



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06155/2014

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2014

Determination Promulgated
On 22 December 2014

Before
LORD BURNS
UPPER TRIBUNAL JUDGE JORDAN

Between

Helen Okine

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:

For the Appellant: Mr F. Khan, Counsel instructed by CTM Immigration & Welfare
For the Respondent: Mr M. Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana, born on 27 January 1969. She appeals against the determination of First-tier Tribunal Judge Hembrough following a hearing on 11 August 2014 dismissing her appeal against the decision of the Secretary of State to refuse her application for leave to remain on the basis that her removal placed the United Kingdom in breach of its obligations under Article 8 of the ECHR. The relevant immigration decision was the service of removal directions under s. 10 of the Immigration and Asylum Act 1999.

2. The appellant arrived in the United Kingdom on 23 December 2002 as a visitor and was permitted to remain until 11 June 2003. Whether she was ever a genuine visitor must be open to conjecture since she failed to return on the expiration of her leave and remained as an overstayer until 25 May 2010 when she was encountered by officials of the Border Agency. She was then served with notice of liability to removal in form IS 151A. Notwithstanding this, she did not leave the United Kingdom and finally, on 28 March 2013 by which time she had been in the United Kingdom for a little over 10 years, she applied for leave to remain on human rights grounds.
3. The decision made by the respondent recited her immigration history. Consideration was given as to whether the appellant's application raised any viable Article 3 grounds based upon the appellant's submission of numerous doctors' appointments, none of which raised even an arguable case that her medical condition merited leave to remain. The respondent went on to consider whether the appellant's private life engaged Article 8 of the ECHR.
4. At that stage, the appellant did not suggest that she had either a partner or a child within United Kingdom. Accordingly, the respondent did not engage with those parts of the Immigration Rules concerned with protecting family life. The decision-maker therefore turned to paragraph 276ADE and the criteria an appellant would normally be expected to fulfil in order to establish a right to remain in the United Kingdom on the basis of her private life. As a single woman aged 45 who had resided in the United Kingdom since 2002, it could not be said that the appellant met any of the requirements of the paragraph. In paragraph 4 of the refusal letter, the respondent recorded that, in her view, there were no compelling or compassionate reasons to warrant any further leave.
5. It has never been suggested that the appellant met the requirements of the Immigration Rules. It was for this reason the respondent refused the application under paragraph 322(1) of the Rules, namely, that leave to remain was being sought for a purpose not covered by the Rules.
6. In her application to appeal to the First-tier Tribunal the appellant claimed that the respondent's decision was incompatible with her Convention rights and that she had been living in the United Kingdom since 2003. She made no reference to having a partner.
7. However, in his determination, the Judge recorded that, since 2011, the appellant had been in a relationship with Mr Peter Asante and that they had been living together for about 2 ½ years. Mr Asante is a naturalised British citizen of Ghanaian origin. They had not made any plans for marriage. The appellant accepted that she was aware she had been working illegally in the United Kingdom and that she had had access to medical treatment on the NHS to which she was not entitled. Mr Asante gave evidence that he was a healthcare assistant with an income in excess

of £40,000 for the year ended April 2014. He spoke of the difficulty of finding employment in Ghana. The Judge accepted this evidence.

8. No attempt had been made to seek leave to remain within the Immigration Rules. The Judge accepted that the relationship with Mr Asante had to be considered and this first required consideration of whether the couple met the requirements of Appendix FM. They were not met because the appellant was an overstayer. The Judge went on to consider whether there were insurmountable obstacles to family life continuing outside the United Kingdom and properly concluded that the appellant failed to establish such obstacles existed. Both she and Mr Asante were of Ghanaian origin. He owns property in Ghana and has family there. He is a qualified health professional and owns no property in the UK. The Judge reasonably found there were no matters, save choice and convenience, preventing him from returning to Ghana with the appellant.
9. In paragraph 39 of the determination the Judge said that it was clear that if the appellant were to return to Ghana to apply as a partner, it would be granted. While this is an unequivocal assertion, it would, of course, depend upon the material that was submitted in the course of the application. Whilst a properly formulated application supported by the appropriate evidence was no doubt *capable* of succeeding, all would depend upon the contents of the application. In the context of this application, it is readily understandable that the application was capable of succeeding but what if there were specified documents to be produced, in a particular form, covering a particular period? If their production is now a legal requirement, we doubt that the Judge was justified in treating it as a foregone conclusion that those requirements would be met, even though the applicant was capable of meeting them. If the Rules make such requirements, Article 8 is not readily a process by which Parliament's intention that they be met should be marginalised; far less emasculated or set on one side.
10. The Judge went on to consider the viability of the appellant returning to Ghana. Any disruption to family life between the appellant and Mr Asante would be temporary. It would not involve serious hardship. The appellant might occupy Mr Asante's property in the course of the application. He has sufficient income to maintain the appellant whilst she was awaiting entry clearance.
11. Pausing at this part in the determination, we are quite satisfied that the Judge was correct in his approach to the appeal. On the one hand, he considered the appellant's appalling immigration history and the method by which the appellant's presence in the United Kingdom might be regularised by an out-of-country application for leave to enter as a partner. Whilst the appellant might well be capable of establishing the maintenance and accommodation requirements of the Immigration Rules, it is not simply a matter of the sponsor giving evidence or producing payslips and P60s which confirmed an annual income in excess of £40,000. The full, including the documentary, requirements of the Rules have to be met. It is not suggested in the determination the appellant made her application

