



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-003838

First-tier Tribunal No:
HU/00460/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th November 2024

Before

UPPER TRIBUNAL JUDGE MAHMOOD

Between

Mr Enoch Lass Wuruyai
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr E Imo, solicitor, Chancery CS Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 4 November 2024

DECISION AND REASONS

1. This is my oral decision which I delivered at the hearing today.

Introduction

2. The Secretary of State brings this appeal, but to ease following this decision, I shall refer to Mr Wuruyai as the Claimant and the Secretary of State as the Respondent.

3. The Claimant's appeal on human rights grounds was allowed by First-tier Tribunal Judge Beach ("the Judge") by way of a decision dated 17 July 2024. First-tier Tribunal Judge Nightingale granted the Secretary of State permission to appeal by way of a decision dated 12 August 2024.

The Grounds of Appeal and Grant of Permission to Appeal

4. The Secretary of State relied on two grounds of appeal. Ground 1 contended that there had been a material misdirection in law because the Judge had failed to weigh the lack of insurmountable obstacles to the family life continuing outside of the UK in the proportionality balancing exercise. There was reliance on the Court of Appeal's decision in *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109 where it was said at paragraph 31:

"31. Where article 8 is in issue within the Rules there will of necessity have to be a conclusion on the question of whether there are insurmountable obstacles to the relocation of the appellant and his family. ... it will factor into its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles - that being a relevant factor both as a matter of policy and on the facts of the case to the question of exceptional circumstances."

5. Secondly, the Secretary of State relied on the Court of Appeal's decision in *Alam & Anor v Secretary of State for the Home Department* [2023] EWCA Civ 30 at paragraph 112 where it was said,

"The two present appeals are both cases in which neither appellant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is the finding that the relationships were formed when each appellant was in the United Kingdom unlawfully."

6. The First-tier Tribunal's grant of permission had stated as follows,

"2. The grounds of appeal argue that the Judge erred in failing to take into account that the appellant did not meet the requirements of the Immigration Rules and, also, failing to adequately balance the other factors in finding that a requirement for entry clearance would cause disproportionate interference.

3. The grounds are arguable. In particular, it is arguable that the Judge failed to take into account that the appellant could return with his Romanian wife to either Romania or, indeed, any other EEA State in order to make an application for entry clearance. Further, it is arguable that the Judge erred in failing to give weight to the appellant's failure to meet the test of insurmountable obstacles in determining proportionality outside of the Immigration Rules. Permission is granted on all grounds pleaded."

The Hearing Before Me

7. Ms Cunha amplified the grounds of appeal and referred to various aspects of the Judge's decision and also took me to various authorities, to which I shall return.
8. Mr Imo had provided a helpful skeleton argument, I think drafted by somebody else at his office, which he had expanded upon. He set out in clear terms, having said all that he possibly could on behalf of the Appellant. He said that the Judge's decision was one reached with lawful consideration of the facts and the background and that there was proper application of the law. He also submitted that there had been a failure by the Secretary of State to comply with the Principal Resident Judge's directions. He said that for example, there was no skeleton argument provided by the Secretary of State for this appeal.
9. Insofar as the lack of a skeleton argument is concerned, Mr Imo is correct. The Upper Tribunal's directions are not something which is an option to consider. Compliance is mandatory and not a choice, and I make it very clear and as I have before, the Upper Tribunal is very different to the First-tier Tribunal. The Upper Tribunal, like the High Court, is a superior court of record. If parties, be that the Secretary of State or Appellants, do not take that seriously, whether by not turning up at court on time, or not complying with directions, there will have to be genuine and relevant reasons. If there are not, then the matter will be dealt with seriously.
10. Having said all of that, in my judgment, in this particular instance even though there is no explanation and not even an apology from the Secretary of State for the non-compliance with the standard directions for a skeleton argument, I am not sure it would have taken matters much further to have a skeleton argument. That is because in this instance, the grounds of appeal and the grant of permission was tolerably clear. But I want it to be noted and reported back by Ms Cunha that 'even' the Secretary of State must ensure that there is compliance with the standard directions. They are not an option, but are mandatory.
11. I make clear though that in this case, the failure to file and serve a skeleton argument is not a knockout blow for the Appellants. Therefore, whilst I am grateful to Mr Imo for bringing the issue to my attention, a failure to file a skeleton argument on this occasion is not sufficient for me to dismiss the Respondent's appeal when I consider the overriding objective.

