



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23066/2015

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2017

Sent to parties on:
On 25 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

EDWARD EBHODAGHE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Praisoody, Okafor & Co Solicitors

For the Respondent: Mr Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent is a national of Nigeria who was born on 11 November 1970. His appeal was allowed by the First-tier Tribunal Judge S Taylor in a decision promulgated on 6 September 2016. The Appellant sought permission to appeal that decision and permission was granted by First-tier Tribunal Judge Robertson on 10 January 2017. For

ease of reference, I shall refer to the Appellant in this appeal as the Secretary of State and to the Respondent as the Claimant.

2. The Claimant made an application to remain in the United Kingdom on the basis of his family and private life. He arrived in the United Kingdom on a student visa valid from 15 September 2009 until 28 January 2011. He entered the UK on 12 October 2009 and was last granted leave to remain as a student from 9 March 2011 until 29 February 2012. His application was considered under the partner route by the Secretary of State in the reasons for refusal letter (“RFRL”) dated 5 June 2015. The Secretary of State accepted that he had a genuine and subsisting relationship with a British partner who had lived in the United Kingdom all her life and was employed here. It was not accepted however that there were any insurmountable obstacles to her relocation and the Secretary of State was not satisfied that she had in fact lived with the Claimant for two years prior to the date of application. The Secretary of State concluded therefore that the Claimant failed to meet the requirements of E-LTRP.1.7. of Appendix FM of the Immigration Rules. In view of the fact that the Secretary of State was not satisfied that EX.1 applied to the Claimant’s case, the application was refused under the partner route. The application was also considered under the private life route, but refused on the length of residence requirements and also because it was not accepted that there would be very significant obstacles to the Claimant’s integration into Nigeria.
3. The First-tier Tribunal Judge heard evidence from the Claimant and his partner. He concluded at paragraph 14 that in the light of the fact that the evidence of the parties was that they started to live together in June 2014, they were living together for less than a year at the date of the application and therefore were unable to meet the requirements of the Rules with regard to unmarried partners. He therefore concluded that the Claimant failed to meet the requirements of E-LTRP and had to rely on paragraph EX.1. In considering EX.1 he concluded in the light of the fact that the sponsor was a UK citizen, had lived all her life in the UK and had her own family in the UK, there would be very significant obstacles or very significant difficulties to continuing her family life in Nigeria. He concluded she would have to leave her job and face a very uncertain job market in Nigeria, and also leave her own family, including an adult daughter. In the light of his findings he stated at paragraph 16 that he was satisfied the sponsor would face very significant difficulties if the parties were required to live outside the UK and therefore met the requirements of paragraph EX.1, as defined by paragraph EX.2.
4. The Secretary of State sought permission to appeal the decision of the First-tier Tribunal in discrete terms, namely that there was a material misdirection of law, in the alternative in allowing the appeal under the partner route, because if the Claimant was not a partner within the definition of a partner under GEN.1.2., then his claim fell outside of the partner route and it was not therefore open for the First-tier Tribunal to go on to consider his case under R-LTRP(d). Permission was granted on the grounds as pleaded because it was arguable that the provisions of GEN.1.2. of Appendix FM paragraph EX.1 were not available via the R-LTRP.1.1 route because the Claimant did not satisfy the definition of partner. Consequently, according to the case of **Sabir**

(Appendix FM – EX.1 not freestanding) [2014] UKUT 00063 (IAC) the partner route was not available to him because, according to the ratio of that case, it is plain from the architecture of the Rules as regards partners that EX.1 is parasitic on the relevant Rule within Appendix FM. It was held that if EX.1 was intended to be a freestanding element some mechanism of identification would have been used and the structure of the Rule as presently drafted required it to be a component part of the leave granting Rule. Consequently therefore, the grounds state that the error was arguably material because the judge in his assessment focused entirely on whether there were insurmountable obstacles to family life continuing in Nigeria and did not move on to a proportionality exercise and the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 were not considered.

