



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

Appeal Number: IA/14608/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 September 2015**

**Decision & Reasons
Promulgated
On 30 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**ANANIAS MAGNO REVILLA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter of Counsel instructed by Equalisers Ltd
For the Respondent: Ms A Everett of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of the Philippines born on 24 April 1963. He states he arrived on 17 April 2003 with a five day visa. On 24 September 2012 he submitted an application for further leave to remain on the basis of his private and family life in the United Kingdom. On 11 March 2014 the Respondent refused the application under the Immigration Rules and by

way of reference to Article 8 of the European Convention outside the Immigration Rules.

2. On 26 March 2004 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds refer to the Appellant's marriage to a British citizen but otherwise are in generic and formulaic terms. It appears the marriage was on 19 October 2013.
3. By a decision promulgated on 13 March 2015 Judge of the First-tier Tribunal Manyarara dismissed the Appellant's appeal under the Immigration Rules and on human rights grounds.
4. On 11 May 2015 Judge of the First-tier Tribunal Grant-Hutchison granted the Appellant permission to appeal because it was arguable the Judge had mis-directed herself in failing to consider the meaning of "insurmountable obstacles" for the purposes of the Immigration Rules and in particular paragraph LTRP.1.1(d)(iii) and Section EX.1(b) of Appendix FM and arguably had not taken into account the significance of the British nationality of the Appellant's wife and had not given adequate reasons for her decision.

The Upper Tribunal Hearing

5. The Appellant with his wife, sister and a friend attended the hearing. He required an interpreter but none had been booked. In the event his participation was not required.

Submissions for the Appellant

6. For the Appellant Mr Slatter relied expressly on the two grounds upon which permission to appeal had been granted, mentioned in paragraph 4 above. He referred to paragraph 23 of the Judge's decision. The only issue which the Judge had rightly identified was whether there would be very significant obstacles to the Appellant's integration on return to the Philippines. However having identified this issue the Judge had failed to address Section EX of Appendix FM and paragraph 25 of the decision could not be read as adequately address the issue. The Judge had failed to take into account that the Appellant's wife was a British citizen and employed although she had mentioned this at paragraph 32.
7. The Judge had the statements by the Appellant and his wife which had been filed but had not taken account of the background evidence about employment opportunities in the Philippines referred to at page 6 of the Appellant's bundle. I noted that page 6 appears to be the first page of a document extracted from the website "countrystudies.us/philippines/73". The bundle does not contain any subsequent pages from this web site although it does contain information about the difficulties and lack of opportunities for employment in the Philippine maritime industry. Further

information on this subject was submitted to the Upper Tribunal on 25 August.

8. Mr Slatter continued that the Judge had erred at paragraphs 27 and 34 in attempting to consider the proportionality of expecting the Appellant to leave the United Kingdom to apply for entry clearance to re-join his wife. Mr Slatter then referred to the decision in the judgment in *R (Thakral) v SSHD IJR [2015] UKUT 00096 (IAC)*, and in particular paragraphs 9 and 11 which state:
 9. Ms Chikwamba herself had had a baby after the Secretary of State's refusal. However, it has subsequently been established that the reasoning in *Chikwamba* is not restricted to Article 8 cases involving children. In *SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054* Elias LJ summarised the principles at [30]:
 - 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 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 judgement 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.

11. In my judgement, though, Ms Apps did identify the fundamental problem with this first ground for seeking judicial review. The *Chikwamba* principle is only engaged if, in the terms of paragraph [30] (a) of *Hayat*, the SSHD has refused the application in question “on the procedural ground that the policy requires that the applicant should have made the application from his home state”. That is not what occurred in this case. The Applicant’s application for leave to remain was *not* refused on the basis that she lacked a requisite entry clearance or that she was barred from making the application while she was still in the UK. On the contrary, the SSHD considered the substance of the application both under the Immigration Rules and in terms of Article 8.

Mr Slatter’s submission did not take into account that the Respondent had given extensive consideration to the Appellant’s claim under paragraph 276ADE of the Immigration Rules and with reference to Article 8 of the European Convention outside the Immigration Rules in the reasons letter of 11 March 2014.

9. He submitted that the Judge had erred in considering the prospect and proportionality of a temporary separation while the Appellant left the United Kingdom to seek entry clearance and that she should have assessed the claim under Article 8 of the European Convention outside the Immigration Rules on the basis that if the Appellant left he and his wife would be permanently separated.
10. He concluded the decision contained errors of law and should be set aside.