for leave to remain on the basis of setting out the requirements of the Immigration Rules and, at each stage, submitting documentary evidence to establish these requirements were met. It cannot be for the Tribunal presented with a large bundle of documentary material to determine whether those documents comply with the requirements of the Rules. It does not seem to us that, given the specific requirements that an applicant now has to meet before the grant of leave to remain as a partner (which the applicant could not meet as an overstayer) it was open to the appellant to rely upon an amorphous concept of private and family life as justification for not making the attempt to meet the Rules.

12. The Judge correctly considered whether the appellant's case exhibited any exceptional circumstances permitting a departure from compliance with the Immigration Rules and reached the inevitable conclusion that it did not. There was nothing unduly harsh in requiring the appellant to meet the requirements of the Rules by making an out-of-country application. Indeed, according to the evidence, it would be a simple and painless exercise.
13. Unfortunately, the Judge then became embroiled in what was an unnecessary consideration of the decision in *Chikwamba v SSHD* [2008] UKHL 40. He concluded by asserting that *Chikwamba* was no longer good law. It is a bold Tribunal Judge who makes such a statement and it is little wonder that permission to appeal to the Upper Tribunal was granted in light of it. However, for the reasons we will now develop, it is apparent that the Judge was not overruling the reasoning in the House of Lord's decision but pointing out that its decision has now to be read in the context that Parliament itself has now set out the requirements that apply in these cases. It is no longer a policy. To pursue this point further requires a more detailed consideration of the opinions of Lord Scott and Lord Brown. Lord Scott accepted the broad sense of imposing an entry clearance requirement but said such a policy had to be flexible enough to produce just results:

4. Not many would dispute, and I do not, that would-be immigrants who desire to remain permanently in this country should apply for permission to do so before coming here. It is the Government's policy that that should be so and that a failed asylum seeker should return, or be returned, to his or her country and make from there any applications for the right to reside in this country that he or she desires to make. But policies that involve people cannot be, and should not be allowed to become, rigid inflexible rules.

8. Ms Chikwamba had come to this country as a refugee from Zimbabwe. Her asylum claim failed but removals were suspended. In this state of limbo she married a Zimbabwe national who had been granted asylum and the right to remain. In April 2004 their daughter was born. In November 2004 the Secretary of State lifted the suspension on removals. The question arose whether the appellant, with her 7-month old daughter, should be required to return to Zimbabwe in order to apply from Zimbabwe for permission to come to this country in order to resume her life with her husband. Lord Scott thought that unreasonable and

disproportionate because the appellant's husband could not be expected to return to Zimbabwe where conditions were described as *'harsh and unpalatable'*, the appellant could not be expected to leave her child behind if she is returned to Zimbabwe and if the appellant were to be returned to Zimbabwe, she would have every prospect of succeeding in an application for entry clearance. Government policy required this to happen but Lord Scott considered this was elevating policy to dogma. Unusually, the House of Lords substituted its own findings of fact.

9. Lord Brown referred to the Secretary of State's Asylum Policy Instruction on Article 8, under the heading Consideration of Article 8 Family Life Claims, which included the following:

"... if there is a procedural requirement (under the immigration rules, extra-statutory policies or concessions) requiring a person to leave the UK and make an application for entry clearance from outside the UK, such a person should return home to make an entry clearance application from there. In such a case, any interference would only be considered temporary (and therefore more likely to be proportionate). ...it may be possible for the family to accompany the claimant home while he makes his entry clearance application, in which case there will be no interference at all...For example, where a claimant is seeking to remain here on the basis of his marriage to a person settled in the UK, the policy is that they should return home to seek entry clearance to come here as a spouse under the relevant immigration rule. Where the spouse can accompany the claimant home while he makes his application, there will be no interference. Where this is not possible, the separation will only be temporary. The fact that the interference is only for a limited period of time is a factor that is likely to weigh heavily in the assessment of proportionality."