5. In a decision sent to the parties on 2 March 2017 I found that the First-tier Tribunal had made a material error of law. My core findings are at paragraphs 7 and 8 of the decision:

“7. It was clear on the findings of the First-tier Tribunal at paragraph 14 that the First-tier Tribunal found that the Claimant did not meet the definition of partner in GEN.1.2. of Appendix FM. That is explicitly stated, and it is then explicitly stated that the Claimant has to satisfy paragraph EX.1. There was no reference by the First-tier Tribunal to the authority of Sabir, the ratio of which I set out earlier. Consequently, since the Rules require that the two year residence period must have elapsed at the date of the application, and in the finding of the Judge that it had not, due to the absence of cohabitation the Claimant was therefore barred from relying on EX.1. The Claimant therefore could not satisfy the requirements of the partner route and the appeal was allowed under the partner route only.

8. The First-tier Tribunal did not conduct a freestanding Article 8 assessment outside the Rules and no proportionality assessment was carried out, simply because the Judge accepted erroneously that the Claimant met the requirements of the Rules. Consequently, the error must be material because the appeal could only be allowed outside the Rules, it not having been the case that the Judge found that any other requirements of the Immigration Rules were met. There was no reference to the statutory requirements that the Tribunal is obliged to take into account under Section 117 of the 2002 Act.”

6. I set aside the decision of the First-tier Tribunal and adjourned with directions for the remaking of the decision in the appeal.

The Re-making of the decision in the appeal

The Parties submissions

7. Ms Praisoody chose not to call the Claimant to give evidence. She submitted that the nature of his wife’s work would put her in danger and it was unclear how long it would take to make an entry clearance application. Living in Nigeria would cause her enormous difficulties. The Claimant satisfied the Rules and to force him to return to seek entry clearance was not necessary.

8. Mr Singh submitted that the Claimant should return and make an entry clearance application.

Discussion

9. The Secretary of State conceded in the RFR that the Claimant and his British partner, Ms Elizabeth Ebhodaghe, were in a genuine and subsisting relationship. However, they could not meet the requirements of the Immigration Rules because they had not lived together for two years at the date of the application. The Claimant now advances his case on the basis that they are now married and therefore they are now partners for the purposes of GEN.1.2 (i) of the Immigration Rules. The Claimant's bundle contains the marriage certificate at p1 and I accept that they are now married.
10. The Claimant's right of appeal is on human rights grounds only against the refusal of a human rights claim under the Immigration, Nationality and Asylum Act 2002 (section 82 and 84). The jurisdiction of the Tribunal in relation to appeals on Article 8 grounds only was considered in respect of visit visa cases and by analogy the approach here should be the same. In **Kaur (visit appeals; Article 8)** [2015] UKUT 00487 the Upper Tribunal held that the Article 8 decision on an appeal cannot be made in a vacuum. The starting-point must be the state of the evidence about the appellant's ability to meet the requirements of the Immigration Rules.
11. In addressing the questions in **Razgar** [2004] UKHL 27 I accept that the Claimant has a genuine and subsisting relationship with his wife which amounts to family life for the purposes of Article 8. Mr Singh did not seek to persuade me otherwise and the relationship has been accepted as genuine by the Secretary of State. It was accepted by the First-tier Tribunal that they have been living together since June 2014. I also find that the proposed interference is of sufficient gravity to engage the operation of Article 8 and that the interference is in accordance with the law and necessary in a democratic society. The remaining question is therefore whether the interference is proportionate to the legitimate public end sought to be achieved.
12. My starting point in terms of proportionality is whether the Claimant can satisfy the Immigration Rules. The Claimant could not meet the requirements of the Immigration Rules at the date of application for the reasons set out in my error of law decision. The Claimant is now married and hence is now a partner for the purpose of the Immigration Rules which is clearly relevant to an assessment of proportionality. The requirements for limited leave to remain as a partner are set out at R-LTRP. They require the satisfaction of the suitability requirements and the eligibility requirements which include relationship requirements; immigration status requirements, financial requirements and English language requirements. It is not in issue that the Claimant satisfies the relationship requirements. He cannot satisfy the immigration status requirements because he is in the UK in breach of immigration laws (E-ETRP.2.2 (b)). This means that in order to succeed he must show that EX.1 applies.
13. Paragraph EX.1 applies if either of two conditions is satisfied. The first applies to persons applying for leave to remain as parents, and is not relevant to the present

appeal. The second applies to persons, such as the Claimant, who apply for leave to remain as partners:

“(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

14. Paragraph EX.2 provides:

“For the purposes of paragraph EX.1(b) ‘insurmountable obstacles’ means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”

