Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00938/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2018	**On 08 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MRS BEAUTY MUNEMO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Nizami of Counsel
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Zimbabwe who first entered the UK on 26 December 1999 as a visitor with valid leave until 26 June 2000. Her leave was then varied to leave as a student. The appellant's final leave to remain in the UK expired on 31 October 2006 with further applications in June and November 2010 being refused. The appellant applied for leave to remain under the ten year partner route under Appendix FM in September 2015. That application was refused on 18 December 2015. In a Decision and Reasons, promulgated on 7 February 2017, Judge of the First-tier Tribunal Mulholland dismissed the appellant's appeal against that decision under human rights grounds under Article 8.

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2. The appellant appeals with permission from the Upper Tribunal on the following grounds:

   Ground 1: The Judge of the First-tier Tribunal erred in finding that there would be no interference with family life under Article 8;

   Ground 2: The First-tier Tribunal erred in giving no cumulative weight to relevant factors when assessing whether family life could be expected to be enjoyed in Zimbabwe;

   Ground 3: It was an error not to consider all factors cumulatively when considering Article 8 outside the Immigration Rules.

Error of Law Discussion

3. For the reasons set out below I am not satisfied that any error of law is disclosed and the decision of the First-tier Tribunal shall stand.

4. Ms Nizami submitted that the judge's findings, at [46] of the Decision and Reasons where the judge found that there would not be an interference with the appellant's family life as the only family life was with her spouse and in the judge's findings they can go to Zimbabwe as a family, were in error. This was on the basis of the judge's earlier findings: although it was accepted that the appellant no longer relied on the Rules (as she did not have lawful leave at the time of the application) the judge as part of her Article 8 consideration considered that, at [29], although the appellant could not succeed under the Rules she had to look through the lens of the Rules when considering the Article 8 claim. The judge therefore considered the relevant tests in Appendix FM, in some detail, including whether there would be insurmountable obstacles to family life outside of the UK and the judge made detailed and reasoned findings from paragraphs [24] to [38].

5. The Tribunal's findings included that, having considered all the evidence in relation to the appellant, who is 47 years old and a Zimbabwean national with qualifications who has lived most of her life in Zimbabwe, that she could return to Zimbabwe and be assisted by her family and friends in reintegrating. The judge went on to consider her spouse. The judge noted, including at [35], that her spouse is 69. She also noted that the appellant claimed to be her husband's carer and that he could not go with her "as he is working and suffers from a panic disorder". The appellant also asserted that her husband's mental health would deteriorate should he be re-exposed to Africa where he served in the armed forces and suffered a breakdown. However, the judge took into consideration that the appellant's spouse was a British citizen and was prepared to accept that he was in a demanding job and set out his income. The judge took into consideration, at [34], that she had before her medical evidence and it was accepted that the appellant's husband suffers from a panic disorder although the judge noted that the last attack was five years ago and that he only occasionally suffers from the condition and the judge reached the finding which, I am satisfied, was open to her, that this condition was managed by medication and that he had suffered from this condition since 2007, long before he met the appellant, but despite the condition has been able to live and work in the UK. The judge concluded, in a

finding which I am satisfied was open to her on the evidence, that any assistance the appellant provides her husband is minimal and could be provided by other family members if he remained in the UK whilst the appellant sought entry clearance or could be provided by her in Zimbabwe should they return together.

6. The judge gave full consideration to the assertion that the appellant's spouse's mental health would deteriorate if re-exposed to Africa, given that he has spent time there in the armed forces. However, the judge found that there was limited information in support of this claim and noted that despite this claim the appellant's spouse had never actually been to Zimbabwe and had not been exposed to any harm there. The judge therefore reached a conclusion, which she gave adequate reasons for and which could not be said to reach the high bar of irrationality, that she was not satisfied that his mental health would deteriorate there to any material extent and that the appellant could assist him. Equally, she was not satisfied that there was any evidence that his condition could not be treated in Zimbabwe. The judge on a number of occasions accepted, and clearly fully appreciated, that the appellant's spouse was 69, but was entitled to reach the conclusion that he was a "fit 69 year old" including given that he was working. I am not satisfied there was anything irrational in her conclusion that despite his age that he could continue working and that he had over £2,200 in pensions and benefits, which would allow the couple to resettle.

7. The Tribunal, in a very comprehensive consideration, considered that there was no evidence presented that he would have any difficulty in applying for entry in Zimbabwe and she was satisfied that he could apply and remain there. The judge also took into consideration that the burden was with the appellant and that neither she nor her spouse had made any material efforts to establish what life would hold for them in Zimbabwe.

8. It was on the basis of these findings that the judge reached the conclusion that she did, at [46], that there would be no interference with family life given that she was satisfied that the couple could relocate together.

