



Upper Tribunal  
(Immigration and Asylum Chamber)

HU/01853/2019

THE IMMIGRATION ACTS

Heard at Glasgow  
on 25 July 2019

Decisions & Reasons Promulgated  
on 2 August 2019

Before

UT JUDGE MACLEMAN

Between

**SANDEEP SINGH MANN**

Appellant

and

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

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Maguire, Solicitors  
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against the decision of FtT Judge Murray, promulgated on 15 April 2019. His 5 grounds are set out in his application dated 30 April 2019. Permission was granted principally on ground 4, based on *Chikwamba* [2008] UKHL 40. Mr Caskie based his submissions on that issue, and on the overlapping question of the weight given to the public interest, it being “clear that the appellant would be granted entry clearance” if he were to apply from India.
2. It is convenient to deal firstly with minor points arising from the other grounds.

3. Ground 1 says that the judge erred by not giving reasons for the adverse credibility finding based on section 8 of the 2004 Act. The ground is not well framed. As Mr Caskie correctly pointed out, this was not a credibility case.
4. The judge's comment was not unreasoned; the matter spoke for itself. It may have been irrelevant, but it is no worse than that. Ground 1 leads nowhere.
5. Ground 2 complains about the judge saying that the sponsor's refusal to accompany the appellant went against a finding that they were in a genuine and subsisting relationship, as her comment is unexplained and there is no indication of the weight given to it.
6. The comment was justified, as far as it went, but she proceeded to decide the case on the basis that the appellant and sponsor do have a genuine and subsisting relationship, so ground 2 also leads nowhere.
7. Ground 3 was not advanced by Mr Caskie, no doubt because it is misconceived. The case on which it relies has no relevance to the present circumstances.
8. Ground 5 is a vague disagreement with the proportionality assessment. It adds nothing to the main argument for the appellant.
9. I return to ground 4 and to the principal submissions.
10. Mr Caskie submitted that although paragraph 320(11) of the immigration rules was not mentioned by either the respondent or the judge, she in effect found against the appellant on a general ground of refusal, due to his adverse immigration history, although there were no aggravating circumstances such as might justify refusal under that paragraph. He accepted that representatives in the FtT had not referred the judge to *Chikwamba*. However, he said that this was a "Robinson obvious" case for the principles of *Chikwamba* to apply, so it was an error of law not to consider the matter, even in absence of submissions, and the decision should be reversed.
11. Mr Govan said that the case was one where the *Chikwamba* principles might have been considered, but that the appellant would not automatically benefit from them. Each case turned on its own facts, and the judge made various observations about the appellant's immigration history which, even if incorrectly referred to as "credibility" matters, amounted to an assessment of all elements relevant in terms of *Chikwamba*. He submitted that the decision should not be set aside, or that alternatively, if a fresh decision was made, the appellant did not qualify for the benefit of *Chikwamba*, and the appeal should again be dismissed.
12. Mr Caskie in reply said that some element of an adverse immigration history was inevitable in any case where *Chikwamba* could be involved, and the appellant's conduct did not rise above that minimum level. He had been in the UK from 2006 until he met the sponsor in 2013, and even if it might be surmised that he had worked illegally during that initial period, that was historic, and he had not done so since, as she supported him. A case like this disclosed a *lacuna* in the rules, because

the sponsor was prevented from going to India with him while he applied by the fact that she would then not have the earnings required for his application to succeed.

13. I was not taken to the case law. The following passages appear to me to be in point.

14. In *Robinson* [1997] Imm AR 568 the Court of Appeal held at [39]:

“Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely "arguable" as opposed to "obvious." Similarly, if when the tribunal reads the special adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the grounds of appeal to the tribunal had a strong prospect of success if leave to appeal were to be granted.”

15. The opinion of Lord Brown of Eaton-under-Heywood in *Chikwamba* includes the following:

“[41] Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?

[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, *Ekinici* 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 (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case—see in this regard *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. 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. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second section 65 appeal here with the appellant abroad and unable therefore to give live evidence. ...

[46] Let me now return to the facts of the present case. This appellant came to the UK to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

16. In her brief concurrence, Lady Hale said:

"Even if it would not be disproportionate to expect a husband to endure a few months' separation from his wife, it must be disproportionate to expect a four year old girl, who was born and has lived all her life here, either to be separated from her mother for some months or to travel with her mother to endure the "harsh and unpalatable" conditions in Zimbabwe simply in order to enforce the entry clearance procedures."

17. I accept that the *Robinson* principles apply also to obvious points of human rights law, and to the extent to which FtT judges are obliged to take points not pleaded. I also accept that although decided before the immigration rules were amended to more closely reflect human rights obligations, the *Chikwamba* principles remain available, and they are not restricted to cases involving children.
18. Cases turn on their own facts, but some comparison here is instructive.
19. The appellant does not have such a bad immigration history as *Ekinici*, but he has entered and remained unlawfully for many years. His case does not involve a child having to travel, or separation of parent and child. He does not face harsh and unpalatable conditions. Lady Hale did not think it necessarily disproportionate for husband and wife to face a few months' separation.
20. Placing the appellant on the spectrum illustrated by *Chikwamba*, he did not have a point as strong as envisaged by *Robinson*. He had an arguable case, rather than an obvious one. A judge might have cited *Chikwamba* and decided against him.
21. There is also force in the argument by Mr Govan that although the judge did not expressly consider *Chikwamba*, she applied it in effect, noting the extent to which his

history was adverse, and observing at [35] that she did not understand why he had not already returned to make his application.

22. I find no error by reference to paragraph 320(11) of the rules. That argument did not arise from the grounds, and it read into the decision something which is not there.
23. The decision of the First-tier Tribunal shall stand.
24. No anonymity direction has been requested or made.

A handwritten signature in black ink, appearing to read "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

25 July 2019  
UT Judge Macleman