15. This question must be determined in the light of the guidance given by the Supreme Court in **R (on the application of Agyarko) v SSHD** [2017] UKSC 11. The First-tier Tribunal in determining the appeal did not have the benefit of this decision. The Supreme Court determined how the “insurmountable obstacles” requirement in paragraph EX.1(b) of Appendix FM was to be interpreted albeit prior to the 2014 changes to the Rules. Lord Reed, giving the lead Judgment, stated at paragraphs 43 and 44:

“43. It appears that the European court intends the words “insurmountable obstacles” to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to “un obstacle majeur” (**Sen v The Netherlands** (2003) 36 EHRR 7, para 40), or to “major impediments” (**Tuquabo-Tekle v The Netherlands** [2006] 1 FLR 798, para 48), or to “the test of ‘insurmountable obstacles’ or ‘major impediments’” (**IAA v United Kingdom** (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could “realistically” be expected to move (**Sezen v The Netherlands** (2006) 43 EHRR 30, para 47). “Insurmountable obstacles” is, however, the expression employed by the Grand Chamber; and the court’s application of it indicates that it is a stringent test. In **Jeunesse**, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant’s partner was in full-time employment in the Netherlands: see paras 117 and 119.

44. Domestically, the expression “insurmountable obstacles” appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression “insurmountable obstacles” is now defined by paragraph EX.2 as meaning “very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or

would entail very serious hardship for the applicant or their partner.” That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State’s statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.”

16. Much of Mrs Ebhodaghe’s witness statement is taken up, surprisingly, with submissions on the law. However, her reasons for claiming that there would be insurmountable obstacles to family life continuing in Nigeria are that she is a senior manager with a charity supporting women fleeing domestic violence and that it would be impossible for her to obtain this type of work in Nigeria. Further, the Claimant is from an area where the FCO advises against all but essential travel. She also relies on the fact that all her family are in the UK including her grandmother and her daughter who is at university. The Claimant states in his witness statement that the fertility treatment which the couple are undergoing here could not be pursued in Nigeria. He further refers to a high threat of terrorism in Nigeria and that going to Church as Christians would be difficult for them both.
17. The First-tier Tribunal found that the sponsor had no connections to Nigeria and had never been there. He did not make any findings in relation to the availability of fertility treatment in Nigeria and there is no supporting evidence of treatment in Nigeria in the Claimant’s bundle before me nor does there appear to have been any before the First-tier Tribunal. He accepted that the sponsor was in a managerial job, earning significantly above the national average and not in profession that was transferrable across national borders. He found that she would face an uncertain job market in Nigeria, although there does not have been any supporting evidence in relation to this. He also found that she would have to leave her own family although her daughter was an adult and therefore he considered that this would not be a prime consideration. He accepted that the sponsor would face very significant difficulties if she was required to live outside the UK and accepted that this met the requirement of paragraph EX.2.
18. The Secretary of State has not challenged these findings in all probability because it was her case that EX.1 should not have been considered in any event as the Claimant’s case fell outside the Immigration Rules. The First-tier Tribunal Judge also did not have the benefit of the Supreme Court decision in **Agyarko**. However, I accept his findings in relation to Mrs Ebhodaghe’s family here, the fact that she would have to leave her job and would in all likelihood have difficulties finding a job in the same area of work. However, it is clear from the Court’s decision in **Agyarko**, in which European law on the question of what constitutes insurmountable obstacles was considered, that the loss the applicant’s partner’s employment, the fact that the partner may never have visited the country to which they were to establish family life are not sufficient to satisfy the requisite test. Further, the Supreme Court also held that there was no basis for interfering with the decision of the Upper Tribunal in the

linked appeal of Mrs Ikuga which held that the “insurmountable obstacles” within the meaning of paragraph EX.1(b), put forward on her behalf “could not possibly persuade any decision-maker that there were insurmountable obstacles to family life continuing in Nigeria”. The fact that Ms Ikuga’s partner would have to change jobs was not an insurmountable obstacle; nor was Ms Ikuga’s wish to continue fertility treatment in the UK.