Submissions for the Respondent

11. Ms Everett relied on the response which the Respondent had made under Procedure Rule 24. The Judge had given full consideration to whether there were insurmountable obstacles to the Appellant and his wife continuing their married life in the Philippines. That the Appellant had long in the past been employed as a seaman was irrelevant. What was relevant was that he had more recently been employed as a cleaner or handyman. The Judge was entitled to consider the claim under Article 8 on the basis that the Appellant could leave the United Kingdom and seek entry clearance. Both the Appellant and his wife are of Filipino descent and maintain connections with their respective families in the Philippines who could give some support.
12. The Judge had adequately dealt with the claim under Article 8 outside the Immigration Rules. She gave cogent reasons at paragraph 34 in support of her finding that it would be proportionate for the Appellant to seek entry

clearance. There was nothing in the grounds for appeal which disclosed a material error of law.

Further Submissions for the Appellant

13. Mr Slatter submitted that the main argument was that at paragraph 25 of her decision the Judge had made no reference to what amounted to “insurmountable obstacles”. The Judge had erred in seeking to determine the proportionality of the decision to remove the Appellant by way of reference to the circumstances which would obtain if he were removed simply for the purposes of applying for entry clearance. This prospect had not been raised by the Respondent or the Appellant before the Judge. The decision should be set aside.

Findings and Consideration

14. I reserved my decision which I now give with reasons. I refer to the grounds for permission to appeal and use the same numbering.
15. In relation to para 2.1 of the grounds it was not until 28 July 2014 that a definition of “insurmountable obstacles” as employed in Section EX was inserted in Appendix FM. The Judge made findings about the likely circumstances which would meet the Appellant or the Appellant and his wife if either or both of them were to return to the Philippines in light of the evidence which she had recorded at paragraphs 11-15 of her decision. Given the nature of the circumstances, found by the Judge for sustainable reasons, it is clear they are a considerable distance from any sensible meaning which could be given to the expression “insurmountable obstacles”.
16. Paragraph 2.2 of the grounds takes issue with the absence of any assessment of the availability of jobs for the Appellant on return. The Appellant had “jumped ship” in 2003. There was no evidence to suggest he would be looking for re-employment in the Philippine maritime industry if he were to return to the Philippines. The Judge noted this at paragraph 11(a) of her decision and that the Appellant’s family owned and worked land and at paragraph 12(c) that the Appellant had at one time lived on the land. At paragraph 12(d) she noted that employment prospects are generally limited in the Philippines. There was limited, if any, evidence before the Judge that on return the Appellant or his wife or both of them would live in circumstances that which would be unduly harsh or similar. The point made in relation to ground 2.1 about the meaning of “insurmountable obstacles” in the Appellant’s circumstances remains also applies here.
17. Ground 2.3 refers to an inconsistency and lack of clarity in the findings on the issue of “insurmountable obstacles”. The ground does not identify any specific inconsistency and appears to rely on the ground based on the lack

of identification of what amounts to “insurmountable obstacles” referred to in ground 2.1.

18. The finding at paragraph 25 of the decision that the Appellant had been absent from the Philippines for twelve years referred to in Ground 2.3.1 is a finding of fact. It is one which the Judge took into account in considering the issue of “insurmountable obstacles”. The relevance of it to the Appellant’s current ability on return to obtain employment within the maritime industry after some twelve years on land is limited.
19. The employment of the Appellant’s wife in the United Kingdom referred to at paragraph 26 of the decision is again a fact which together with her other economic ties, if any, to this country are factors to be considered as expressly required by Section 117B of the 2002 Act. In the light of the evidence and the finding at the end of paragraph 32 of her decision, there was little weight which the Judge rightly and properly could give to the wife’s employment.
20. Ground 2.4 raises the significance of the Appellant’s wife being a British citizen. Her nationality was not challenged and was impliedly accepted because it was a condition which needed to be fulfilled by reference to Section EX.1 set out at paragraph 21 of the decision before the Judge could proceed at paragraph 23 to consider whether there were insurmountable obstacles to family life continuing in the Philippines. The Judge identified the legitimate public objective against which the proportionality of the decision under appeal was to be assessed at paragraphs 34 and 38 of her decision.
21. Ground 2.4.2 fails to take cognisance of the fact that *R (MM) v SSHD [2013] EWHC 1900* was overturned by the Court of Appeal under the citation *[2014] EWCA Civ 985* to which the Judge correctly referred at paragraph 28 of her decision.
22. Ground 3 challenges the Judge’s consideration of the possibility of the return of the Appellant to the Philippines to seek entry clearance. The ground raises the issue of what Mr Slatter described as the “*Chikwamba* procedural point”. The law in this area has subsequent to the judgment in *Thakral* upon which Mr Slatter relied been extensively reviewed in some depth by Upper Tribunal Judge Gill in *R (Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2014] UKUT 00189 (IAC)*. Of note are the findings at paragraphs 39 and 40 which I set out below together with paragraphs 41 and 42 which latter two paragraphs have relevance to the facts of the Appellant’s case.
 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.