10. No challenge was made to the lawfulness of the policy. Rather, the challenge was whether, in the particular circumstances of Ms Chikwamba's case, the policy as applied by the decision-maker produced a lawful result. There was no dispute there was an *'insurmountable obstacle'* faced by her husband in accompanying her back to Zimbabwe. Lord Brown asked himself precisely what purpose was served and what in reality was achieved by this policy? He thought, rhetorically, the real rationale for the policy might well be deterring people from coming to the United Kingdom without having obtained entry clearance by subjecting them to substantial disruption of their lives by requiring them to return. He continued:

"42. Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, *R (Ekinici) v SSHD* [2003] EWCA Civ 765 still seems to me just such a case. The appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally...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."

44. 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.”

11. *Chikwamba*, whilst making it plain that the principle is not limited to cases where children are involved, applies to all cases where there is likely to be a significant interference with the family and private lives of a returnee whose application for entry clearance will succeed. However in *SSHD v Treebhowan and Hayat* [2012] EWCA Civ 1054 overturning *Hayat (nature of Chikwamba principle)* Pakistan [2011] UKUT 00444 (IAC), we see the Court of Appeal in the judgment of Elias LJ analysing the true rationale behind *Chikwamba* in a passage entitled ‘*Summarising the principles*’:

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.

12. The thinking behind *Chikwamba* thus becomes clear. In the case of a female applicant who has an exemplary immigration history and has created a lawful family life in the form of a nuclear family with young children; where her husband

is working; where her departure would require him to give up work in order to look after the children; where the applicant's departure is likely to result in the remaining family depending upon state benefits; where they have no obvious savings to pay for her return trip or the cost of accommodation for a significant period of time while the application is being processed; where the children's education and welfare may be jeopardised by their accompanying their mother and increasing her expenses and where the applicant establishes in precise detail that she meets the requirements for entry clearance, it is plainly and obviously disproportionate to require the applicant to regularise her position by making an out of country application which will be rubber-stamped at huge personal and financial cost. In the words of the Court of Appeal, it is not sensible to require her to do so.

13. This is what the House of Lords meant when Lord Scott spoke of Kafkaesque bureaucracy applying rigid inflexible rules and elevating policy to dogma. It is what Elias and Sullivan LJ spoke of when considering the application of policies where there was no sensible reason for doing so.
14. Our example of circumstances in paragraph 12 above was selected because it is at the extreme end of the spectrum. It is not difficult to imagine a case that is at the other extreme: an appalling immigration history; a doubtful relationship; no children; a separation that causes no or limited disruption and few financial consequences; an uncertain outcome for the proposed application for entry clearance and little or no attempt to establish the applicant meets the requirements of the Rules.
15. Both extreme examples do no more than establish that such cases are fact-sensitive. As the Court of Appeal rightly pointed out, it is normally the preserve of the First-tier Tribunal to make findings of fact. Unusually, in *Chikwamba*, the House of Lords made its own findings of fact in order to substitute a different ultimate conclusion. It is, however, clear that the appeal was decided by the House of Lords on its facts and whilst the legal thinking remains as clear and persuasive as ever, it would be wrong to elevate its fact-finding function (making 'the substantive Article 8 decision for itself') to the status of a factual precedent.
16. In essence, the fact-finder has to strike a balance between the legitimate public interest in ensuring, on the one hand, that an applicant does not achieve an unfair advantage by his own illegal conduct and, on the other, the respondent using the applicant's illegal conduct to make life just as difficult as it might possibly be for him by making compliance an unreasonable burden for the sake of little more than *amour propre*, even though that might fall short of an abuse of power.
17. As the Judge correctly pointed out in the present appeal, the House of Lords reasoning has now to be assessed by reference to a new legal landscape. That does not mean that the reasoning ceases to be good law. Rather, the common sense of requiring the Secretary of State to apply her policies only when there is a sensible

reason for doing so has to be re-assessed when a policy has become a rule and compliance with the rule has become a requirement dictated by Parliament. Lord Brown asked himself what purpose was served and what was to be achieved by the policy. That approach loses much of its force when a policy becomes the law which the Courts and Tribunals are required to follow.

18. For these reasons, we conclude that the First-tier Tribunal reached a proper and lawful conclusion on the facts and on the law.

DECISION

The Judge made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

5 December 2014