19. The Claimant also argues that it would be unsafe for the sponsor to live in Nigeria in view of the risk of kidnap and crime. This is not a matter in respect of which the First-tier Tribunal made any findings. According to the Claimant’s witness statement his family live in Edo State and his parent’s house was broken into before Christmas. He says this is where they would have to stay and that he feels that he could not safeguard his wife adequately. There was no evidence in the Claimant’s bundle in regard to the issue of safety but evidence was attached to the Claimant’s grounds of appeal which I therefore consider. The Claimant claims to be from Edo State and has produced the FCO advice to British Citizens for June 2015 regarding travel to Nigeria. Whilst this is not current, it is all I have been provided with. Edo State is not one which the FCO either advised against all travel or all but essential travel in 2015. The advice for that area is to see the FCO travel advice before travelling. The advice says generally that there is a high risk of kidnaps throughout Nigeria and a high threat from terrorism.
20. I accept that all of these factors would amount to hardship and it would be difficult for his wife to adjust to life in Nigeria. However, there has been no suggestion that the Claimant and his wife would not have anywhere to live in Nigeria or that he would be unable to work on return there. The test in EX.2 has been held to be a stringent one and applying the case law to the facts of this case I find that it has not been met. There is no evidence before me to show that the FCO currently advise against travel to the Claimant’s area of Nigeria and I do not accept that the Claimant has demonstrated very significant difficulties which would entail very severe hardship either for himself or his wife in living in Nigeria.
21. The Claimant also argues that were he to apply for entry clearance now he would be successful because he meets the requirements of the Immigration Rules as a partner. He therefore argues that it would be disproportionate to remove him and that it would not be proportionate for him to return to Nigeria to seek entry clearance. The requirements for entry clearance as a partner are set out at EC-P of Appendix FM of the Immigration Rules. The Secretary of State does not dispute that he would meet the relationship or suitability requirements. Mr Singh also did not seek to argue that he would not meet the financial requirements on the evidence provided in the Claimant’s bundle. The Claimant has produced a letter dated 15 February 2017 confirming that she has been appointed to the post of Service Manager at the Brent, Barking and Dagenham Domestic Abuse Service following her completion of her 9 month review period. Her salary is said to be £36,348 per annum. She has produced wage slips for November 2016 to February 2017 in the Upper Tribunal bundle showing a monthly net payment of £2,255. Her wages slips for the period March 2016 to 28 July 2016 are in the First-tier bundle. Her wage slips for August to October 2016

are not in either bundle. Her bank statements in the Upper Tribunal bundle cover the period from 8 October 2016 to 6 March 2017 showing her income arriving in her bank account. She has also produced her annual tax summary for the year 2015 to 2016 showing that her taxable income for that period was £34,902. Her contract of employment is at page 22 of the First-tier bundle.

22. The Immigration Rules in relation to specified evidence are at Appendix FM-SE and require, in the case of salaried employment, that an applicant must produce payslips for a period of 6 months prior to the date of the application; a letter from the employer who issued the payslips confirming the salary; the length of the employment; the period they were paid the level of salary relied on and the type of employment. Additionally personal bank statements corresponding to the same period must be provided. The evidence must be submitted with the application and dated no earlier than 28 days before the application. The Claimant could not satisfy the requirements for specified evidence because it was not submitted with the application in 2015. Further, even considering the position at the date of the hearing the payslips do not cover six months prior to the hearing.
23. However, notwithstanding that the formal requirements of Appendix FM-SE cannot be met, in my judgment the evidence clearly demonstrates that the Claimant's wife earns in excess of the maintenance requirements set by the Rules of £18,600. There is sufficient evidence to show that she earns £36,348, as claimed. As the Supreme Court remarked at paragraph 76 of **R (on the application of MM (Lebanon)) (Appellant) v Secretary of State for the Home Department** [2017] UKSC 10 when discussing the margin of appreciation accorded by Strasbourg to the national courts:

"The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (**Hesham Ali**, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise."

24. The fact that the Claimant meets the requirements of the Rules save for the immigration status requirement is clearly relevant to the balancing exercise. I have concluded that there are no insurmountable obstacles for the purposes of the Immigration Rules in the Claimant's spouse continuing family life in Nigeria. I now also address, having regard to all the factors relevant to the balancing exercise, whether the Claimant's removal would be proportionate.

25. Sections 117A and 117B are found in part 5A of the 2002 Act and apply in all cases where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8.

