**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/07826/2014

**THE IMMIGRATION ACTS**

| **Heard at North Shields** | **Determination Promulgated** |
|---|---|
| **On 21 September 2015** | **On 12 October 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES**

**Between**

**MAMBO YVES KORE**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:
For the Appellant: Mr Selway, Solicitor, Brar & Co Solicitors
For the Respondent: Mr Mangion, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, born 5 October 1966, is a citizen of the Ivory Coast. He first came to the UK illegally in July 2005. On 14 April 2006 he was served with illegal entry papers, whereupon he claimed asylum. That claim was refused on 9 June 2006, and a removal decision was made against him as a result. His appeal against the removal decision was dismissed by the Tribunal on 31 July 2006, so that his appeal rights were exhausted on 17 August 2006. He did not however

leave the UK as a result, and instead he ceased to report to the Respondent, so that he was treated as an absconder.

2. On 21 January 2010 the Appellant submitted an application for a grant of leave to remain outside the Immigration Rules based upon his Article 8 rights, which was refused on 23 March 2010. He made further representations to the Respondent about his circumstances on 31 January 2014, relying upon the fact that he was by now cohabiting with Mrs G, but the Respondent once again refused to grant him leave, and in addition made a further decision to remove him as an illegal entrant on 17 September 2014.

3. The Appellant's appeal against those immigration decisions was heard on 4 December 2014 when it was dismissed under the Immigration Rules, and on Article 8 grounds, in a Decision promulgated on 22 December 2014 by First Tier Tribunal Judge Duff.

4. The Appellant's application to the First Tier Tribunal for permission to appeal was refused by Judge Page on 23 January 2015 because the application was made out of time, and without any explanation as to why time should be extended, and the grounds of complaint amounted to no more than a disagreement with the Judge's conclusions.

5. Undaunted the Appellant renewed his application to the Upper Tribunal, whereupon it was granted by Deputy Upper Tribunal Judge Symes on 1 May 2015.

6. The Respondent filed a Rule 24 response to the grant of permission dated 19 May 2015.

7. Thus the matter comes before me.

The hearing below

8. The Appellant's case before the First Tier Tribunal was that although he had entered illegally, and had never obtained any grant of leave, he had nevertheless established both a "family life" with Mrs G, and a "private life", whilst living in the UK.

9. Although this is perhaps not entirely clear from the terms of the decision, Mr Selway confirmed to me that it had been accepted before Judge Duff, by the Appellant's then representative, that the Appellant did not meet the requirements of the Immigration Rules for a grant of leave to remain. He accepted that the appeal was pursued before Judge Duff solely on Article 8 grounds outside the Immigration Rules, on the basis that the removal was a disproportionate interference in the Article 8 rights of the Appellant and Mrs G [23].

10. I also note that Mr Selway did not seek to resile from the position the Appellant's former representative had adopted before Judge Duff, which was to accept that absent the Appellant's relationship with Mrs G, the Article 8 appeal could not succeed.

11. The Appellant's case before the Judge was that he no longer had any realistic connection with the Ivory Coast, and that he had made his life in the UK since July 2005. He said that he had first met Mrs G in May 2009, and that his relationship with Mrs G had been akin to a marriage since the occasion in August 2013 when he had begun to cohabit with her at her home in Durham. He had since attended college courses that she had paid for. Whilst they had not yet married, this was said to be simply the result of their financial circumstances.

12. Mrs G is a British citizen, with two adult daughters, and one grand-daughter, all of whom live in the UK. Her evidence was that it would be impossible for her to relocate from the UK to the Ivory Coast because all of her roots and all the members of her family were in Britain.

13. Both the Appellant and the sponsor gave evidence to the Tribunal, and it is accepted before me that they were the subject of a searching cross-examination by the Respondent's representative.

14. The Judge's assessment of the evidence given under cross-examination resulted in his finding that the Appellant was not free to marry Mrs G, and that despite the passage of time since he had travelled to the UK, he remained married to a woman in the Ivory Coast [19]. The Appellant's attempt to distance himself from the evidence he had given during the course of his asylum claim and his appeal (in which he had agreed that he was married to a woman in the Ivory Coast) was rejected as untrue.

15. Whilst the definition of "partner" in the Appendix FM to the Immigration Rules was not met because the couple had not lived together for the requisite length of time, nevertheless the Judge did accept that there was a genuine and subsisting relationship between the Appellant and Mrs G [17].

