



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

Appeal Number: HU/07804/2015

**THE IMMIGRATION ACTS**

**Heard at FIELD HOUSE**

**On 16<sup>th</sup> May 2017**

**Decision &  
Promulgated  
On 26<sup>th</sup> May 2017**

**Reasons**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL  
Ms. GA BLACK**

**Between**

**MR HARRISON GATHAGE**

Appellant

**And**

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

Respondent

No anonymity order made

**Representation:**

For the Appellant: Mr I Kumi Counsel instructed by Templeton Legal services solicitors

For the Respondent: Mr T Wilding Home office Presenting Office

**DECISION AND REASONS**

1. I shall refer to the parties as follows; “the Appellant” in these proceedings is Mr Gathage and the Secretary of State is “ the

Respondent". This is an error of law hearing in respect of the decision and reasons of the First-tier Tribunal (Judge Fowell)("FTT") promulgated on 7<sup>th</sup> November 2016, in which she dismissed the appeal on human rights grounds.

## **Background**

2. The Appellant is a citizen of Kenya and whose date of birth is 17.9.1963.

3. The Appellant first entered the UK in 2002 by way of a multi visit visa which allowed him to make trips to the UK over a five year period. He remained in the UK from 2003. He claimed that in 2007 his wife and children were killed in Kenya and his house was burned down [2]. He made two applications for leave to remain and then claimed asylum which was never considered [4]. In November 2013 he married his wife, a British citizen. In his application for leave to remain he raised health problems suffered by his wife and argued that in the event of return to Kenya he would suffer trauma because of the tragic circumstances of the death of his family members in 2007 [7].

4. The FTT found that the family tragedy never took place. It found that there was no supporting evidence in addition to which there was no asylum claim made by the appellant nor any reference made to the incident in his application in 2009 [30]. It was accepted that the appellant and his wife were a genuine relationship and that he lived in the UK for 14 years (mostly illegally). The FTT took into account a letter dated March 2015 from the appellant's wife's GP [33] and found that her medical conditions were common and that treatment would be available in Kenya [33-34]. Accordingly the FTT found that the appellant had not shown insurmountable obstacles under the Immigration Rules to continuing married/family life in Kenya. In considering Article 8 outside of the Rules the FTT cited the judgment of **Agyarko [2015] EWCA Civ 440** [39] and concluded that Article 8 was not engaged and that the interference was proportionate. The FTT took into account that the appellant lived unlawfully in the UK and that the parties entered the relationship in that knowledge [40]. The FTT considered that **Chikwamba v SSHD 2008 UKHL** did not apply in the light of the fact that there would be a 60 day delay time for a visa application to be considered [43-44].

## **Grounds of application for permission**

5. The appellant argued that the FTT failed to fully consider the availability of medical treatment in Kenya and that it applied a too stringent test to the question of "insurmountable obstacles".

## **Permission to appeal**

6. Permission was granted on renewal by FTJ Gibb who observed that the Supreme Court decision in **Agyarko v SSHD [2017] UKSC 11** had not been before the FTT and that the public interest can be reduced where there has been delay and where the Appellant met the requirements of Appendix FM. Further more FTJ Gibb found that the FTT arguably erred in assessing the evidence in reaching a negative finding as to the occurrence of the family tragedy in Kenya.

### **The hearing**

7. At the hearing I heard submissions from both representatives. Mr Kumi relied on a skeleton argument in addition to the grounds of appeal and relied heavily on the terms of the grant of permission by FTJ Gibb. The details of the appellant's submissions were fully set out in the various documents and in the record of proceedings and I do not repeat the same. Mr Wilding contended that the application was simply an attempt to rehear matters before this Tribunal and that the terms of permission by FTJ Gibb were beyond the scope of the grounds.

8. At the end of the hearing I decided that there was no material error of law and that none of the grounds argued were made out. The decision and reasons shall stand and the appellant's appeal is dismissed. I now give my reasons.

### **Reasons for decision**

9. I am fully satisfied that the FTT applied the proper approach in its consideration of the existence of insurmountable obstacles and which was consistent with the guidance given by the Supreme Court in **Agyarko**. The FTT made negative findings of fact that were open to it to make on the occurrence of the family tragedy in Kenya. It relied on the lack of supporting evidence together with findings relating to the appellant's immigration history. The FTT fully considered the medical evidence about the appellant's wife's conditions set out in the decision and reasons [43]. The FTT considered Article 8 with reference to **SS(Congo)** [38] and concluded that no exceptional circumstances had been established. Although subsequent to the hearing before the FTT the Supreme Court effectively removed the threshold test for Article 8, the FTT did go on to consider relevant factors in assessing of the proportionality of the interference including the period of separation measured by reference to a visa processing times documents showing a period of 60 days, awareness of precarious circumstances at the time of the relationship and the length of unlawful residence. Those findings were again entirely sustainable on the evidence before the FTT. There was no contrary evidence relied on by the appellant to question the processing period of 60 days for a visa. It appeared that the appellant's application for entry clearance would meet the financial requirements having regard to his wife's earnings. I find no basis for raising any argument under section 117B (6), which was misconceived and indeed this was not a matter raised in the grounds of

application for permission. The FTT did in any event consider proportionality and weighed up the public interest and private interest and had regard to the factors relevant in **Chikwamba**.

10. There is no material error of law disclosed. The FTT decision and reasons shall stand. The appeal is dismissed.

Signed Date 25.5.2017

GA Black

Deputy Judge of the Upper Tribunal

No anonymity order made  
As the appeal is dismissed there is no fee  
award.

Signed Date 25.5.2017

GA Black

Deputy Judge of the Upper Tribunal