Section 117A is as follows:

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

26. The considerations referred to in section 117A(2)(a), which are said by that provision to be applicable in all cases where the public interest question is under consideration, are as follows:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

27. The Claimant entered the UK on 12 October 2009 and was last granted leave as a student valid from 9 March 2011 until 29 February 2012. According to Mrs Ebhodaghe, she met him in April 2014 at which point he had applied for a residence card on the basis of a relationship with an EEA national. She says he thought he had the right to reside in the UK as a matter of European law. He, however, does not comment on this in his witness statement. In any event, it is clear that the relationship with his wife, a qualifying partner, was established whilst he was here unlawfully. Even though he may have been trying to obtain a right of residence, he had no leave to remain and that was clear to both parties. I am required to give the relationship little weight. I have born in mind also what the Mr Justice McCloskey has recently said in the case of **Kaur (children's best interests / public interest interface)** [2017] UKUT 00014 (IAC), namely that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

28. In relation to the weight to be accorded to their relationship within the spectrum referred to above, I accept that the fact that the couple are attempting to have children together and have lived together since 2014 shows that they are in a committed relationship. In relation to the other factors required to be considered under s117B, the Claimant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of fluency in English, or the strength of his financial resources as these are neutral factors (**Rhuppiah** [2016] EWCA Civ 803). In **Rhuppiah** the Court of Appeal held at paragraph 63 that the expression 'financially independent' should be given its natural meaning of as indicating someone who is financially independent of others. The Claimant is dependent on his wife and for the purposes of s117B is not financially independent although it cannot be said that he will be a burden on the state as he meets the financial requirements of the Immigration Rules. He speaks English. I also take account of the fact that the maintenance of immigration control is in the public interest.

29. In **Agyarko** Lord Reed concluded that exceptional circumstances in European case law means that, in cases involving precarious family life, “something very compelling ... is required to outweigh the public interest”, and stated at paragraph 57 that:

“57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State’s policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are “insurmountable obstacles” or “exceptional circumstances” as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

30. The Claimant has remained in the UK in breach of immigration laws since 2012, established his relationship here whilst his status was precarious and does not meet the requirements of EX.2. I have considered all the factors relevant to the question of whether family life could be continued in Nigeria in my assessment of whether the Claimant meets EX.2 and I do not consider that there are any further factors which require consideration in this regard which have not been dealt with under the Rules.

31. In view, however, of my finding that, but for the immigration status requirement, the Claimant would meet the requirements of the Rules, I have considered whether it would be proportionate for the Claimant to return to Nigeria to seek entry clearance. If an applicant is otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, there may be no public interest in his or her removal (**Chikwamba v Secretary of State for the Home Department** [2008] UKHL 40).

32. In **Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan (Mauritius)** [2012] EWCA Civ 1054 Elias LJ summarised the effect of **Chikwamba** and the subsequent decisions of the Court of Appeal in **TG (Central African Republic)**[2008] EWCA Civ 997 and **SZ (Zimbabwe)** [2009] EWCA Civ 590 and **MA (Pakistan)** [2009] EWCA Civ 953:

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. There is no evidence before me as to the period of time an entry clearance application would be determined. Article 8 is engaged and the Claimant and his wife enjoy family life. In view of the fact that at the date of the hearing all of the requirements of the Immigration Rules save for the immigration status requirement are satisfied, I conclude that were the Claimant to apply for entry clearance that application would be granted. I was also not addressed in relation to any case law. The Secretary of State has not, at this hearing, advanced a sensible reason why the Claimant should return to seek entry clearance nor is this a case where there is an appalling immigration history such as **R (Ekinici) v Secretary of State for the Home Department** [2004] Imm AR 15. As concluded by Lord Reed in **Hesham Ali v Secretary of State** [2016] UKSC 60, para 42, and **R (on the application of Agyarko) v SSHD** [2017] UKSC 11, para 42, the ultimate issue is whether a fair balance has been struck between individual and public interests, taking account the various factors identified. In the circumstances of this case, where the Claimant meets the requirements of the Rules save for the immigration status requirement and no sensible reason has been put forward for requiring him to seek entry clearance I find that his removal would be disproportionate.

Notice of Decision

Having set aside the decision of the First-tier Tribunal I re-make the decision in the appeal by allowing it on Article 8 grounds.

No anonymity direction is made.

Signed

Dated 14 July 2017

Deputy Upper Tribunal Judge L J Murray