16. That relationship had however been formed in the knowledge that the Appellant was in the UK illegally, and that he might have to return to the Ivory Coast before he could gain any immigration status in the UK. The couple's vicar gave evidence, and he had accepted that he knew that there was an issue over whether the Appellant was free to marry Mrs G. He had not sought to resolve that issue, and would not do so unless and until the couple requested that he marry them, which they had not yet done [20]. The vicar also believed that if the appeal failed, then despite his past behaviour, the Appellant would "do what was right" and return to the Ivory Coast, and that Mrs G would either go with him, or would at least visit him there [20]. Mrs G however told the Judge that she would not go to the Ivory Coast. She accepted that she knew that she

might have to make a choice between doing so, and continuing her relationship with the Appellant.

17. The Judge noted the Appellant's immigration history, his illegal entry, and his failure to claim asylum until after he was encountered, and then his decision to abscond once his appeal rights were exhausted. He noted that the relationship with Mrs G had only developed to one of cohabitation once the 2010 application for a grant of leave had been refused [25]. He noted that the Appellant had no children in the UK, and that Mrs G's own children were now adults. He concluded that there was no reason why Mrs G could not go to, or visit, the Ivory Coast in safety.

Error of law?

18. In the light of those findings Mr Selway addressed me on the basis that the two arguments that are set out in the grounds were really one complaint, namely, that the Judge had failed to adequately consider Mrs G's ties to the UK, and had failed to demonstrate that he had applied the correct legal principles in his assessment of the proportionality of the removal decision. As Mr Selway put it, the complaint was that the facts of the case required a more detailed consideration than they had received. Thus, as advanced, this was a complaint that the decision lacked adequate reasoning.

19. Thus, contrary to the remarks made in the course of granting permission to appeal, it was not suggested by Mr Selway that the Judge had fallen into the trap identified in Beoku-Betts v SSHD [2008] UKHL 39 of a failure to consider the Article 8 rights of the individual with whom the Appellant was said to have enjoyed their Article 8 "family life". He was right not to do so. The Judge plainly did give consideration to Mrs G's position, and Mr Selway did not seek to argue that any material evidence was left out of account.

20. Mr Selway also confirmed that he accepted that the appeal had not been argued before the Judge on the basis that it was impossible for the Appellant to return to the Ivory Coast in safety, or for Mrs G to visit that country in safety. He also confirmed that he accepted that the appeal had not been argued on the basis that the Appellant was unable to make an application for entry clearance to the UK as the partner, or fiancée, of Mrs G, that had any prospect of success under the Immigration Rules.

21. Notwithstanding the terms in which permission was granted I am not satisfied that there is any merit in the grounds, which I am satisfied are in reality no more than a disagreement with the Judge's assessment of where the balance of proportionality lay(as Judge Page had also observed).

22. It is in my judgement clear that the Judge quite properly had regard to the Appellant's extremely poor immigration history. On any view the relationship that the Appellant relied upon had been formed under the most precarious of circumstances, and Mrs G had always known that the Appellant might be

required to leave the UK, and that she might face a choice between living in the UK and living with the Appellant.

23. Moreover it is clear that the Judge had well in mind that both the Appellant and Mrs G could visit the Ivory Coast, or live together there, in safety.

24. There was also no reason advanced to the Judge as to why the Appellant could not return to that country in order to make an application for entry clearance in the proper way, and the evidence did not establish clearly one way or the other, whether such an application would be successful. Accordingly this was not one of those cases in which the claimant could argue that removal would serve no purpose because a grant of entry clearance would be inevitable, and nor could he argue that removal would inevitably lead to permanent separation from the sponsor.

25. Whilst the Judge made no reference to the principles set out in Chikwamba [2008] UKHL 40, and SSHD v Hayat [2012] EWCA Civ 1054, it does not follow that his decision is inconsistent with them. Within the terms of those decisions the Appellant clearly did have the "poor immigration history" described in Chikwamba.

