Chikwamba** then the appeal would have been allowed.

22. Mr Tufan submitted that the judge had considered the possibility of the appellant returning to Nigeria and making an entry clearance application from there at [53]. Even if the judge failed to properly consider **Chikwamba**, this could not have made any material difference to the decision given the appellant's immigration history and the absence of any evidence that there would be any substantial impact on the appellant's Article 8 relationships as a result of requiring him to temporarily leave the UK. I was reminded that **Chikwamba** was not authority for the proposition that any temporary separation between an applicant and his partner in circumstances where the applicant was certain to be granted entry clearance would constitute a disproportionate breach of Article 8.

Discussion

23. I deal first with the application to amend the grounds so as to argue the delay point. The grounds of appeal as originally pleaded, in respect of both the application for permission to appeal made to the First-tier Tribunal on 3 February 2020 and the renewed application for permission to appeal made directly to the Upper Tribunal on 18 August 2020, did not include the delay point. When permission was granted by Upper Tribunal Judge Norton-Taylor on 28 August 2020 no reference was made to any delay point. This point was first raised in the skeleton argument dated 15 September 2020, but there was no formal application to amend the grounds until the day of the 'error of law' hearing on 30 March 2021. The delay is very significant and is without any good explanation. In considering whether to allow the amendment I have considered and applied the guidance identified in **R(Hysaj) v SSHD** [2014] EWCA Civ 1633 and **SSHD v SS(Congo)** [2015] EWCA Civ 387, and remind myself of the overarching principle to deal with cases fairly and justly. I note that no argument appears to have been advanced before the First-tier Tribunal relating to the delay point. The judge could not be said to have erred in law by failing to take account of an argument never advanced. In any event, I consider the delay point to be unarguable given that **EB(Kosovo)** was concerned with delays by the SSHD in making decisions in respect of applications, and there was no appreciable delay by the respondent in deciding any of the appellant's applications. For these reasons I refuse to allow the appellant to amend his grounds of appeal.

24. The grounds of appeal to the First-tier Tribunal following the respondent's decision were general in nature and did not expressly refer to any legal argument based on the authority of **Chikwamba**. No skeleton argument appears to have been provided to the First-tier Tribunal. I am however satisfied that brief arguments based on the **Chikwamba** principles were advanced in oral submissions before the judge.
25. The judge did not mention **Chikwamba** by name (and any such failure would not of itself constitute an error of law) but she did acknowledge, at least to a limited degree, that arguments were advanced based on the respondent's acceptance that the appellant met all but the Eligibility immigration status requirements of Appendix FM (see [53]). It is not however apparent from the decision, read as a whole, that the judge fully 'got to grips' with the consequences of such compliance or the arguments being advanced on behalf of the appellant. The appellant was essentially arguing, by reference to **Chikwamba**, that there was little or no public interest in removing him in circumstances where he would be granted entry clearance to re-enter the UK should he make an entry clearance application from Nigeria. Although the respondent did not expressly acknowledge that an entry clearance application would be successful, her acceptance of all the requirements for a grant of leave to remain under Appendix FM other than the immigration status requirement strongly indicated that, had the appellant made a notional entry clearance application, the application would have succeeded. The judge does not however engage with the **Chikwamba** based argument and she has failed to explain how this was factored into her Article 8 proportionality assessment. Whilst the judge does conclude, at [53], that requiring the appellant to return to Nigeria to "regularise his immigration status from there" would not constitute a disproportionate interference with Article 8, she does not explain how she reached this conclusion or why any temporary separation, in light of the appellant's particular circumstances and the likelihood of an entry clearance application being successful, would not be disproportionate.
26. The Upper Tribunal does not however have to set aside a First-tier Tribunal decision merely because it involved the making of an error on a point of law. If the error of law was not material, in the sense that it could not, on any rational view, have affected the judge's ultimate conclusion, then the decision will not need to be set aside. I now consider whether the judge's failure to engage with the **Chikwamba** principles could have made any material difference to her decision based on the evidence before her or whether the decision would inevitably have been the same.
27. Mr Semega-Janneh's argument in respect of the materiality of the error of law was that the mere fact that the judge failed to engage with the **Chikwamba** principles was material as, had she done so, she would have allowed the appeal. Mr Semega-Janneh's approach to **Chikwamba** appeared to be based on the understanding that, if an applicant was certain to be granted entry

clearance, then it would always be disproportionate to require him or her to have to go through the expense and inconvenience of having to leave the UK merely to make an application that was bound to be granted. Mr Semega-Janneh later clarified that the disproportionality of requiring the appellant to be temporarily separated from his sponsor stemmed also from his long residence in the UK (around 15 years at the date of the First-tier Tribunal's decision), the fact that the sponsor was undergoing fertility treatment and the "delay" by the respondent in not removing the appellant.