Analysis and Consideration

12. I turn to the appeal itself. In my judgment there are 3 reasons why the Secretary of State's appeal must succeed. First, I refer to paragraph 14 of the Judge's decision which stated as follows:

"The appellant and his partner do not need to relocate to Nigeria necessarily; they could relocate to Romania or another EU country. I find

that the appellant and his partner have not shown that they would face insurmountable obstacles in continuing their family life outside the UK.”

13. Then at paragraph 21, the Judge identified that the main issue was the assessment of Article 8 outside of the Immigration Rules. Namely, whether or not the Appellant should return to Nigeria to make an application for entry clearance as a spouse.

14. Second, the Judge referred to the House of Lords decision in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 and also referred to the Supreme Court’s decision in *R (on the application of Agyarko) v SSHD* [2017] UKSC and then referred to the Upper Tribunal’s decision in *Chikwamba to Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 129 (IAC). Ultimately the Judge concluded at paragraph 29 that the case was not an easy one to decide but that:

“On the other hand, there are a number of factors in favour of the appellant including his strong relationship with his partner and the effect of their concerns over the safety situation in Nigeria on their mental health whilst the application is pending. The likely timeframe for an application to be considered is 24 weeks according to the gov.uk website. This is a significant period of time for a couple to live with the anxiety and stress of whether the appellant is safe in Nigeria.”

15. Third, in my judgment, the Judge materially erred in law because, as is clear from paragraphs 67 and 68 of the Supreme Court’s judgment in *Agyarko*:

“67. Typically, however, as in the present cases, the British citizen would not be forced to leave the EU, any more than in the case of *Dereci*, and the third-country national would not, therefore, derive any rights from Article 20.

68. Counsel also referred to the right of a British citizen, under section 1(1) of the 1971 Act, ‘to live in the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.’ This does not advance the argument. The entitlement conferred by section 1(1) is an important right, but it does not entitle a British citizen to insist that his or her non-national partner should also be entitled to live in the UK, whether that partner may lawfully be refused leave to enter or remain.”

16. In the Court of Appeal’s decision in *Alam & Anor v Secretary of State for the Home Department* [2023] EWCA Civ 30 consideration of the *Chikwamba* principle took place. It is demonstrably clear from the Court of Appeal decision and also from *Younas* that just because a claimant has to return to their country to apply for entry clearance is not sufficient of itself to mean an appeal can succeed. That is so even if it appeared that the claimant would be successful in the application for entry clearance. 24 weeks is not an unusually long period of time and nor is the fact that there will be anxiety and stress whilst the couple are apart.

17. In my judgment, a fortiori, here the Claimant was not a British citizen and, in the circumstances, the extra hurdle, which needed to be overcome was even more significant than that identified by the Supreme Court in *Agyarko*.
18. In my judgment, having rejected the Appellant's arguments in relation to the Immigration Rules, the Judge materially erred when allowing the appeal outside of the Immigration Rules.
19. The error of law is manifest, whether that is in respect of whether or not this family could live outside of the United Kingdom in Romania, in a different EU country or indeed whether it was possible for the Claimant and his family to live in a different city in Nigeria for the relatively short period of time of some 24 weeks. For all the reasons set out within the authorities including *Younas*, *Alam* and *Agyarko*, in my judgment the Judge has materially erred in law. I have regard to the expertise of the First-tier Tribunal and that I must exercise great caution in interfering with the Judge's decision, noting the judgment of the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464, but in my judgment in this instance, such interference is essential.
20. I apply *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). I carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principles set out in paragraph 7 of the Senior President's Practice Statement. I take into account the history of the case, the nature and extent of the findings to be made and in considering paragraphs 7.1 and 7.2 of the Senior President's Practice Statement and given the scope of the issues and findings to be made, I consider that it is appropriate that the First-tier Tribunal re-make the decision.
21. Therefore, despite the helpful submissions of Mr Imo, I am unable to agree with him and I thereby allow the Secretary of State's appeal. For the avoidance of doubt for the benefit of the Claimant, it means that the effect is that the decision of Judge Beach, which had originally allowed the appeal, is set aside. There will be a complete rehearing at the First-tier Tribunal.

Notice of Decision

The Decision of the First-tier Tribunal contains a material error of law and is thereby set aside.

There shall be a complete re-hearing at the First-tier Tribunal. None of the current findings shall stand.

Abid Mahmood
Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 November 2024