9. Ms Nizami took me to the evidence before the Tribunal, including witness statements from the sponsor, that he did not see why it would be considered reasonable for him to leave his country. The judge's findings reflect the evidence in that she noted the evidence from the appellant that her husband did not want to go to Africa. Ms Nizami accepted however, that there was no evidence before the First-tier Tribunal that the appellant's husband would refuse to go to Zimbabwe.

10. It was also argued by Ms Nizami that the First-tier Judge failed to properly apply the principles in **Chikwamba v SSHD [2008] UKHL 40** in circumstances where Ms Nizami argued that there was an acceptance that the appellant would likely meet the Immigration Rules, was in a genuine relationship with a 69 year old British citizen and the judge should have considered whether it was proportionate to expect the appellant to make an application outside the UK.

11. However, the Judge of the First-tier Tribunal, when considering Article 8 outside of the Rules, considered the **Chikwamba** principle including in the context of the most

recent Tribunal guidance on **Chikwamba**: **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 00189**. This included the principle that there may be cases where there are no insurmountable obstacles to family life, but where temporary separation may be disproportionate. However, **Chikwamba**: **R (on the application of Chen)** further confirms (as set out by the judge) that:

> "in all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba v SSHD [2008] UKHL 40**".

The judge stated that she was not prepared to speculate on the outcome of an application but indicated, at [40], that she had not been presented with evidence of the appellant's knowledge of English and at [41] that she had no information before her to demonstrate that all other aspects of the test would be met and, again, that she was not prepared to speculate. In that context, where it cannot be shown that it was certain that the appellant would be successful, albeit that it was accepted that her spouse's level of income should exceed the requirements, it cannot be properly said that there was any error in the judge's approach to **Chikwamba**.

12. The findings of the judge were open to her and no material error of law is disclosed in ground 1.

13. In relation to ground 2, Ms Nizami submitted that the judge erred in failing to give weight to the cumulative evidence before her and the very significant difficulties that would be faced by the appellant and her partner which could not be overcome and it was submitted that the judge failed to take into consideration adequately the evidence of his age, his medical condition, his service in the armed forces and the issues he might face in Africa and that he had not resided in Zimbabwe and that it was not realistic that he could gain employment there. It was submitted that the judge did not refer to the country conditions.

14. However, Ms Nizami was unable to point to any evidence that the judge failed to adequately take into consideration but submitted that the judge should have taken judicial notice of the conditions in Zimbabwe and submitted that it was one thing that the appellant's sponsor was a 69 year old working in the UK but another to expect him to take employment and relocate to Zimbabwe given the country conditions and in the context of a regime that would be hostile to someone like the appellant's husband who had worked in the British Army.

15. I do not find any merit in the grounds, which amount to no more than a disagreement with the judge's coherent and well-reasoned findings including the finding that there were no insurmountable obstacles to family life. The Tribunal properly directed itself as to the correct test applicable under Appendix FM, EX.1(b) in that they are not obstacles that are impossible to surmount but concern the

practical possibilities of relocation. The Tribunal reminded itself that the test is a stringent one.

16. As reflected in the Tribunal's findings, the judge was fully aware of the situation of both the appellant and her husband including the husband's age, his panic disorder and that he had lived and worked in Africa and did not want to return there. It is evident, including from the judge's recording of the proceedings at [4] to [12] of the decision, that the judge was appraised of the situation in Zimbabwe and noted the appellant's evidence including of the difficulties that have occurred in Zimbabwe and why she did not want to return there. Reading the decision as a whole, the judge has set her findings in the context of judicial knowledge of Zimbabwe as a starting point but was nevertheless satisfied that there would be no insurmountable obstacles to relocation. There is no error of law disclosed in the second ground.

17. In relation to ground 3 Ms Nizami relied on the Supreme Court's decision in **Agyarko [2017] UKSC 11** and submitted that the appellant's sponsor exceeds the minimum income requirements and the judge had not adequately considered the issues including in relation to proportionality, in relation to the sponsor's age, medical condition and the other issues and that there had been inadequate consideration outside of the Rules and that a balance sheet approach had not been applied. It cannot be properly argued that there was inadequate consideration. The judge comprehensively considered all the material factors cumulatively when considering whether there would be insurmountable obstacles. The fact that this was not specifically stated as consideration outside of the Rules, is of limited relevance, particularly when this is a case which is only argued outside of the Rules in any event and the consideration under the Immigration Rules is to the limited extent that Article 8 must be considered from "the lens of the Rules". I am of the view that when the decision is considered holistically, the Tribunal applied the balance sheet approach approved by the Supreme Court (see **Hesham Ali v Secretary of State [2016] UKSC**).

18. The judge gave adequate reasons for finding, including at [41], that there was nothing exceptional or compelling about this case. The judge has provided adequate reasons for the conclusions she reached and the grounds are in reality no more than an argument with the outcome.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

No anonymity direction was sought or is made.

Signed Date: 5 February 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal before the First-tier Tribunal is dismissed and no fee award is made.

Signed Date: 5 February 2018

Deputy Upper Tribunal Judge Hutchinson