Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45072/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th August 2015	**On 2nd September 2015**

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE LINDSLEY

Between
MR SHAHID KHALIL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, Counsel instructed by MA Consultants (London)
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born on 1st May 1975. He arrived in the UK in 2004 with a work permit. His permission to remain was extended until November 2005, since when he overstayed his leave to remain. In 2011 the appellant married a British citizen, Mrs Christine Watson. On 9th February 2012 the appellant made an application to remain in the UK as a spouse. There was then confusion over the

submission of a signed declaration page, which resulted in the appellant making a fresh application which was rejected in the refusal letter dated 13th June 2013. His appeal against the decision to refuse leave as a spouse was dismissed by First-tier Tribunal Judge Scott on Article 8 ECHR grounds and on the basis that there was no jurisdiction to hear an appeal under the Immigration Rules after a hearing on 26th March 2015.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Kelly on the basis that it was arguable that the First-tier judge had erred in law in failing to properly consider whether Chikwamba v SSHD [2008] UKHL 40 was applicable to the appellant's case in the context of s.117B of the Nationality, Immigration and Asylum Act 2002 (henceforth the 2002 Act). It was said in the grant of permission that any error with respect to the finding that there was no jurisdiction to determine the appeal under the Immigration Rules was immaterial as the appeal had ultimately been dismissed under Article 8 ECHR.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law

Submissions

4. Mr Karim submitted that the requirements of Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 to make a limited grant of permission to appeal excluding some grounds had not been met, and Mr Kandola agreed that this was the case. In the circumstances we therefore agreed that all grounds could be argued.

5. In summary, Mr Karim argued firstly that the First-tier Tribunal had erred in law by failing to acknowledge that it had jurisdiction to allow the appeal under Appendix FM of the Immigration Rules, and that this error of law was material because there was oral evidence from Mrs Watson that there were insurmountable obstacles to the couple having family life in Pakistan. The evidence was set out at paragraph 8 of the decision of the First-tier Tribunal and indicated that she would not feel safe in Pakistan; and that she would not be able to work or lead an independent life in that country. Mr Kandola replied by saying that there was no objective evidence that this was the case and that any error was therefore immaterial as the appeal could not have succeeded on this basis.

6. Secondly Mr Karim argued that in consideration of the Article 8 ECHR appeal outside of the Immigration Rules the First-tier Tribunal had erred in law at paragraph 25 of the decision, as they had not given proper consideration to Chikwamba. This was because the judge had erroneously understood that this decision was not compatible with s.117B(4) of the 2002 Act. He argued that this appellant could show that if he returned to Pakistan he would be very likely to succeed in an entry clearance application based on his marriage. He accepted that there were problems with the documentation before the First-tier Tribunal in

two respects when measured against the requirements for an entry clearance application: there was no letter from Mrs Watson's employer and the IELTS certificate from the appellant was out of date as it had expired in January 2013. He argued that any issue of a potential discretionary refusal under paragraph 320(11) of the Immigration Rules strengthened the applicability of Chikwamba. He also argued that there was evidence before the First-tier Tribunal that it would cause difficulties to the appellant to make an entry clearance application: at paragraph 6 of the decision it was clear the appellant no longer had family in Pakistan with whom he could stay and from paragraph 8 of the decision it was clear that a prolonged period of separation would put the relationship in difficulties. Mr Karim argued that Chikwamba had not become irrelevant to the consideration of proportionality under Article 8 ECHR simply because little weight had to be given to family life with a qualifying partner if the relationship was formed at a time when that partner was unlawfully in the UK. If Chikwamba had relevance, as it was argued it did here, then an appeal could be allowed as s.117B of the 2002 Act did not provide that no weight could be given to the family life with a qualifying partner who is unlawfully in the UK.

