



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

Appeal Number: IA/10874/2015

THE IMMIGRATION ACTS

Heard at Bradford

On 3 May 2016

**Decision & Reasons
Promulgated
On 19 May 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**HANNAH ELISABETH CAPON
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mumon, instructed by J M Wilson

For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Hannah Elisabeth Capon, was born on 28 December 1993 and is a female citizen of the United States of America. The appellant and her son (born 2014) arrived in the United Kingdom on 1 June 2014 on a visit visa valid until 1 December 2014. Whilst in the United Kingdom and by an application dated 1 November 2014, the appellant applied for a variation of leave to remain on the basis of her wish to settle in the United

Kingdom with her husband. Her application was refused by a decision dated 6 March 2015. The appellant appealed to the First-tier Tribunal (Judge Atkinson) which, in a decision promulgated on 21 September 2015 dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Mr Mumon raised a preliminary issue at the Upper Tribunal hearing on 3 May 2016. Judge Andrew had granted permission only in respect of the grounds of appeal concerning Section 117B of the 2014 Act. She refused permission in respect of those grounds raising issues under *Chikwamba* [2009] 1 AER 363. Mr Mumon told me that a renewed application for permission had been made in respect of that ground and it had been granted by Upper Tribunal Judge Perkins. I did not have a copy before me. I have no reason to doubt what Mr Mumon told me is true. Having discussed the matter with both representatives, I stated that I would determine the appeal on the basis of all the grounds raised by the respondent including that initially refused by Judge Andrew.
3. The parties agree that the appellant could not meet the requirements of HC 395, in particular paragraph 276ADE and paragraph E-LTRPT2.3. The appellant had only been living in the United Kingdom for five months at the date of the application. The appellant challenges the additional finding in respect of paragraph E-LTRPT2.3 but there was no significant obstacle to her returning and integrating into life in the United States of America [16].
4. I find the decision of the First-tier Tribunal should be set aside. I have reached that conclusion for the following reasons. I find that this was a case which falls fully within the parameters of the House of Lords decision in *Chikwamba*. The evidence put before the First-tier Tribunal does not appear to have been disputed by the respondent. The appellant claims that it would be (in the words of Judge Atkinson) “Emotionally traumatic for her and [the child] to have to return to the United States in order to make an application for settlement.” It appears that it may take anything between five days and six weeks for such an application to be processed. Very significantly, the judge appears to have based his determination of the appeal on the understanding that the appellant would succeed with an application from the United States [33]. The judge recorded at [11], that “in the present case it is not disputed that the appellant meets the substantial requirements of the Rules relating to the status of the parties’ relationship and level of income, maintenance and accommodation.” I find that it is that particular finding that led the judge to err in law and in the application of *Chikwamba*. Indeed, rather than (as the judge appears to have assumed) there being only a minimal disruption with the appellant’s private and family life caused by her being required to remain in the United States for only five days-six weeks in order to make an application for entry clearance requiring her to undertake that journey (with its attendant cost which the judge does not appear to have considered) in circumstances where the Secretary of State agrees that the appellant meets all the requirements of the necessary Immigration Rule is, for the

reasons stated in the opinions of the House of Lords in *Chikwamba*, disproportionate. If the appellant is plainly unable to meet the requirements of the Immigration Rules then she would, by entering on a visit visa and attempting to remain under Article 8 ECHR, the obtaining of a significant advantage which she would not have obtained had she applied for settlement out of country. There exists a significant public interest for seeking to discourage such individuals in circumventing immigration law. Whilst there may, as in this present case, be some public interest in discouraging individuals from “switching” from a temporary to a more established and settled status whilst in this country, that is plainly outweighed when one considers that there is minimal public interest in refusing leave to remain to a person who will obtain entry clearance in any event. In short, the fact that entry clearance might be obtained in as short a period as five days, strengthens the appellant’s case under Article 8 in circumstances where she can meet the substantive requirements for settlement as a spouse; the shortness of the delay does not, as the First-tier Tribunal Judge appears to have believed, render any interference proportionate.

5. I do not intend to deal with the other arguments as set out in the grounds of appeal, in particular as regards discrimination (the exclusion of the appellant from applying under paragraph EX.1 of Appendix FM) although I do find that those grounds are significantly less cogent and persuasive than the *Chikwamba* point.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 21 September 2015 is set aside. I remake the decision. The appeal of the appellant against the decision of the respondent dated 6 March 2015 is allowed on human rights grounds (Article 8 ECHR).

No anonymity direction is made.

Signed

Date 4 MAY 2016

Upper Tribunal Judge Clive Lane