Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11137/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 8th March 2019	**On 22nd March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS SHALINI RAMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Shwank (Counsel), Imaan Solicitors
For the Respondent: Mr A. McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Malik, promulgated on 24th September 2018, following a hearing at Manchester on 13th September 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a citizen of Canada and Mauritius, and was born in 1991, and is a female. She appealed against the decision of the Respondent dated 3rd May 2018 refusing her application for leave to remain under Appendix FM on the basis of her family and private life, in order to join her husband in the UK, Mr [HI], a British citizen, who is present and settled in the UK.

The Appellant's Claim

3. The essence of the Appellant's claim is that she had applied for an extension of leave to remain in the UK, but had been delayed by three days on account of news from Mauritius, that her grandmother had fallen critically ill, which impacted upon her in such a way, as to cause panic attacks. The Appellant herself has a history of panic attacks and this is borne out by medical evidence. She had entered the UK on a Tier 4 (General) Student visa that was valid until 3rd November 2015, after she had first entered on 1st October 2010. She had then been granted an extension of stay from 2015 onwards until 4th March 2018. She should have made her application for further extension of leave to remain on 3rd March 2018.

4. However, on 1st March, she heard that her grandmother was very ill in Mauritius. That was the date when she was expecting her February 2018 bank statement to arrive as well. The news of her grandmother's illness caused her great shock. She went into panic attacks. By the time she did make her application, which was on 7th March, she was out of time by three days. She relies upon the fact that she did have panic attacks (see paragraph 9 of her witness statement). She relies upon the medical evidence that she has had pre-existing mental health conditions (see page 78 of the Appellant's bundle). She relies upon the specialist opinion in her favour that "she has been diagnosed with panic attacks – which may well have affected her ability to complete the application form".

The Judge's Findings

5. The judge had regard to much of the background evidence in this case. She noted that on 8th November 2015, the Appellant was found to have an illegal immigrant in the boot of her car at Dunkirk, following which her leave was terminated but then reinstated. Nevertheless, she was in a genuine and subsisting relationship with her partner. There was no evidence of insurmountable obstacles upon her return to either Canada or Mauritius. After her marriage in the United Kingdom in April 2014, she had made an application for leave to remain as a spouse in July 2015, which was granted until 4th March 2018. It was then that she had to make a renewal application for further leave.

6. It is not in dispute that the Appellant's application had been delayed by three days. That being so, the judge had regarded to paragraph 39(e) (see paragraph 22 of the determination), where the judge sets out this provision in full, and highlights the fact that if "there was a good reason beyond the control of the applicant or their representative" which led to a delay then this could be overlooked. The judge

observed (at paragraph 23) that the Appellant received information "that her grandmother was critically ill and that upon being advised of this on 1st March 2018, such was her reaction to this news, she was unable to submit her application by 4th March 2018". The judge is also cognisant of the fact that there was a doctor's letter issued in Mauritius on 1st March 2018, which was included with the application, and this confirmed what was being alleged.

7. The judge concluded, upon applying the discretionary basis of paragraph 39(e), that the decision of the Respondent to reject the application, was not unreasonable, given the importance of the application, and the deadline that the Appellant had to reach. The Appellant maintained that only one item was awaiting receipt by her, and this was eventually for February 2018. Nevertheless, the judge's view was clear that the Appellant was not "prevented by reasons beyond her control for making the application before her leave expired" (paragraph 26).

8. That left the other issues to be determined, and with regard to EX.1, and insurmountable obstacles, the judge observed that the Appellant was a Canadian national, and had lived in Canada for a number of years raising her family, and her husband had also been to Canada to celebrate their marriage, there was no reason why her right to family life could not be exercised in Canada. Thereafter full consideration was given to Article 8 by the judge but it was concluded that the Section 117 considerations, with regard to the public interest and the maintenance of effective immigration control, meant that the appeal could not succeed (see paragraphs 31, 32 to 33).

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge failed to have regard to the **Chikwamba** principles where the House of Lords held that it would be a violation of the Appellant's Article 8 rights to require her to leave the UK to make an out of country application. This had been clarified subsequently by the court in **Hayat [2011] UKUT 00444**, which refers to the legitimate objectives of immigration control.

11. The grounds also draw attention to the case of **Beoku-Betts [2008] UKHL 39**, which state sthat the rights of the Sponsor, who is a British citizen in this case, should also be given due weight, in terms of his claim to a family life with his Appellant wife. Reference is also made to the case of **Chen [2015] UKUT 189**, which makes it clear that even a temporary separation between a genuinely married couple, can engage Article 8 considerations.