26. In Hayat [2011] UKUT 444, the Upper Tribunal said;

> "23. The significance of Chikwamba, however, is to make plain that, where the only matter weighing on the respondent's side of the balance is the public policy of requiring a person to apply under the rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance.
>
> 24. Viewed correctly, the Chikwamba principle does not, accordingly, automatically trump anything on the State's side, such as a poor immigration history. Conversely, the principle cannot be simply "switched off" on mechanistic grounds, such as because children are not involved, or that (as here) the appellant is not seeking to remain with a spouse who is settled in the United Kingdom.
>
> 25. Like the absence of children, that last factor may be one which diminishes the force of the principle; but whether it will do so depends upon an assessment of the facts. For example, if the position disclosed by the evidence had been that the appellant's wife was due to finish her studies only a few weeks after the date of the hearing, and was intending to return to her country of origin, and the evidence was such that she did not need the appellant to be present with her while she finished her studies and prepared to leave, then the Chikwamba principle would have had nothing to add to the appellant's case. The actual facts of the present case, however, were very different. As we have already seen, the appellant's wife had the best part of a year to go before the end of her first tranche of the ACCA course. She has now been given leave to remain until 2014 in order to complete that course. There is no suggestion that her practical and emotional need for her husband to be with her has diminished in any respect.
>
> 26. The fact that the presence in the United Kingdom of the appellant's wife depends upon her status here as a student, and only on that, has to be

> acknowledged in undertaking the balancing exercise. However, as we have indicated, that fact alone does not negate the Chikwamba principle. She is entitled to remain and study here until 2014. In practice, if the appellant were to be removed, it is highly likely that she would be without his help and support for a very substantial proportion of that time. The evidence is that she needs the appellant's help and support. She has committed no breach of the Immigration Rules. Nor has the appellant. There is a likelihood that, if the appellant were removed, his wife will find she is unable to continue her studies, thus negating the rationale of requiring him to go back to Pakistan to make an entry clearance application.
>
> 27. In short, on a proper analysis of the facts, the principle in Chikwamba points plainly to the factors in favour of the appellant outweighing the single factor relied on by the respondent."

27. As explained by the Upper Tribunal in Hayat, the Chikwamba principle does not therefore mean that no individual should ever be required to return to their country of origin to seek entry clearance in the usual way. On the contrary if there are factors that weigh in the Respondent's favour when balancing the proportionality of removal, other than simply the public policy of requiring entry clearance to be sought from abroad, then the Chikwamba principle does not automatically mean that they carry no weight.

28. The Court of Appeal in Hayat [2012] EWCA Civ 1054 approved that approach. (I do not consider that Zhang [2013] EWHC 891 adds anything to the analysis of the relevant principle by the Court of Appeal.) Nor does the Court of Appeal approach in MF (Nigeria) [2013] EWCA Civ 1192 alter the guidance given in Hayat, indeed in my judgement it reaffirms that guidance.

29. On the facts of this case the significant fact in the Respondent's favour are the findings as to when this relationship was formed, and the circumstances in which it was formed. Looking at the evidence in the round the Judge was perfectly entitled to conclude that the removal decision was proportionate, and thus dismiss the Article 8 appeal. The arguments available to the Appellant did not rely upon the core concepts of moral and physical integrity. In my judgement it was well open to the Judge to conclude that the evidence relied upon did not establish that there were any compelling compassionate circumstances that meant the decision to remove the Appellant to the Ivory Coast, lead to an unjustifiably harsh outcome. He gave adequate reasons for that conclusion, and he was not required to itemise each and every element of the evidence that had been placed before him by the Appellant in doing so. Moreover, despite the remarks made in the course of the grant of permission to appeal, it is clear from the decision that he did have regard to the provisions of s117A-D of the 2002 Act. He did not make express reference to the guidance to be found in AM (s117B) Malawi p2015] UKUT 260, but I am satisfied that his decision is consistent with it, and Mr Selway did not argue to the contrary. To the extent that the decision fails to address the provisions of s117A-D in turn, and in detail, that failure does not amount to a material error of law, because Mr Selway does not suggest that any material provision has been overlooked.

Nor does he argue that the provisions of s117A-D afford the Appellant any material assistance. Moreover the Judge specifically addresses the question of whether there were "insurmountable obstacles" to the pursuit of the Appellant's relationship with Mrs G in the Ivory Coast. His conclusion that there were none was open to him on the evidence, and was consistent with the approach taken by the Court of Appeal to that test in Agyarko.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 22 December 2014 did not involve the making of an error of law in the decision to dismiss the appeal that requires that decision to be set aside and remade. The decision to dismiss the appeal is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

The Appellant did not seek anonymity before the First Tier Tribunal, and no request for anonymity is made to me. There appears to be no proper basis for the Upper Tribunal to make such a direction of its own motion.

Deputy Upper Tribunal Judge JM Holmes
Dated 5 October 2015