



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03179/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22nd May 2018

Decision & Reasons Promulgated
On 6th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR EDITHO CALIZO ALBORES
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Otchie of Counsel
For the Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant born on 15th December 1961 is a citizen of the Philippines. The Appellant was represented by Mr Otchie of Counsel. The Respondent was represented by Mr Bramble, a Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application for leave to remain on the basis of his family and private life in the UK with his spouse on 27th November 2015. The Respondent refused that application on 20th January 2016.

3. The Appellant appealed that decision and his appeal was heard by Judge of the First-tier Tribunal Burnett sitting at Taylor House on 25th May 2017. The judge dismissed the Appellant's appeal.
4. An application for permission to appeal was made. That application was refused by Judge of the First-tier Tribunal Alis on 25th December 2017. He found no error of law identified. Grounds for reconsideration were put in on the Appellant's behalf and permission to appeal was granted by Upper Tribunal Judge McWilliam on 21st March 2018. The grant stated that although the decision in respect of insurmountable obstacles is unarguably sound it is arguable that when assessing proportionality the judge did not properly factor into the assessment of the public interest that the Appellant met the substantive requirements of the Rules relating to maintenance (see paragraph 51 of Agyarko [2017] UKSC 11). Directions were issued for the Upper Tribunal to firstly decide whether an error of law had been made or not and the matter came before me in accordance with those directions.

Submission on Behalf of the Appellant

5. It was said that the Appellant and Sponsor had been together for a seven year period and the Sponsor had indefinite leave to remain and her earnings were above the income threshold. It was submitted that paragraph 51 of Agyarko effectively brought in as alive and well the principle in Chikwamba and it was submitted that the Appellant was certain to be granted leave to remain if his application was made outside of the UK. It was therefore an error not to look at that Chikwamba principles.

Submissions on Behalf of the Respondent

6. It was submitted that the judge had looked at the income level and therefore had engaged with the Chikwamba point at paragraph 54. I was also referred to the case of Chen and it was submitted by Mr Bramble if the Appellant had precarious leave and was in the UK unlawfully then in those situations the Appellant needed to show why they could not go back to their home country to make an application.
7. At the conclusion I reserved my decision to consider the submissions raised and the evidence in the case.

Decision and Reasons

8. The submissions essentially claim the judge made a material error in law in not following paragraph 51 of Agyarko which as submitted reaffirmed the Chikwamba principles.
9. The Appellant is from the Philippines. He had entered the UK as a student in 2008 but his leave expired in July 2009. Thereafter he had remained unlawfully in the UK. The Sponsor was from the Philippines and had only been given ILR in December 2013.
10. The judge had properly considered the matter firstly under the Immigration Rules and in that respect looked at the relevant Rules namely Appendix FM EX.1(b). He had found for clear reasons provided that there were no insurmountable obstacles to family life continuing in the Philippines. There was strong evidence in support of that finding and clear reasons provided by the judge at paragraphs 34 to 48. Indeed both

judges involved in the application process acknowledged that those findings were sound. In like manner the judge had found that there were not very significant obstacles to the Appellant reintegrating into life in the Philippines when looking at the case under paragraph 276ADE. Again he provided clear and detailed reasons within the decision. That matter again does not appear to be contested.

11. In terms of the "Chikwamba principle" said to be within paragraph 51 of Agyarko it was said in the grant of appeal that "when assessing proportionality the judge did not properly factor into the assessment of the public interest that the Appellant met the substantive requirements of the Rules relating to maintenance. That is not the case. At paragraph 50 the judge had set out the five stage test in Razgar. He had noted in terms of proportionality the Appellant's length of stay in the UK and the fact that it was for the most part unlawful. He had applied the findings he had already made when examining the case within the Rules to the issue of proportionality outside of the Rules. He acknowledged at paragraph 53 that the Appellant and Sponsor had a genuine relationship (although both remain married to their respective spouses who lived in the Philippines). At paragraph 54 he specifically noted that the Appellant now met the financial threshold but significantly further noted that it had not been evidenced in the manner required (a reference to Appendix FM-SE). He had also taken note of Section 117B(4) and (5) significant in this case where Statute states at Section 117B(4) that little weight should be given to private life or a relationship formed with a qualifying partner that is established at a time when the person is in the UK unlawfully.
12. In summary the judge had found for reasons clearly given and accepted the Appellant could not meet the requirements of Article 8 within the Rules (i.e. the Immigration Rules). Looking outside of the Rules he was applying the same factual matrix but with the additional statutory requirement to put into practice Section 117B(4) precisely applicable in the Appellant's case. Cases of these type that essentially rely on issues of proportionality are fact-sensitive. The decision taken by the judge was reasonable and proportionate and he gave clear reasons for reaching his decision. Agyarko generally or paragraph 51 in particular does not seek to be prescriptive nor presumably does it seek to overrule Section 117B of the 2002 Act. This was not as the judge's findings indicate a classic "Chikwamba" case and his finding did not disclose any material error of law.

Notice of Decision

13. There was no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity direction is made

Signed 

Date 5/6/18

Deputy Upper Tribunal Judge Lever