40. In Chikwamba, it was accepted that an application for entry clearance would succeed and that went in the claimant's favour. It is unresolved whether, conversely, the Secretary of State's view that an application for entry clearance would be unlikely to succeed (if she took that view in any individual case) means that the Chikwamba principle cannot apply. I did not hear argument on this point. I therefore reach no concluded view on it. However, in my experience, applicants frequently rely upon the Secretary of State's silence on this point as synonymous with an acceptance by her that an application for entry clearance would succeed, in that, it is said that the Secretary of State has not said that an application would not succeed. To state the obvious, if an individual makes an application for leave to remain on the basis of Article 8, the Secretary of State is only obliged to reach a decision on that application. She is not obliged to consider further (although she is not prevented from doing so if she wishes to) whether an application for entry clearance would succeed.
41. In the instant claim, the applicant has relied upon the Chikwamba to make good her Article 8 claim. She has not placed before the respondent any evidence to show that her removal (if removal notionally took place consequent upon the refusal of leave to remain on the basis of Article 8) would interfere with any family life being enjoyed. It has been accepted on her behalf that there are no insurmountable obstacles to family life being enjoyed between her and Mr Cheung in China. Mr Palmer appeared to retract from para 7 of his skeleton argument, which specifically states that it has to be accepted that the applicant is unable to argue that there are no insurmountable obstacles to her returning to China to apply for entry clearance. Even if it is the case that this was not a concession as to the facts, the reality is that the applicant has not placed any evidence of her circumstances and/or those of Mr Cheung. The couple do not have children. There was quite simply no evidence before the respondent to show that the decision would result in any interference with family life.
42. The applicant has relied solely upon the case-law concerning the Chikwamba principle in an attempt to make good her Article 8 claim outside the IRs. Unfortunately, this misguided approach is not uncommon. Indeed, in the instant claim, it would be correct to say that such evidence as there was before the respondent

undoubtedly shows that the respondent was fully entitled to take the view that it would be proportionate to require the applicant to make an application for entry clearance from China, pursuant to the guidance in Chikwamba. Her parents and siblings live in China. There was no evidence or explanation why, even if there were no insurmountable obstacles to family life being enjoyed on a permanent basis in China, temporary separation for the purpose of making an application for entry clearance would interfere with family life. The applicant simply has not descended into any detail about her Article 8 claim, choosing instead to rely upon legal principles. She made no case as to any form of hardship that she and/or her husband would suffer if she were to be required to make an application for entry clearance.”

23. In the light of these paragraphs, the Judge was entitled to the conclusions she reached because the Appellant had failed to discharge the burden of proof to show that there were “insurmountable obstacles” to the return of either himself or himself and his wife to the Philippines and their pursuit of their private and family lives there or to the Appellant’s return to seek entry clearance.
24. While the Judge’s treatment of the issues under both the Immigration Rules and Article 8 outside the Immigration Rules might be considered to be brief and compressed, she reached her conclusions for sustainable reasons which are adequately but only just, given in her decision and the appeal amounts to no more than a disagreement with the Judge.
25. The consequence is that the First-tier Tribunal’s decision did not contain a material error of law such that it should be set aside in whole or in part and it shall stand.

Anonymity

26. There was no request for an anonymity order and having heard the appeal I do not find such an order is required.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain a material error of law such that it should be set aside. It shall stand.

Signed/Official Crest
2015

Date 30. ix.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