12. On 31st December 2018, permission to appeal was granted by the Upper Tribunal on the basis that any separation, which may be temporary, could arguably engage the principles in **Chikwamba**. This may be so even if the reasons given by the Appellant for the delay in making her application were in fact untrue.

Submissions

13. At the hearing before me on 8th March 2018, Mr Shwank, appearing on behalf of the Appellant, made the following two submissions, in clear, careful, and attractive ways.

14. First, that there was no good reason for the judge not to accept that the discretion afforded by paragraph 39(e) was one that would lead a reasonable decision maker to accept that the Appellant was justified in having her application taken into account if it was only late by three days.

15. Second, that regardless of the application of the discretion in paragraph 39(e), the decision reached by the judge was disproportionate because it breached the **Chikwamba** principle. Here, Mr Shwank drew my attention to the case of **Hayat [2011] UKUT 00444**, which stated that,

> "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." (paragraph 23).

16. This was a case, where the Appellant had succeeded considered Mr Shwank, if the application had been made on time. The Respondent was simply requiring the Appellant to return to Canada to make an application from there. Second, in any event, even a temporary separation between the parties, would, under the principles in **Chen**, lead to an interference with family life.

17. For his part, Mr McVeety submitted that, although there had been a letter earlier, to the effect that the grandmother was critically ill, a subsequent letter on file makes is equally plain that she was not suffering from a terminal illness. In any event, it was not clear why the Appellant's husband, who was in the UK with her, did not assist in making an application on time, so that it was not late by three days. The judge had not erred in law. The only way in which the decision can be attacked is if the judge's conclusion is an error of law. The judge concluded that there was no good reason and that was the conclusion that the judge was entitled to come to.

18. Second, the Appellant was only being asked to return to Canada to make an application from there, and this is a country where there would be no insurmountable obstacles, no hardship, no violation of human rights, and the application of the "**Chen**" principles does not come into operation, because all the Appellant is being asked to do is to make an application in the normal manner, in circumstances where there are no "exceptional" reasons for her not doing so.

19. In reply, Mr Shwank submitted that the Appellant is not able to make a subsequent application that easily. What is being overlooked here is that the Appellant set up a new business in this country on 12th September 2018. She has to wait for the requisite period of time for her accounts to arrive so that she can provide six months of

evidence to show that she can furnish the necessary £18,600 financial threshold requirement. In these circumstances, she cannot leave her job and go to Canada to make an application. In any event, her life is in this country. Her home is here. Her friends are here. She has a job here. She is receiving medical treatment in this country. On top of that she is married to a British citizen who is resident in this country. This was not a "near miss" case.

20. This case was based upon the **Chikwamba** principles, and the issue here was whether the public policy requiring a person to apply under the Rules from abroad, should give weight to the Appellant's side of the balance. It is clear that the Appellant's circumstances were considerable. They did outweigh the public policy in requiring the Appellant to apply from abroad. It also needed taking into account that the principle in **Beoku-Betts** required consideration to be given to the Sponsor's rights, as a British citizen, who was living in this country, and was entitled to have his wife live with him here.

No Error of Law

21. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. I come to this conclusion, notwithstanding Mr Shwank's admirable efforts to persuade me otherwise. This is a case, however, where the judge, as a fact-finding Tribunal, was entitled to come to the conclusions that she did, on the basis of the analysis that she undertook, with full regard to the evidence as was presented before her. That evidence included the claim that the Appellant, who was awaiting her February bank statement, had to wait until 1st March for that statement to arrive, before the application could be made by 3rd March 2018 (so as not to fall foul of the deadline date of 4th March 2018).

22. On 1st March 2018, however, the Appellant received notification from Mauritius that her grandmother was critically ill. The Appellant who has a history of anxiety and mental health problems, as attested to by supporting expert evidence, was so affected by this that she was unable to make this application. However, the evidence that appears in the Appellant's bundle (at page 17) only sees the expert refer to the fact that this "may well have affected her ability to complete the application process". It also does not account for why the Sponsor did not assist in making the application for the Appellant so that it could arrive on time.

23. Second, as far as the general **Chikwamba** and **Razgar** arguments are concerned, the judge proceeds to address these from paragraphs 27 onwards, and follows the steps logically, taking into account the Section 117B considerations, before concluding that:

> "There is nothing to suggest he [the Sponsor] would be unable to sponsor the Appellant's application in due course or that the time taken to do so would be disproportionate. They can maintain contact in the interim and her husband can also visit Canada" (paragraph 33).

That conclusion was available to the judge to arrive on the facts of this case. The decision cannot, for this reason be regarded as falling into an error of law.

Notice of Decision

24. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

25. No anonymity direction is made.

26. The appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 20th March 2019