7. In reply Mr Kandola said that this was not a case in which the Chikwamba principle applied as it was accepted by Mr Karim that the appellant had not shown at the date of hearing that he could meet the requirements of Appendix FM-SE in respect of his wife's employment (the letters from her employers) and his own standard of English language. Further, even if the appellant had been able to show that he met all the relevant requirements of Appendix FM and Appendix FM-SE, there was no error in law in what was said at paragraph 25 of the decision. He submitted that not all applicants who had formed relationships with qualifying partners at a time when they were unlawful would be required to return and apply for entry clearance: there would be some who be able to meet the requirement of EX1 and could show insurmountable obstacles to family life in their country of origin. He did not exclude the possibility that the Chikwamba principles might potentially permit an appeal to be allowed where an appellant had not succeeded under EX1 and had formed his family life relationship whilst unlawfully present (and thus had to show regard to s.117B(4) of the 2002 Act), but he could not think of a factual scenario which would succeed in that way. He argued that Chikwamba allowed for the fact that appellants could be expected to return to apply for entry clearance if their immigration history were particularly poor, and this was now reflected in s.117B(4) of the 2002 Act.

8. Both parties agreed that if an error of law was found, and if we found it was material, that they were happy for us to re-make the appeal based on their submissions as summarised above.

Discussion

9. It is clear that there was jurisdiction for the First-tier Tribunal to hear this appeal as it is an appeal against a removal decision, and thus against an immigration decision as defined under s.82 (1)(g) of the 2002 Act. It was therefore an error of law not to consider all the grounds of appeal put forward by the appellant in accordance with s.86 of the 2002 Act. However we do not find that the Tribunal made a material error in refusing to make findings and determine the appeal under the EX1 (ten year route) of Appendix FM of the Immigration Rules as we find that this ground of appeal was bound to fail. We do not accept Mr Kandola's argument that an appellant must provide "objective" evidence that there are insurmountable obstacles to family life with the partner continuing outside of the UK, but clearly an appellant must show that this is the case on the balance of probabilities. The small amount of oral evidence from Mrs Watson set out at paragraph 8 of the decision is simply insufficient to show this test is met as it does not demonstrate that there would be very serious hardship for the appellant or Mrs Watson if they were to continue their family life outside of the UK. A far more detailed statement, preferably supported with objective materials and/ or statements from Mrs Watson's wider family, would have been needed to create an arguable case that they could meet this demanding test, and thus that there was a material error of law on this basis.

10. Chikwamba was decided on the basis that it was inevitable in Article 8 ECHR terms that the appellant would be granted entry clearance to return to the UK to her British citizen daughter, and her husband who held indefinite leave to remain and refugee status in the UK. It was noted that there were insurmountable obstacles to family life taking place in Zimbabwe due to her husband's refugee status. It was held enforcing return to the country of origin to obtain entry clearance was largely a policy aimed at deterring people from coming to the UK without entry clearance, which might on occasion be a relevant consideration, but would have to be balanced against whether there were good reasons for the illegal presence, and the prospective length and degree of family disruption. It was noted that in Zimbabwe conditions were harsh and unpalatable. It was of course a decision made by the House of Lords at a time when the Immigration Rules did not attempt to encompass Article 8 ECHR at all, and when the ordinary marriage Rules were encapsulated in a short set of straightforward requirements with no specific evidence required to demonstrate compliance with those requirements. At the time judgement was given in Chikwamba it was therefore potentially easier for a court to foresee whether an appellant would be returning for a straightforward administrative exercise in which entry clearance would inevitably be granted; and in addition there was no EX 1 (ten year route) under the Immigration Rules for those unlawfully present to potentially utilise if they could show insurmountable obstacles to family life continuing outside of the UK.

11. The "insurmountable obstacles" provision in EX1 provides a route whereby some appellants whose relationship are formed at a time when

they are illegally present in the UK do not need to return to obtain entry clearance, and can thus (in accordance with Chikwamba and their Article 8 ECHR rights) be allowed to remain in the UK. It could be said that this test deals with the issue of concern in Chikwamba exempting a spouse who can show harsh, unpalatable conditions in the country of origin and where there would be a significant degree of family disruption from being required to return.