28. In order to determine the issue of materiality I will consider various decisions relating to the **Chikwamba** principle, starting with **Chikwamba** itself. Mrs Chikwamba was Zimbabwean, and her husband was a recognised refugee from Zimbabwe and could not return there. They had young child. Her asylum claim had been rejected on the basis of her credibility. At the time of their marriage her husband was aware of her immigration status. The issue in the case was whether it was appropriate to dismiss an appeal on the basis that the appellant should be required to leave the UK and seek leave to enter from abroad. Of relevance was an API policy on Article 8 requiring persons seeking to remain on the basis of their relationship with a partner present and settled in the UK to leave the UK and make an entry clearance application.

29. At [42] Lord Brown, giving the judgment of the Court, stated,

"In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant."

30. At [44] Lord Brown stated,

"I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. 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."

31. At [46] his Lordship stated,

"No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

32. In **SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054** the appellant could not satisfy the immigration rules in an application for leave to remain as the partner of a PBS migrant because of his immigration status in a different category. The appellant had no relatives but had a home in Pakistan. He supported his student wife by picking her up from college, doing shopping and providing moral support. His wife had no other relatives in UK and they claimed to depend on each other. In summarising the applicable legal principles derived from the various authorities, including **Chikwamba**, Lord Justice Elias stated at [30]

“In my judgment, the effect of these decisions can be summarised as follows:

- a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.
- b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
- c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in *Chikwamba*. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.
- d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.
- e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba* was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.
- f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.
- g) Although the cases do not say this in terms, in my judgment 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.”

33. **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)** concerned a Chinese national (student) who overstayed and married a British citizen. The Upper Tribunal accepted, in the context of Appendix FM of the Immigration Rules, that, in some circumstances, it may be disproportionate to expect a person to return to their country of origin and make an entry clearance application even if there were no insurmountable obstacles to the couple relocating to country of origin [24(ii)]. Headnote (ii) reads,

“(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD) [2011] EWHC 2070 (Admin)).

34. Headnote (iii) reads,

“(iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made) will be successful. Accordingly, her silence on this issue does not mean that it is accepted that the requirements for entry clearance to be granted are satisfied.”

35. At [36] Upper Tribunal Judge Gill stated,

“Mr Palmer relied upon para 30 c) and d) of Hayat to suggest that there must be a “sensible reason” to require an individual to make an application for entry clearance from abroad. I reject the submission. I do not accept that, in using the phrase “sensible reason”, Elias LJ was setting out the test for applying the guidance in Chikwamba, nor that he reversed the burden of proof. The burden remains upon the applicant to place before the Secretary of State all material that he or she relies upon to suggest that removal pursuant to the refusal of leave would breach Article 8 (Kotecha, at para 56).”

36. And at [39] Judge Gill stated,

“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.”

37. **Chen** is a decision followed in **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)**, a presidential panel.
38. Reliance has also been placed by the appellant on **Agyarko [2017] UKSC 11**, at [51], where Lord Reed stated,

“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*.”

39. In **Kaur, R (on the application of) v SSHD [2018] EWCA Civ 1423** Lord Justice Holroyde observed, at [45], with reference to **Agyarko [2017] UKSC 11**, that Lord Reed ...

“... spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK, and said that in such a case there might be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain.”

40. Most recently, in **Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC)**, a Presidential panel considered the above authorities and decisions and concluded, at [90], that:

“..an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest".

41. At [91] to [99] the panel asked itself four questions when applying the **Chikwamba** principle, which are (i) whether the temporary removal is a sufficient interference to even engage Article 8(1); (ii) whether an application for entry clearance from abroad would be granted; (iii) whether there is a public interest in the appellant being required to leave the UK in order to undertake the step of applying for entry clearance and, if so, how much weight should be attached to the public interest; (iv) whether the interference with the appellant's

(and his family's) right to respect for their private and family life arising from him being required to leave the UK for a temporary period is justified under article 8(2).

42. I have considered and applied the principles that emerge from the above-mentioned authorities and decisions. In determining whether the judge's mistake on a point of law is material I have considered the particular facts and evidence advanced by the appellant at his appeal before the First-tier Tribunal.
43. Mr Semega-Janneh accepted that there was no independent evidence before the First-tier Tribunal that the appellant and his partner were undergoing fertility treatment at the time of the First-tier Tribunal appeal hearing. There was very brief reference in the sponsor's statement to her undergoing gynaecological and fertility treatment, but the only medical evidence before the First-tier Tribunal was a letter from the sponsor's GP dated 17 December 2019 relating to the treatment of fibroids and noting that the sponsor had recently developed some new gynaecological symptoms and had been referred to a gynaecologist to consider treatment options. The letter additionally stated, "She is trying to conceive with her partner." No reference was made to any fertility treatment. Assuming however that the appellant and his sponsor were undergoing fertility treatment, no details of any such treatment were provided and, in particular, there was no evidence of the impact on the fertility treatment should the appellant be required to make an entry clearance application from Nigeria. There was simply no evidence that requiring the appellant to leave the UK in order to make an entry clearance application would have any adverse impact on any fertility treatment.
44. Although the burden was upon the appellant to place before the Tribunal all material that he relies upon to support his claim that removal would breach Article 8 there was no evidence before the First-tier Tribunal as to how long an application for entry clearance by the appellant was likely to take (in **Chikwamba** it was acknowledged that return to Zimbabwe would be for a "relatively short period" [16], and the period of any separation was considered to be a relevant factor - [42]). The judge found that the appellant (and indeed the sponsor) had family members in Nigeria who would be able to help and support him and upon whom he could rely for assistance. The judge found that the appellant had spent his formative years in Nigeria and that he spoke English and Yoruba. There was no suggestion that there was any impediment preventing the sponsor and the appellant from maintaining contact throughout any temporary period of separation. There were no children affected by the decision. There was no evidence that either the appellant or the sponsor were vulnerable or had welfare issues or that, other than the sponsor's undisclosed new gynaecological symptoms (in respect of which there were no details) and the sponsor's claim to be undertaking fertility treatment, either of them had any material medical or mental health problems. The judge rejected the appellant's