12. The case of Agyarko v SSHD [2015] EWCA Civ 440 is in point when considering the relevance of Chikwamba in the current context. The Court of Appeal held, at paragraphs 29 to 31, that it would not only be in cases where insurmountable obstacles can be shown that it would be disproportionate to remove the appellant, and that where exceptional circumstances are shown Chikwamba may still be of relevance in a case with an illegally present spouse. Such an instance of "exceptional circumstances" might be cumulative circumstances equivalent to those that prevailed in Jeunesse v Netherlands (2015) 60 EHRR 17, i.e. children and partner holding British nationality; the appellant being the children's principle carer; a degree of hardship to the children; strong ties of the illegally present partner with the UK; and the authorities tolerating the unlawful person living with their family for a period of 15 or more years. However, to succeed in such an argument it would be necessary to show, as a starting point, that all the entry clearance requirements of Appendix FM and Appendix FM-SE would be met, see paragraph 35 of Agyarko.

13. We consider the proper approach to the Chikwamba principle in the light of what is said by the Court of Appeal in Agyarko; the Immigration Rules; and the direction at s.117B(4) of the 2002 Act in relation to an unlawfully present appellant to be as follows.

14. To the extent that return to obtain entry clearance was to a place where there would be insurmountable obstacles to family life outside of the UK the Immigration Rules at EX 1 allows that those appellants would not have to return to obtain entry clearance.

15. The fact that little weight is to be given to qualifying relationships established whilst the appellant is unlawful in accordance with s.117B(4) of the 2002 Act does not mean that no weight is to be given to them, or that an appellant might not succeed on appeal. There will be some circumstances, analogous to those which prevailed in Jeunesse v Netherlands, where return would be ultimately disproportionate if it was inevitable that entry clearance would be issued for the appellant's return as a partner because the appellant had shown an ability to comply with all relevant elements of Appendix FM and Appendix FM-SE to obtain entry clearance as a partner at the time of hearing. There may also be circumstances which mean an appellant succeeds because of other substantial private life or family ties with persons other than a qualifying partner. It is however for the appellant to produce evidence that return to obtain entry clearance would be a disproportionate

interference with his or her family life: see conclusion (i) R (on the application of Chen) v SSHD (Appendix FM-Chikwamba –temporary separation – proportionality) IJR [2015] UKUT 00189 and at paragraph 42 regarding the need to descend into practical detail with regards the interference with family life rather than rely upon legal principles, which is consistent with what was said in Agyarko on this point.

16. What is clearly also important to note is that s.117B(4) of the 2002 Act only refers to cases where the relationship was formed whilst the appellant was unlawfully present in the UK. It does not deal with a scenario where the appellant forms a relationship whilst lawfully present in the UK, and then applies under Appendix FM; is unable to meet the requirements at that point but by the point of hearing can show demonstrably that he or she would be able to obtain entry clearance as a partner if forced to return to an entry clearance post. Such a case could more easily succeed under Chikwamba principles even if there are no insurmountable obstacles to family life outside of the UK.

Conclusions

17. The appellant in this case has not shown a material error in law. In the context of the material before the First-tier Tribunal, as set out above, there was no material error of law in relation to the appeal under the Immigration Rules because there was insufficient evidence of insurmountable obstacles to family life taking place in Pakistan. In relation to the Article 8 ECHR appeal outside of the Immigration Rules there is also no material error. Most simply this is for the reason that the appellant could not show at the date of hearing before the First-tier Tribunal that an entry clearance application would inevitably succeed: it was accepted by Mr Karim that all the necessary evidence under Appendix FM-SE had not been before the First-tier Tribunal. In addition the appellant, as a person who formed his relationship with his partner when unlawfully present, has not produced evidence of any exceptional circumstances (such as those in Jeunesse v Netherlands) when arguing return to Pakistan to obtain entry clearance is disproportionate, which he needed to do to show an error of law given the regard that must be had by courts and tribunals under s.117B (4) of the 2002 Act to the consideration that little weight be given to his relationship with his partner.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
2. The decision of the First-tier Tribunal dismissing the appeal is upheld.

Signed: Date: 24th August 2015
Upper Tribunal Judge Lindsley