claim that he would face ill-treatment in Nigeria on account of being a Christian.

45. Neither the appellant's statement nor that of the sponsor contained any evidence relating to the degree of family disruption that a temporary separation to enable the appellant to make an entry clearance application would entail (see [42] of **Chikwamba**). Nor is any such evidence contained in the judge's record of the oral evidence given at the hearing or in her decision. There was little or no evidence before the judge that there would be any significant interference with family life between the appellant and his sponsor by reason of his temporary removal (see **Chen**, at [39]).

46. Applying the approach adopted by the Tribunal in **Younas** at [91] to [99], I am prepared to proceed on the basis that the appellant's temporary removal is a sufficient interference to engage Article 8(1), and that, were he to make an entry clearance application from Nigeria, it would be granted. In assessing the third question (whether there is a public interest in the appellant being required to leave the UK in order to undertake the step of applying for entry clearance and, if so, how much weight should be attached to the public interest?) the appellant's overall immigration history is relevant, including the nature and extent of his overstaying (see [42] of **Chikwamba**; see also **TG (Central African Republic) v SSHD** [2008] EWCA Civ 997, at [16]). The appellant's overstaying is very significant (14 years, although I note his unsuccessful attempts to regularise his lawful status) and his relationship with the sponsor was established when he was unlawfully present in the UK (relevant in respect of s.117B(4)(b) of the Nationality, Immigration and Asylum Act 2002, not s.117B(6) as the judge mistakenly stated at [51]). The appellant entered as a visitor, a category that did not lead to settlement, and overstayed for a significant period of time after he was required to leave the UK. For reasons I have already given there has been no 'delay' in the **EB (Kosovo)** sense in removing the appellant such as to reduce the weight to be accorded to the maintenance of effective immigration controls. Although the strength of the public interest in the maintenance of effective immigration controls may, on the one hand, be diminished if someone was certain to be granted entry clearance on an application, in circumstances where there has been significant overstaying in circumstances where a person clearly should have returned to their country of origin removal serves the important public interest of the maintenance of effective immigration controls.

47. The fourth question in **Younas** is whether the interference with the appellant's and the sponsor's right to respect for their private and family life arising from him being required to leave the UK for a temporary period is justified under Article 8(2). This proportionality evaluation must apply the public interest factors in s.117B. I have already considered above s.117B(1) and s.117B(4) (for the reasons given above both factors weigh in favour of removal). S.117B(2) and (3) are neutral factors on the particular facts of this case, and s.117B(6) does not

apply. S.117B(5) goes against the appellant given that for all but 6 months of his residence in the UK his immigration status was precarious.

48. I again remind myself of the high test in determining whether the judge's decision would inevitably have been the same even if she had lawfully considered the **Chikwamba** point. Different judges can legitimately reach different conclusions on the same facts and an error of law would only be immaterial if no reasonable judge, properly directing themselves on the facts and the law, could rationally have allowed an appeal on the basis advanced by the appellant. Having regard to the evidence before the judge and for the various reasons given at [43] to [47] above, I am compelled to conclude that the error of law was immaterial. The appellant did not show, and did not come close to showing how there would be any significant interference with his or his sponsor's family life by reason of temporary removal, as per **Chen**. There was no evidence of the impact of a temporary separation on any fertility treatment that the sponsor may have been undergoing, and there was little evidence of any significant or serious health or welfare issues relating to the appellant and the sponsor. The appellant overstayed after entering as a visitor for 14 years, he failed to produce any evidence of the length of likely separation based to application processing times, and he would be returned to the country in which he grew up and with which he was familiar and where he could make his entry clearance application whilst being supported by his own family. In the absence of clear evidence that there would be a significant impact on the Article 8 rights of the appellant or the sponsor caused by their temporary separation, no judge would have been entitled to allow an appeal on **Chikwamba** grounds.
49. The appeal is consequently dismissed.

Notice of Decision

The human rights appeal is dismissed.

D. Blum

22 April 2021

Signed
Upper Tribunal Judge Blum

Date